

THE LAW REFORM COMMISSION OF CANADA, THE PROPOSED CANADA EVIDENCE ACT AND STATEMENTS BY AN ACCUSED

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It is trite law that a statement by an accused made out of court to a person in authority is admissible against the accused only if it was made voluntarily. Underlying the requirement of voluntariness are important policy considerations. The proposed Canada Evidence Act would abrogate this rule in some cases and, this article submits, narrow the definition of "involuntariness". The article takes the position that the Law Reform Commission of Canada, in its Working Paper and Report entitled "Questioning Suspects", erroneously represents the proposed Act as essentially innocuous legislation which would merely codify existing common law on the admissibility of statements by an accused.

Tout le monde sait que la déclaration que fait l'accusé aux autorités compétentes hors du tribunal ne peut être recevable contre lui que si elle a été faite volontairement. Derrière la nécessité de déclaration volontaire se cachent des principes importants. La Loi sur la preuve telle qu'on se propose de l'amender abolirait cette règle dans certains cas et, d'après l'auteur de cet article, limiterait le champ de ce qui est considéré comme involontaire. L'auteur soutient, dans cet article, que la Commission de réforme du droit du Canada a tort de prétendre, dans son document de travail comme dans son rapport intitulé "L'interrogatoire des suspects", que la loi telle que proposée, est, dans son essence, une loi inoffensive qui ne fait que codifier la common law existante en matière de recevabilité des déclarations de l'accusé.

Introduction

Perhaps no rule of criminal evidence is more certain or better known than the requirement that a statement made by an accused out of court to a person in authority is admissible against him only if it was made voluntarily.¹ The certainty and familiarity of this rule are no doubt due to the fundamental importance in a free society of the purposes served by it. These have been identified in judicial pronouncements as ensuring the trustwor-

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¹ *Ibrahim v. The King*, [1914] A.C. 599 (P.C.); *Prosko v. The King* (1922), 63 S.C.R. 226, 37 C.C.C. 199; *Boudreau v. The King*, [1949] S.C.R. 262, (1949), 94 C.C.C. 1; *Powell v. The Queen*, [1977] 1 S.C.R. 362, (1976), 28 C.C.C. (2d) 148; *Erven v. The Queen*, [1979] 1 S.C.R. 926, (1978), 44 C.C.C. (2d) 76. The voluntariness requirement does not apply to statements which form part of the *actus reus* of the offence alleged; *Regina v. Stapleton* (1982), 134 D.L.R. (3d) 239, 26 C.R. (3d) 365, 66 C.C.C. (2d) 231 (Ont. C.A.).

thiness of the statement, safeguarding the civil liberties of the individual during police interrogation and maintaining the integrity of the criminal justice system generally. Closely related, although somewhat less precise in its exact terms, is the procedural requirement that the voluntariness of a statement must be determined in a *voir dire*.

The Working Paper and the Report of the Law Reform Commission of Canada, both entitled "Questioning Suspects",² constitute an uneven mix of good recommendations concerning police interrogation of suspects preceded by a potentially misleading statement of current Canadian law concerning the admissibility of statements by an accused. In particular, the Working Paper suggests that certain key provisions of Bill S-33, the proposed new Canada Evidence Act,³ dealing with the admissibility of an accused's statement, would merely codify existing common law. This is not so. Bill S-33 would work fundamental changes, and bad ones, in the law on the admissibility of such statements. First, "involuntariness" would be defined more narrowly than under existing common law. Second, not all statements by an accused would have to be voluntary in order to be admissible.⁴ The Working Paper, regrettably, tends to legitimize

² Law Reform Commission of Canada, Working Paper 32: Questioning Suspects (1984); Report No. 23: Questioning Suspects (1984); hereafter referred to as the Working Paper and the Report. The Report was tabled in the House of Commons on November 19, 1984. The Report states at page 1:

In Working Paper 32 the Commission published tentative recommendations for reform of the law relating to the questioning of suspects by police officers. After further reflection and consultation, we have finalized our proposals with regard to this matter. In the main we have adopted the position that we took in the earlier Working Paper . . . Accordingly, this brief Report should be read together with the earlier paper.

³ Bill S-33, given first reading in the Senate, November 18, 1982, died when the first session of the 32nd Parliament ended on November 30, 1983. The Bill was not re-introduced in the second session of that Parliament. Clause 1 of the Bill provides: "This Act may be cited as the *Canada Evidence Act, 1982*". Presumably, if ever enacted, the new Canada Evidence Act would incorporate into its title the year of its passage. Bill S-33 is based largely upon the Uniform Evidence Act contained in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982), which was prepared for the Uniform Law Conference of Canada. For comments on the Uniform Evidence Act, see D.C. McDonald, Some Observations on the Proposed Uniform Evidence Act (1981-82), 24 C.L.Q. 298; J. Sopinka, A Commentary on the Proposed Uniform Evidence Act (1981-82), 24 C.L.Q. 331; B.E. Devlin, Proposed Changes to Evidence Laws Affecting Criminal Trials (1981-82), 24 C.L.Q. 356; E.A. Tollefson, The New Uniform Evidence Act, in S.E. Oxner (ed.), Criminal Justice (1982), pp. 151-164. Only the article by Tollefson deals specifically with the relationship between evidence of an accused's statement and evidence admissible as part of the *res gestae*, but *quaere* the accuracy of some of the statements therein: see, *infra*, footnote 87. On section 22 of Bill S-33, see D.M. Paciocco, The Proposed Canada Evidence Act and the "Wray Formula": Perpetuating an Inadequate Discretion (1983), 29 McGill L.J. 141.

⁴ The Working Paper, at page 46, does recognize other changes in existing law which would be worked by Bill S-33:

Bill S-33 when, in my opinion, supporting these provisions of Bill S-33 is the last thing that should be done.

The Working Paper focusses on police interrogation of suspects. This aspect of criminal investigation and the admissibility of statements by an accused are inextricably connected by the voluntariness requirement, that is, the rule that such statements are admissible only if they were made voluntarily. The question of voluntariness is determined by considering all of the circumstances surrounding the making of the statement. Effective police interrogation of suspects is an essential aspect of the administration of criminal justice and there is no doubt that the police have the right to question suspects.⁵ But in order to protect the rights of individuals and prevent abuse of police powers,⁶ our law has put constraints, albeit indirect ones, on the power of the police to question suspects. First, an individual may remain silent and need not answer questions put to him.⁷ Second, a person under arrest or detained has the

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 extrajudicial 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 a reasonable doubt to satisfaction of the court on the balance of probabilities, the reversal of *DeClercq v. The Queen*, and some modification of the rule in *R. v. St. Lawrence*. (Footnotes omitted)

⁵ *Rice v. Connolly*, [1966] 2 Q.B. 414, at p. 419, [1966] 2 All E.R. 649, at p. 651 (C.A.); *R. v. Bonnycastle* (1968), 3 D.L.R. (3d) 288, [1969] 4 C.C.C. 198 (B.C.C.A.); *R. v. Precourt* (1976), 18 O.R. (2d) 714, at p. 721, 39 C.C.C. (2d) 311, at p. 317 (Ont. C.A.), per Martin J.A.:

Although improper police questioning may in some circumstances infringe the governing rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons. whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation.

⁶ There is no doubt that abuse of suspects at the hands of the police does occur and that control of police questioning is required: see, for example, R.V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (1982), pp. 166-168, and the empirical evidence there referred to.

⁷ *Hall v. The Queen* (1970), 55 Cr. App. R. 108, at pp. 111-112, [1971] 1 All E.R. 322, at p. 324 (P.C.); *Attorney-General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218, at p. 258, (1978), 43 C.C.C. (2d) 49, at p. 81; *R. v. Guthrie*, [1982] 5 W.W.R. 385 (Alta. C.A.). Lamer J. succinctly stated the policy underlying this right in *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 683, (1981), 59 C.C.C. (2d) 30, at p. 64 (S.C.C.) as follows:

In Canada the right of a suspect not to say anything to the police . . . is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that a suspect, save in certain circumstances, [footnote: There are circumstances under which a citizen is under the obligation to answer certain police queries, i.e. *Moore v. The Queen* [1979] 1 S.C.R. 195] must say anything to the police that we say that he has the right

right to retain and instruct counsel and to be informed of that right.⁸ Third, any statement made by an accused out of court to a person in authority is admissible against him only if the statement was made freely and voluntarily.⁹ The recommendations of the Working Paper would put direct constraints on police questioning of suspects.

Part One of the Working Paper reviews current law on the admissibility of statements by an accused. Part Two sets out the Law Reform Commission's recommendations concerning the procedure to be followed during police interrogation of suspects. The primary purposes of this article are, first, to briefly outline the recommendations of the Working Paper on police interrogation and, second, to argue that the Working Paper's statement of the current law on statements by an accused contains significant shortcomings. However, since the voluntariness rule is "a rule of policy"¹⁰ and since consideration of the policy rationales underlying the rule will be crucial in this article, I shall first make an excursus into those rationales.

I. Rationales Underlying the Voluntariness Rule

Concern for the trustworthiness or reliability of an accused's statement was the rationale traditionally espoused by the courts for the voluntariness rule. For example, in his judgment in *Boudreau v. The King*,¹¹ Rand J. stated:

It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule.

Similarly, in *Piché v. The Queen*,¹² Cartwright C.J.C. said:

The main reason assigned for the rule that an involuntary confession is to be excluded is the danger that it may be untrue

to remain silent; which is a positive way of explaining that there is on his part no legal obligation to do otherwise. His right to silence here rests on the same principle as his right to free speech,

⁸ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, s.10(b); *R. v. Manninen* (1983), 1 O.A.C. 199, 8 C.C.C. (3d) 193 (Ont. C.A.), leave to appeal to S.C.C. granted; *R. v. Therens* (1983), 5 C.C.C. (3d) 409 (Sask. C.A.), leave to appeal to S.C.C. granted [1983] 1 S.C.R. xii; *R. v. Anderson* (1984), 10 C.C.C. (3d) 417 (Ont. C.A.); *R. v. Simmons* (1984), 11 C.C.C. (3d) 193 (Ont. C.A.). Violation of other Charter guaranteed rights and freedoms might result in a statement by an accused, which was obtained as a result of the Charter violation, being excluded. "If there was a denial or infringement of one of the legal rights in the Charter of Rights and Freedoms there would be a discretion to exclude the statement under s.24(2) of the Constitution Act, 1982. Possibly, ss. 7 to 10 or s.11(a), (c) or (e) might afford the basis for exclusion"; P.K. McWilliams, *Canadian Criminal Evidence* (2nd ed., 1984), p. 435.

⁹ *Supra*, footnote 1.

¹⁰ *Ibrahim v. The King*, *supra*, footnote 1, at p. 610, per Lord Sumner.

¹¹ *Supra*, footnote 1, at pp. 269 (S.C.R.), 8 (C.C.C.).

¹² [1971] S.C.R. 23, at p. 25, [1970] 4 C.C.C. 27, at p. 29.

The concern is with the potential for truthfulness, not the actual truthfulness of the statement; there is no direct inquiry into the veracity of the statement.¹³

In the passage just cited, Cartwright C.J.C. seems to have contemplated purposes served by the voluntariness rule in addition to the concern for trustworthiness; he said that that concern was the "main reason" for the rule, not the only reason. Niceties such as the civil liberties of the individual, while formerly not at the forefront of judicial reasoning, were undoubtedly always present in the minds of judges. Recent judgments in the Supreme Court of Canada have made explicit a concern for the rights of the individual suspect being questioned by the police, and in particular his right to remain silent, and a concern for maintaining the integrity of the criminal justice system generally.

Some judges have emphasized the rights of the individual. For example, in *Horvath v. The Queen*,¹⁴ Beetz J. stated:

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. In a *voir dire*, voluntariness not veracity governs admissibility.

Other judges focus on the integrity of the legal system. Estey J., in his judgment in *Rothman v. The Queen*,¹⁵ considered the rationales underlying the voluntariness requirement and stated:

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.

Estey J. considered why the law has adopted voluntariness and not veracity as the test for admissibility of a statement by an accused. He

¹³ See E. Ratushny, *Unravelling Confessions (1970-71)*, 13 C.L.Q. 453, at p. 476. See also the judgments of Lamer and Estey JJ. in *Rothman v. The Queen*, *supra*, footnote 7.

¹⁴ [1979] 2 S.C.R. 376, at p. 433, (1979), 44 C.C.C. (2d) 385, at p. 430.

¹⁵ *Supra*, footnote 7, at pp. 646-647 (S.C.R.), 49-50 (C.C.C.). See B.M. McLachlin, A. Miller, *Comment: Rothman: Police Trickery: Is the Game Worth the Candle?* (1982), 16 U.B.C.L. Rev. 115; J.J. Arvey, *Developments in Criminal Law and Procedure: The 1980-81 Term* (1982), 3 Sup. Ct. L. Rev. 171, at pp. 263-279; F. Kaufman, *Confessions Revisited: Two Recent Cases*, in N.E. Eastham, B. Krivy (ed.), *The Cambridge Lectures 1981* (1982), pp. 1-7.

stated that "[c]onfessions have doubtless been suspect from the earliest times" since they had no doubt on occasion been obtained by "torture and other forms of violence".¹⁶ Such means not only raised doubt concerning the veracity of the statements obtained, but also violated the right of the accused to remain silent. To admit statements under such circumstances would detract from the public support necessary for the survival of the criminal justice system. In summary, as Estey J. stated:¹⁷

... [there has been] 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.

All of this can be found in different shades and hues in the authorities, commencing with *Ibrahim v. The King*

Lamer J., in his judgment in *Rothman*, agreed that "the reliability test is not the only test of the admissibility of a statement against an accused"¹⁸ and took up both of the other themes. In his view, trial judges excluded even trustworthy statements if they had been obtained by "seriously unfair, oppressive, or undesirable conduct on the part of persons in authority . . .".¹⁹ This was because, in addition to effectively investigating crimes and convicting the guilty, the criminal justice system is concerned with protecting the innocent against conviction and protecting the system itself by ensuring that what is done reflects the fundamental values of society.²⁰ Indeed, the focus of the voluntariness rule "is the repression of conduct on the part of the authorities that indirectly frustrates an accused's right not to testify".²¹ Protecting the right of the accused to remain silent is part of the broader purpose of maintaining public respect for the administration of criminal justice. Lamer J. stated:²²

This concern by the courts for the protection of the integrity of the system has always been present when defining voluntariness, . . . Unfortunately, because this concern was not clearly identified and dealt with in an autonomous and comprehensive way, endeavours to rationalize the confession rule have given somewhat blurred results.

The whole matter is perhaps best summed up in the words of Chief Justice Freedman:²³

¹⁶ *Ibid.*, at pp. 647 (S.C.R.), 50 (C.C.C.).

¹⁷ *Ibid.*, at pp. 649 (S.C.R.), 52 (C.C.C.).

¹⁸ *Ibid.*, at pp. 682 (S.C.R.), 63 (C.C.C.).

¹⁹ *Ibid.*, at pp. 688 (S.C.R.), 68 (C.C.C.).

²⁰ *Ibid.*, at pp. 689 (S.C.R.), 68-69 (C.C.C.).

²¹ *Ibid.*, at pp. 692 (S.C.R.), 70 (C.C.C.).

²² *Ibid.*, at pp. 694 (S.C.R.), 72 (C.C.C.).

²³ Admissions and Confessions, in R.E. Salhany and R.J. Carter (ed.), *Studies in Canadian Criminal Evidence* (1972), p. 99, quoted by Estey J. in *Rothman*, *supra*, footnote 7, at pp. 648 (S.C.R.), 52 (C.C.C.).

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.

Thus, while the concern for trustworthiness remains an important rationale underlying the voluntariness rule, it is clearly no longer, if it ever was, the sole rationale. Perhaps, as some have suggested, it is no longer even the main rationale—perhaps the concern for due process, focussing on the conduct of the person in authority, has become the primary concern of the courts when dealing with an accused's statement.²⁴ Unquestionably there is a public interest in the effective investigation and prosecution of criminal offences. A legitimate part of this process is effective police questioning of suspects.²⁵ However, questioning by a person in authority which violates a suspect's right to remain silent or, more generally, which involves conduct on the part of the person in authority which would tend to bring the administration of justice into disrepute, is not countenanced by the courts. These are the broader purposes than trustworthiness alone which are served by the voluntariness rule.²⁶

II. Recommendations on Police Interrogation

In its Report the Commission recommends adding a Part XIII.1 to the Criminal Code²⁷ to be entitled "Investigative Powers", consisting of sections 447.1-447.5.²⁸ The recommendations are good ones and would directly protect the rights of suspects during police interrogation by focussing on the interrogation itself. This would be achieved without denying the recognized right of the police to interrogate suspects.

Section 447.1 would define "questioning" and "suspect" as follows:

"questioning" includes any utterance or gesture that is calculated to elicit, or is

²⁴ On the rationales underlying the voluntariness requirement, see A.C. Hutchinson, N.R. Withington, *Horvath v. The Queen: Reflections on the Doctrine of Confessions* (1980), 18 O.H.L.J. 146; S.I. Bushnell, *The Confession Cases: Erven, Horvath and Ward—Towards a Due Process Rationale* (1980), 1 Sup. Ct. L. Rev. 355.

²⁵ *R. v. Precourt*, *supra*, footnote 5; *Rothman v. The Queen*, *supra*, footnote 7, at pp. 689 (S.C.R.), 68 (C.C.C.), per Lamer J.: "Bringing about a guilty suspect to admit guilt in a statement is not in itself an improper activity".

²⁶ Bushnell, *loc. cit.*, footnote 24, at p. 366, summarized the competing policy interests well when he wrote:

At the heart of the matter is the comment made by Mr. Justice Beetz in *Horvath* that what had taken place was a "dehumanising process". Although there is a clear public interest in the capture and conviction of criminals, there is also an interest in the dignity of the individual and in the maintenance of humane procedures in the administration of criminal justice. In the balancing of these interests, the Supreme Court of Canada at the moment would seem to have come down on the side of the maintenance of the rights of the individual.

²⁷ R.S.C. 1970, c.C-34.

²⁸ *Op. cit.*, footnote 2, pp. 11-13.

reasonably likely to elicit, a statement from a person with respect to the investigation of an offence.

"suspect" means any person who [sic] a police officer has reasonable and probable grounds to believe has committed an offence and, notwithstanding the generality of the foregoing, includes any person under arrest or detention, any person who is an accused within the meaning of section 448 of this Act, and any person charged with an offence.

Section 447.4 would provide, in part:

447.4(1) Each police officer who participates in the questioning of a suspect shall, as soon as possible and to the fullest extent possible, make a record of all questions put and statements made.

(2) The record prepared under subsection (1) may be made in writing or by electronic recording . . .

This recommendation may serve to discourage police abuse of suspects, decrease the number of unfounded allegations of abuse brought against the police and reduce the court time presently spent on lengthy *voir dres* to determine the voluntariness of statements by an accused.²⁹

In the earlier Working Paper the Commission had recommended that questioning of suspects "that takes place in a police station or prison . . . be electronically recorded wherever feasible, either by audio-taping or video-taping".³⁰ In the Report, the Commission states:³¹

We have decided to suspend our recommendation for the enactment of a requirement for electronic recording, but we remain convinced that such recordings will provide the best possible means of reconstructing and thus accounting for the questioning of a suspect. The electronic recording of statements is not an end in itself but an improved mechanism or technique for achieving a specified objective. Provided that the recommendations we propose, and the law, reflect a clear bias in favour of the best possible evidence, we see no need to legislate at this time the means of obtaining that evidence. If in our opinion the police are not providing the courts with the best possible record of questioning, we may in the future recommend that Parliament demand an improvement in the quality of evidence by enacting a requirement for electronic recording.

Section 447.2 would require that a mandatory warning be given to a suspect advising him of his right to remain silent, his right to contact a lawyer and the fact that anything he says may be introduced as evidence in court.³²

²⁹ *Ibid.*, pp. 18-19.

³⁰ *Op. cit.*, footnote 2, Recommendation 10, pp. 58, 71. The Metropolitan Toronto Police have announced that they will soon begin videotaping inculpatory statements made by murder, sexual assault and robbery suspects in the Borough of Scarborough; see *Globe and Mail* (Toronto), September 7, 1984. However, such videotapes would be virtually useless in court since the concern of the courts in determining voluntariness is not with the content of the final statement but with the circumstances involved in the interrogation leading up to the making of the statement.

³¹ *Ibid.*, p. 18.

³² Section 447.2, when combined with section 447.5, might constitute a change in the law as stated in *Boudreau v. The King*, *supra*, footnote 1. This would depend upon how the courts interpreted the qualified rule of exclusion contained in section 447.5.

Most importantly, section 447.5 would provide:

Evidence obtained in contravention of this Part is not admissible at the instance of the prosecution at a preliminary inquiry or trial unless the prosecution establishes that the admission of the evidence would not bring the administration of justice into disrepute.

Thus the constraints on police interrogation of suspects would be specifically tied in with the admissibility of an accused's statement.

In summary, if these recommendations were enacted, a statement by an accused to a police officer, if it was made when the accused was already a suspect, would be admissible only if it was voluntary and if the recommended rules governing police interrogation of suspects had been satisfied. If the accused's statement was made before he was a suspect, the statement would only have to be voluntary. This makes sense; to require otherwise would put an impractical burden on the police to prepare an accurate record of every investigative questioning of any person.

III. *Shortcomings in the Working Paper's Statement of Current Law*

The Working Paper is flawed in its statement of current Canadian law concerning the admissibility of an accused's statement. First, the Working Paper has chosen the narrow *Ibrahim*³³ definition of "involuntariness", opting to accept Bill S-33's definition and not to follow recent expansive authority in the Supreme Court of Canada. Second, the Working Paper misstates the evidentiary nature of an accused's statement and confuses the law on the admissibility of such a statement with the law on the admissibility of *res gestae*.

A. *The definition of "involuntariness"*

The following words of Lord Sumner, delivering the judgment of the Privy Council in *Ibrahim v. The King*,³⁴ have been the "magnetic and obsessive"³⁵ starting point for any consideration of voluntariness ever since they were written in 1914:

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 of prejudice or hope of advantage* exercised or held out by a person in authority.

Subsequent cases which have considered Lord Sumner's judgment are often classified into two broad groups. One group holds that his words are exhaustive; a statement is involuntary only if it was obtained as a

³³ *Ibrahim v. The King*, *supra*, footnote 1.

³⁴ *Ibid.*, at p. 609 (emphasis added).

³⁵ Hutchinson, Withington, *loc. cit.*, footnote 24, at p. 167.

result of "fear of prejudice" or "hope of advantage" held out by a person in authority. This is the "narrow" interpretation of involuntariness.³⁶ The second group adopts a "wide" interpretation and holds that fear of prejudice or hope of advantage are only examples of conduct on the part of a person in authority which will render an accused's statement involuntary.³⁷

The Working Paper adopts the narrow interpretation of involuntariness. It reproduces the definition of "voluntary" contained in clause 63 of Bill S-33:³⁸

"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.

Immediately after reproducing this definition, the Working Paper states that "new and old law would coincide",³⁹ and goes on to state:⁴⁰

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.

Thus, the Working Paper twice specifically asserts that the *Ibrahim* definition of "involuntariness", the definition adopted in Bill S-33, is the definition at common law as it now exists.⁴¹

³⁶ The following are examples of the narrow interpretation: *Boudreau v. The King*, *supra*, footnote 1, at pp. 266 (S.C.R.), 6 (C.C.C.), per Taschereau J.; *R. v. Murakami*, [1951] S.C.R. 801, at p. 802, (1951), 100 C.C.C. 177, at p. 178, per Rand J., and per Cartwright J. at pp. 814 (S.C.R.), 190 (C.C.C.); *R. v. Fitton*, [1956] S.C.R. 958, at p. 962, (1956), 116 C.C.C. 1, at p. 5, per Rand J.; *Horvath v. The Queen*, *supra*, footnote 14, at pp. 387-388 (S.C.R.), 394 (C.C.C.), per Martland J.; *Rothman v. The Queen*, *supra*, footnote 7, at pp. 674-675 (S.C.R.), 45 (C.C.C.), per Martland J.

³⁷ V. Del Buono, *Voluntariness and Confessions: A Question of Fact or Question of Law?* (1976-77), 19 C.L.Q. 100, provides an excellent review of the two lines of authority. Writing before *Erven*, *Rothman* and *Horvath*, Del Buono was of the view, at page 123, that "[a]lthough even the most recent cases are by no means unanimous, there has been a noticeable trend in several recent Canadian cases to shift support from the 'narrow' definition to the 'wide' one . . .". It is submitted that this is even more so now in view of *Erven*, *Rothman* and *Horvath*.

³⁸ *Op. cit.*, footnote 2, p. 7.

³⁹ *Ibid.*, p. 7.

⁴⁰ *Ibid.*, p. 12 (emphasis added).

⁴¹ The Report, *op. cit.*, footnote 2, adheres to this narrow definition of "voluntariness" and states at page 4:

The law governing the interrogation of suspects . . . is a rule of admissibility that permits the introduction by the prosecution of a statement by the accused upon proof that a person in authority did not induce the statement by suggesting to its maker any cause for hope or fear This rule of admissibility affords no authority for direct supervision or regulation of the manner in which statements are obtained. Although the concept of voluntariness and the standard of proof can provide some leverage for indirect regulation, the orthodox interpretation of the voluntariness rule in Canadian courts is that admissibility inheres in the absence of an inducement and not in compliance with positive standards or norms of procedural regularity.

The Working Paper provides an explanation for its choice of the narrow interpretation in an endnote:⁴²

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*, . . . ; *R. v. Fitton*, . . . ; *DeClercq v. The Queen*, . . . ; *R. v. Wray*, . . . ; *Rothman v. The Queen*, 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*, . . . and *Ward v. The Queen*, Following the Court's decision in *Rothman*, . . . 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

The choice made in the Working Paper is open to objection on two grounds. First, it reads the decision in *Ibrahim* itself in an unduly narrow way. It is clear from Lord Sumner's judgment that the Privy Council did not intend to exhaustively define "involuntariness". Lord Sumner stated:⁴³

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary.

He also stated:⁴⁴

. . . 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

Is not focussing "largely on . . . the impropriety of the questioner's conduct" the due process concern apparent in recent judgments in the Supreme Court of Canada?

Second and more importantly, there is much more to Canadian common law on the meaning of "involuntariness" than the 1914 decision of the Privy Council in *Ibrahim*. In narrowly defining "involuntariness", the Working Paper represents current law as though many of the various and varied judgments in the Supreme Court of Canada in such cases as *Ward v. The Queen*,⁴⁵ *Horvath v. The Queen*,⁴⁶ and *Rothman v. The Queen*⁴⁷ were mere surplusage to be relegated to the realm of the "also ran". The section of the Working Paper entitled "Recent developments"⁴⁸ does not

⁴² *Op. cit.*, footnote 2, p. 85, endnote 47 (emphasis added).

⁴³ *Supra*, footnote 1, at p. 614 (emphasis added).

⁴⁴ *Ibid.* (emphasis added).

⁴⁵ [1979] 2 S.C.R. 30, (1979), 44 C.C.C. (2d) 498 (S.C.C.).

⁴⁶ *Supra*, footnote 14.

⁴⁷ *Supra*, footnote 7.

⁴⁸ *Op. cit.*, footnote 2, p. 14.

adequately emphasize, in my opinion, these important Supreme Court judgments.

What is the effect of the judgment of Spence J., delivering the judgment of a unanimous court in *Ward*, in which he stated that statements of an accused to a person in authority must have been "the utterances of an operating mind"⁴⁹ in order to be admissible? Or the judgment of Spence J. in *Horvath* in which he was concerned with the aspect of "oppression" in general?⁵⁰ Or of Beetz J. in the same case, who was concerned with the problems involved if "a special form of interrogation"⁵¹ has been employed, such as hypnosis, a polygraph examination or narco-analysis? Echoing Spence J. in *Ward*, Beetz J. asks whether the accused when interrogated "was . . . in full and voluntary control or possession of his faculties".⁵² What is the effect of the judgments of each of Estey and Lamer JJ. in *Rothman*, in which they were concerned with the admission of an accused's statement under circumstances "bringing the administration of justice into disrepute"?⁵³ In short, as stated by Beetz J. in *Horvath*:⁵⁴

⁴⁹ *Supra*, footnote 45, at pp. 40 (S.C.R.), 506 (C.C.C.). There is Australian authority stating that the question of mental capacity is "entirely different" from the question of voluntariness: *R. v. Starecki*, [1960] V.R. 141, at p. 151 (S.C.), referring to *Sinclair v. The King* (1946), 73 C.L.R. 316 (H.C. Aust.). However, Spence J. in *Ward* explicitly stated that "consideration of the mental condition of the accused at the time he made the statements" is part of the "investigation of whether the statements were 'freely and voluntarily made'"; at pp. 40 (S.C.R.), 506 (C.C.C.). However, Martland J., dissenting in *Horvath*, was of the view that mental capacity and voluntariness are two different matters. He stated: *supra*, footnote 14, at pp. 391-392 (S.C.R.), 397 (C.C.C.):

The Crown did not seek to introduce in evidence the statements made by the appellant while he was in, what Dr. Stephenson describes as "a light hypnotic state". The two statements which the Crown sought to introduce in evidence were made after he was "in full and voluntary control of his faculties". Had the Crown sought to introduce the statements made while the appellant was in a light hypnotic state, it is clear that they would not have been admitted by the trial judge, but the refusal to admit them would not have been because of threats or inducements by a person in authority, but because the appellant, at the time those statements were made, was not in a condition which would make it safe to admit them.

This follows from Martland J.'s adoption of a narrow *Ibrahim* definition of involuntariness: see *infra*, footnote 56. See also *R. v. Santinon*, [1973] 3 W.W.R. 113, (1973), 11 C.C.C. (2d) 121 (B.C.C.A.); *Nagotcha v. The Queen*, [1980] 1 S.C.R. 714, (1980), 51 C.C.C. (2d) 353. See A.G. Henderson, *Mental Incapacity and the Admissibility of Statements* (1980-81), 23 C.L.Q. 62.

⁵⁰ *Supra*, footnote 14, at pp. 408-410 (S.C.R.), 410-412 (C.C.C.).

⁵¹ *Ibid.*, at pp. 422 (S.C.R.), 421 (C.C.C.).

⁵² *Ibid.*, at pp. 424 (S.C.R.), 423 (C.C.C.).

⁵³ *Supra*, footnote 7, at pp. 649 (S.C.R.), 52 (C.C.C.) per Estey J.; pp. 696 (S.C.R.), 74 (C.C.C.), per Lamer J.

⁵⁴ *Supra*, footnote 14, at pp. 424-425 (S.C.R.), 423 (C.C.C.) (emphasis added).

In typical legal fashion, the test of voluntariness is expressed negatively in the *Ibrahim* rule by reference to instances of involuntariness: a statement obtained by hope of advantage (a promise), or fear of prejudice (a threat), exercised, held out or inspired by a person in authority, is involuntary in the eyes of the law.

The question arises as to whether the enumeration in the rule of instances of involuntariness is a limitative one.

It cannot be limitative . . . the principle which inspires the rule remains a positive one: it is the principle of voluntariness. The principle always governs and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear and serious enough to bring the principle into play.

In my view, the principle behind the rule justifies that the rule *be extended* to cover the circumstances of the case at bar.

Similarly, Spence J. in *Horvath* stated:⁵⁵

It is my strong opinion that *Ibrahim* and the many cases which followed have not and need not be considered to have reduced the words "free and voluntary" in the test [as stated by Lord Sumner in *Ibrahim*] as to the admissibility of a statement made by the accused to only meaning that the statement has not been induced by any hope of advantage or fear of prejudice, and it is my view that a statement may well be held not to be voluntary, at any rate, if it has been induced by some other motive or for some other reason than hope or fear.

Estey J. concurred with Spence J. and Pratte J. concurred with Beetz J. Thus, a majority of the seven judge court⁵⁶ in *Horvath* held that the reference in *Ibrahim* to hope of advantage or fear of prejudice was not an exhaustive definition of circumstances which would render a statement involuntary. The narrow interpretation of *Ibrahim* is not a complete statement of Canadian law on the question of voluntariness.⁵⁷

⁵⁵ *Ibid.*, at pp. 401 (S.C.R.), 404-405 (C.C.C.). Spence J. had less explicitly stated the same thing in *Ward* in which he brought the question of the accused's mental capacity into the voluntariness analysis. He said there, *supra*, footnote 45, at pp. 40 (S.C.R.), 506 (C.C.C.), "... the examination of whether there was any hope of advancement [sic] or fear of prejudice moving the accused to make the statements is simply an investigation of whether the statements were 'freely and voluntarily made'." (emphasis added).

⁵⁶ Martland J. dissented and adopted a narrow *Ibrahim* definition of "voluntariness". He stated, *supra*, footnote 14, at pp. 387-388 (S.C.R.), 394 (C.C.C.):

... to render a statement of the accused to a police officer inadmissible there must be the compulsion of apprehension of prejudice or the inducement of hope of advantage whether that apprehension or hope be instigated, induced or coerced.

Ritchie and Pigeon JJ. concurred with Martland J.

⁵⁷ McWilliams, *op. cit.*, footnote 8, pp. 444-445, comments on the adoption of the narrow definition of "voluntariness" in Bill S-33 as follows:

This is a negative statement which simply parrots the test stated by Lord Sumner in *Ibrahim v. The King*. It fails to state expressly the obvious and strongest reason for ruling inadmissible a statement to a person in authority, namely, actual torture or violence. Nor does it provide for oppression, which can be fully as inhuman and effective in extorting confessions. It would be a retrograde step for the definition of 'voluntary' to be restricted to the narrow and particular test called for in the *Ibrahim*

Judgments such as those of Martland J., in dissent in *Horvath* or speaking for the majority in *Rothman*, do not detract from the judgments in *Ward*, *Horvath* and *Rothman* just referred to and, in any event, are no more influential or persuasive authority since all are recent judgments in the Supreme Court of Canada. Indeed, in the more recent 1982 judgment of the Supreme Court in *Hobbins v. The Queen*,⁵⁸ Laskin C.J.C., delivering the judgment of an unanimous court, cited all of *Ward*, *Horvath* and *Rothman*, and stated that "[t]here is no doubt that the *state of mind of the accused* is relevant to the admissibility of a statement made by him to the police after interrogation . . .", and that "[a]n *atmosphere of oppression* may be created in the circumstances surrounding the taking of a statement, although there be no inducement held out of hope of advantage or fear of prejudice . . .".⁵⁹ Similarly, in the 1983 case of *R. v. Turgeon*,⁶⁰ Lamer J. considered "the effect of a flagrant denial of the rights of an inmate, recognized by the Canadian Bill of Rights, on the admissibility in evidence of a statement". It is important to note that, in a seven judge court, three judges concurred with Lamer J. and the remaining three judges, while holding that the appeal did not raise a question of law, concurred in the result. It does not require much imagination to suspect that the subtext of Lamer J.'s judgment involves a concern with the integrity of the administration of justice which he specifically relied upon in his judgment in *Rothman*.

Why, one may wonder, in view of this "expanding" law on involuntariness, has a narrow interpretation of *Ibrahim*, or "the orthodox test"⁶¹ as the Commission refers to it, been chosen by the Commission as the definition of involuntariness? Did the Commission desire to bring its statement of the law into line with the choices made by the government in its drafting of Bill S-33? In any event, it is submitted that a full and generous interpretation should be given to "involuntariness" in order to protect the interests of the individual and of the community which underlie the voluntariness rule.⁶² These important public interests can only be fully protected by a broadly defined test of involuntariness. The Commission is mistaken perhaps as a matter of law, certainly as a matter of policy, in opting for a narrow definition of involuntariness. This is particularly so in a

case just at a time when the Supreme Court of Canada has shown the way out from its inadequacy. Nor does the definition when read with s.67 allow for any residual discretion, which was certainly acknowledged in . . . other passages of *Ibrahim* not so slavishly quoted.

See the text accompanying footnote 44 setting out a passage from *Ibrahim* which recognizes judicial discretion and a focus on the conduct of the questioner.

⁵⁸ [1982] 1 S.C.R. 553, (1982), 66 C.C.C. (2d) 289.

⁵⁹ *Ibid.*, at pp. 556-557 (S.C.R.), 292 (C.C.C.) (emphasis added).

⁶⁰ [1983] 1 S.C.R. 308, at p. 309, (1983), 8 C.C.C. (3d) 921, at p. 94.

⁶¹ Working Paper, footnote 2, p. 85, endnote 47.

⁶² *Supra*, Part I.

period of legal development in Canada emphasizing concern for individual rights, as highlighted by the enactment of the Canadian Charter of Rights and Freedoms. It is difficult to see why the Commission opted for a narrow reading of the Privy Council formulation of involuntariness, ignoring the wealth of articulate and sensitive judgments in our own Supreme Court over the last decade expanding the definition of involuntariness.

B. *Statements by an accused and res gestae*

(1) *The Working Paper's view of the law*

The section of the Working Paper entitled "The voluntariness rule" contains a serious error which distorts much of the content of that section. The Working Paper misstates the evidentiary nature of an accused's statement⁶³ and confuses the law on the admissibility of evidence of such a statement with the law on the admissibility of *res gestae*.⁶⁴ The Working Paper states:⁶⁵

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.

This statement, expressed definitively without qualification, is wrong. Evidence of a statement made out of court by an accused to a person in authority may or may not be hearsay. The Supreme Court of Canada has clearly stated, in *Piché v. The Queen*,⁶⁶ *Powell v. The Queen*⁶⁷ and *Erven v. The Queen*,⁶⁸ that the voluntariness requirement applies to any statement by an accused to a person in authority. In particular, the voluntariness requirement applies to both inculpatory and exculpatory statements. Dickson J. succinctly stated the voluntariness rule in *Erven* as follows:⁶⁹

I think it can now be taken to be clearly established in Canada that *no statement* made out of court by an accused to a person in authority can be admitted into evidence *against* him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily . . .

Of course, in practice the statement offered by the Crown will usually be inculpatory. In that situation, the prosecution is offering the statement for the truth of its contents and, therefore, the offered evidence is

⁶³ For a brief comment on the "involved evidentiary pedigree" of evidence of an accused's statement, see Hutchinson, Withington, *loc. cit.*, footnote 24, at pp. 168-169.

⁶⁴ The Report does not touch on these points.

⁶⁵ *Op. cit.*, footnote 2, p. 6.

⁶⁶ *Supra*, footnote 12, at pp. 25, 36-37 (S.C.R.), 29, 37 (C.C.C.).

⁶⁷ [1977] 1 S.C.R. 362, at p. 366, (1976), 28 C.C.C. (2d) 148, at p. 152.

⁶⁸ *Supra*, footnote 1.

⁶⁹ *Ibid.*, at pp. 931 (S.C.R.), 87 (C.C.C.) (emphasis added). I emphasize "against him" in view of the line of authority considered *infra*, text commencing at footnote 126.

hearsay.⁷⁰ However, if the Crown offers the statement for any purpose other than proving the truth of the contents of the statement, the evidence is not hearsay.⁷¹ For example, in *Piché*, the accused, who was charged with non-capital murder, testified at trial that she had accidentally shot the victim. However, in a statement made to the police shortly after the discovery of the victim's body, she had told a totally different story, saying that she had had nothing to do with the shooting and that the victim had been alive when she last saw him. Clearly the Crown was not tendering this statement to prove the truth of its contents and the offered evidence was not hearsay. Similarly, in *Erven*, the accused made a statement to police officers that he was on Crescent Beach because he was involved in search and rescue work and was taking soil samples. On the accused's trial for drug trafficking, the Crown was not offering this evidence to prove the truth of the statement and, again, the evidence was not hearsay. In each case, however, the offered evidence, since it was a statement by an accused to a person in authority, was admissible only if voluntary. Thus, as indicated, it is wrong to say that evidence of a statement by an accused to a person in authority is "by definition a species of hearsay". Rather, such evidence may or may not be hearsay.

The source of this error may be reliance on pre-*Piché* Canadian authority or current English authority. Prior to *Piché*, Canadian law was that the voluntariness requirement applied only to inculpatory statements which, when offered by the Crown, would be offered for their truth and which would, therefore, be hearsay. This was because it had been held that "[t]he law concerning the admissibility of statements made to persons in authority, finds its application only when these statements are of an incriminating nature".⁷² After *Piché* the voluntariness requirement applies to all statements made by an accused. Current English law probably still limits the requirement to inculpatory statements.⁷³

Following upon the erroneous starting position that evidence of a statement by an accused to a person in authority is always hearsay, the Working Paper attempts to incorporate the *res gestae* exception to the hearsay rule⁷⁴ into the analysis of the admissibility of such statements. In

⁷⁰ *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965, at p. 970 (P.C.); *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 41, (1982), 68 C.C.C. (2d) 394, at pp. 408-409.

⁷¹ *Ibid.*

⁷² *Boudreau v. The King*, *supra*, footnote 1, at pp. 265 (S.C.R.), 6 (C.C.C.).

⁷³ See, for example, R. Cross, *Evidence* (5th ed., 1979), pp. 534-535; S.L. Phipson, *Evidence* (13th ed., 1982), s. 22-01. But, see M. Schrager, *Recent Developments in the Law Relating to Confessions: England, Canada and Australia* (1981), 26 McGill L.J. 434, at pp. 467-468, referring to *R. v. Storey* (1968), 52 Cr. App. R. 334 (C.C.A.).

⁷⁴ Declarations which have such peculiar relevance to the acts which form the subject matter of the issues at trial that it would be artificial to separate them from those acts are "admissible as part of the *res gestae*": *R. v. Beddingfield*, (1879), 14 Cox C.C. 341 (Assize); *Gilbert v. The King* (1907), 38 S.C.R. 284; *Teper v. The Queen*, [1952] A.C.

so doing, the Working Paper follows Bill S-33. Both Bill S-33 and the Working Paper assume that, in dealing with evidence of out of court words,⁷⁵ the initial and paramount question of classification is whether the words come within the *res gestae* criteria. If so, they are admissible, whether a statement by an accused or a declaration by a non-accused person. However, the *res gestae* criteria⁷⁶ only serve to ensure trust-

480, [1952] 2 All E.R. 447 (P.C.); *Ratten v. The Queen*, [1972] A.C. 378, [1971] 3 All E.R. 801 (P.C.). The law on *res gestae* is undoubtedly one of the most imprecise areas of the law of evidence. Lord Wilberforce referred to the expression "*res gestae*" as an "opaque or at least imprecise Latin phrase": *Ratten v. The Queen*, [1972] A.C. 378, at p. 389 (P.C.). J.B. Thayer wrote that this "valuable phrase" did for lawyers "what the limbo of theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one—some things belonged there, others might, for purposes of present convenience be put there"; Comment, *Bedingfield's Case* (1881), 15 Amer. L. Rev. 1, at p. 10; Legal Essays (1908), at p. 244. Despite the imprecision, the criteria for admissibility as part of the *res gestae* are generally accepted as being that the declaration was made contemporaneously with the main event and with spontaneity on the part of the declarant. However, a difficult question is the purpose for which such evidence is admissible. The traditional Canadian view, at least in criminal cases, was that such declarations were admissible as original evidence, that is, for some non-hearsay purpose: see, for example, *R. v. Leland* (1950), 98 C.C.C. 337 (Ont. C.A.); *R. v. Wilkinson*, [1934] 3 D.L.R. 50 (N.S.S.C. *in banco*). However, there were civil cases which considered declarations made contemporaneously with accidents, and which seem to say that such evidence was admissible as an exception to the hearsay rule: *Jarvis v. London Street R.W. Co.* (1919), 45 O.L.R. 167, at p. 174 (S.C., App. Div.) (although on the facts in the case the declaration was held not to be part of the *res gestae* because it was not sufficiently spontaneous); *Ineson v. Gray Coach Lines*, [1960] O.R. 661, at p. 666 (Ont. C.A.). The High Court of Australia, in a civil case, but after having referred to some of the leading criminal cases involving *res gestae*, including *R. v. Bedingfield*, stated: "... it seems better to regard such statements as evidence of the facts they recount, and thus as exceptions to the general rule excluding hearsay . . ."; *Ramsay v. Watson* (1961), 108 C.L.R. 642, at p. 648. In *Ratten v. The Queen*, the Privy Council held that declarations admissible as part of the *res gestae* may be admitted as an exception to the hearsay rule or as original evidence: [1972] A.C. 378, at pp. 388-389, [1971] 3 All E.R. 801, at p. 806. If the evidence is offered for its truth, then in addition to the criteria of contemporaneity and spontaneity is added the criterion of stress on the declarant to minimize the possibility of concoction or fabrication: *ibid.*, at pp. 389-390 (A.C.) 1, 807 (All E.R.). Subsequent Canadian cases have followed *Ratten* on this point; the exclusivity of the original evidence purpose in Canadian criminal evidence law has been replaced by the dichotomous possibilities of an original evidence purpose and a hearsay purpose. See, for example, *R. v. Mahoney* (1979), 50 C.C.C. (2d) 380 (Ont. C.A.), affirmed [1982] 1 S.C.R. 834; *R. v. Clark* (1983), 7 C.C.C. (3d) 46 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused, October 3, 1983. However, given the Working Paper's assertion that evidence of an out of court statement made by an accused to a person in authority is always hearsay when offered by the Crown, the Working Paper focusses on the hearsay exception possibility.

⁷⁵ I use the neutral expression "out of court words" to include both statements by an accused and declarations by persons other than an accused.

⁷⁶ Spontaneity, contemporaneity with the main act and, since we are considering *res gestae* evidence which is admissible as an exception to the hearsay rule, stress on the declarant: see *Ratten v. The Queen*, *supra*, footnote 74, and generally footnote 74.

worthiness.⁷⁷ On the other hand, under the existing common law the initial and paramount question of classification is whether the out of court words are a statement by an accused to a person in authority. If so, then the words are admissible only if they were voluntary.⁷⁸ The common law focusses on the relationship between the person being questioned and the person questioning; is the questioner, in the subjective view of the person being questioned, someone who can affect a potential criminal prosecution? The test of voluntariness serves not only the purpose of ensuring trustworthiness, but also the purposes of protecting the civil liberties of an individual being questioned by a person in authority and the integrity of the criminal justice system generally.⁷⁹ The purposes served by the common law initial question, and thereunder the voluntariness requirement, are broader than that served by the *res gestae* exception to the hearsay rule. The question at common law—are the words an out of court statement by an accused to a person in authority—is a classification which is easy to apply⁸⁰ and which, it is submitted, is correct in principle since it protects interests of fundamental importance in a free society which are not met by the criteria of *res gestae*.

The Working Paper has mistakenly chosen an incorrect starting point of classification. The result is considerable confusion in its statement of current law concerning the relationship between evidence of an accused's statement and evidence admissible as part of the *res gestae*. This error is reflected in its endorsement of clauses 62(1)(f)-62(1)(i) of Bill S-33. The clauses read as follows:⁸¹

62(1) The following statements are admissible to prove the truth of the matter asserted:

[paras. (a)-(e) omitted]

⁷⁷ *Ratten v. The Queen*, *ibid.* Of course, the two classic rationales given for the exceptions to the hearsay rule are a circumstantial probability of truthfulness and necessity; J. H. Wigmore, *Evidence* (Chadbourn Rev., 1974) Vol. 5, s.1420; *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, at p. 241 (C.A.); *Public Trustee for Alberta v. Walker* (1981), 122 D.L.R. (3d) 411, at pp. 438-439, [1981] 3 W.W.R. 199, at pp. 231-232 (Alta. C.A.).

⁷⁸ If the statement to the person in authority is offered by the accused, and the statement meets the criteria established by *Graham* and related authority, the statement may be admissible as part of the *res gestae*: see *infra*, text commencing at footnote 126. If the out of court words of the accused were made to a person other than a person in authority, they may be admissible as an admission of the accused (*R. v. Erdheim*, [1896] 2 Q.B. 260, at p. 270 (Cr. C. Res.)), or as original evidence (*Subramaniam v. Public Prosecutor*, *supra*, footnote 70).

⁷⁹ *Supra*, Part I.

⁸⁰ Subject as always to problems of factual assessment: for example, is conduct a "statement"? and was the person to whom the statement was made a "person in authority"?

⁸¹ Set out in the Working Paper, *op. cit.*, footnote 2, pp. 8-9, 101-102. The words emphasized in clause 62(1) mean that statements admissible thereunder would be admitted as an exception to the hearsay rule.

(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]

Paragraphs 62(1)(f)-62(1)(i) are made applicable to a statement by an accused to a person in authority by the exception phrase contained in clause 64 of Bill S-33, which provides:⁸²

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.

The Working Paper states that "[t]his 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*".⁸³ The inference is that this is substantially innocuous legislation which basically does little more than codify existing common law. This is not so. While existing common law is not entirely clear as to whether words which would be admissible under paragraph 62(1)(f)-62(1)(i) are presently admissible for their truth against a declarant who is not an accused,⁸⁴ the law is clear that such words, if they are a statement by an accused to a person in authority, are not admissible unless the Crown establishes that they were made voluntarily.⁸⁵ In *Erven Dickson J.* put the position as follows:⁸⁶

⁸² *Ibid.*, pp. 7, 102-103 (emphasis added).

⁸³ *Ibid.*, p. 9 (emphasis added).

⁸⁴ See Report of the Federal-Provincial Task Force on Uniform Rules of Evidence, *op. cit.*, footnote 3, pp. 206-210. The Working Paper itself admits, at page 9, that the common law hereon involves "uncertainty with regard to the foundation upon which spontaneous declarations are admissible". Of course, even if the provisions of clause 62 of Bill S-33 were enacted, all the problems of factual assessment which now exist under the common law criteria of contemporaneity, spontaneity and stress on the declarant would continue to apply; what, in any given fact situation, is "spontaneous" (clause 62(1)(h)), "made in direct reaction" (clause 62(1)(h)) or "made spontaneously at the time the event or act occurred" (clause 62(1)(i))?

⁸⁵ *Ibrahim v. The King*, *supra*, footnote 1; *Boudreau v. The King*, *supra*, footnote 1; *Powell v. The Queen*, *supra*, footnote 67; *Erven v. The Queen*, *supra*, footnote 1.

⁸⁶ *Ibid.*, at pp. 938-939 (S.C.R.), 94 (C.C.C.) (emphasis added). Two caveats concerning these words of Dickson J. are required. First, evidence admitted as part of the *res gestae* may be admitted as an exception to the hearsay rule or as original evidence: *supra*, footnote 78. Second, the voluntariness requirement pertains only to statements

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.

Bill S-33 would dramatically change the law by removing the voluntariness hurdle to admissibility in the case of some statements by an accused to a person in authority. McWilliams deals with these proposed changes succinctly and with an appropriate degree of indignation when he states:⁸⁷

It is, with respect, heresy to say that because a statement of an accused may be admissible as part of the *res gestae*, the confession rule does not apply. One would think that Dickson J. had settled that in *Erven v. The Queen* It just goes to show how the prosecution keeps chipping away at our safeguards.

The Working Paper reproduces⁸⁸ the passage I have quoted from Dickson J.'s judgment in *Erven*, but states that "it is unclear whether the

made by an accused to a person in authority. Statements made by an accused to anyone other than a person in authority are admissible under the admissions exception to the hearsay rule; see, for example, *R. v. Erdheim*, *supra*, footnote 78, at p. 270. Of course, Dickson J. was making his statements in the context of a consideration of statements by an accused to a person in authority.

⁸⁷ *Op. cit.*, footnote 8, p. 54. McWilliams made this comment after referring to sections 65(1)(i) and 67 of the Uniform Evidence Act, which provisions correspond to clauses 62(1)(f)-62(1)(i) and 64 of Bill S-33. (McWilliams' use of the expression "confession" is explained in his caveat to readers at p. 438: "Through habit the rule [that is, the requirement of voluntariness] will from time to time be referred to as the confession rule, although it is obviously a misnomer.") Tollefson, *loc. cit.*, footnote 3, at p. 163, stated that enactment of the Uniform Evidence Act would "be a giant step forward in the law of evidence in Canada"; and, on the relationship between evidence of an accused's statement and *res gestae* evidence, stated, at p. 156:

Apart from the elimination of the term [*res gestae*] itself, the Uniform Act makes only one change, namely, that where an accused wishes to adduce a self-serving spontaneous statement made by him, describing or explaining some relevant act or event, he may do so only as part of the defence evidence and only if he testifies personally. This is to close a loophole whereby a sophisticated accused can get a well-rehearsed, "spontaneous" exculpatory statement into evidence through cross-examination of a Crown witness without ever having to enter the witness box.

Tollefson is referring to *Graham* and related authority, considered *infra*, text commencing at footnote 126. This completely ignores the dramatic change in the law which would be effected by the Uniform Evidence Act, ss. 65(1)(f)-65(1)(i) and 67 (at Report of the Task Force, *op. cit.*, footnote 83, pp. 561-562) and Bill S-33, ss. 62(1)(f)-62(1)(i) and 64. There is more change in the Uniform Evidence Act and Bill S-33 than the "only one change" referred to by Tollefson. I prefer the view expressed by McWilliams in the passage cited.

⁸⁸ *Op. cit.*, footnote 2, p. 9.

position taken by Dickson J. [that statements by an accused to a person in authority are not admissible *via* the back door, that is, *via* the *res gestae* route] represents the law at the moment"; rather remarkably the Working Paper goes on in the same sentence to say that "it is clear that the Government rejected this position [that is, the position of Dickson J.] in the formulation of Bill S-33".⁸⁹ Is the Working Paper suggesting that a proposed change in the law contained in a government Bill is to be taken as an authoritative statement on the present law? Further, the Working Paper suggests that Dickson J.'s statement is merely dicta.⁹⁰ Whether the statement represents current law and whether it is only dicta are both points that require detailed examination.

(2) Authority relied upon by the Working Paper

In seeking to demonstrate that Dickson J.'s statement might not represent the law, the Working Paper relies on Wigmore,⁹¹ the decision of the Privy Council in *Ratten v. The Queen*,⁹² parts of the Report of the Federal-Provincial Task Force on Uniform Rules of Evidence,⁹³ and two lines of Canadian cases. The Canadian cases require extended consideration; the first three sources may be dealt with fairly summarily.

The section from Wigmore cited by the Working Paper is part of a consideration of *res gestae* declarations generally, not a consideration of statements by an accused.⁹⁴ Similarly, recent cases in Canada suggesting the creation, perhaps, of an excited utterance exception to the hearsay rule, have not involved statements by an accused to a person in authority.⁹⁵ This authority has nothing whatsoever to do with the law concerning the admissibility of a statement by an accused to a person in authority.

In *Ratten* the primary issue was the purpose for which *res gestae* evidence is admissible. In particular, is such evidence admissible only to show that the declaration was made or is it admissible to prove the truth of the contents of the declaration, that is, as an exception to the hearsay

⁸⁹ *Ibid.*, p. 10.

⁹⁰ *Ibid.*, endnote 29.

⁹¹ *Op. cit.*, footnote 77, vol. 6, s.1747.

⁹² *Supra*, footnote 74.

⁹³ *Op. cit.*, footnote 84.

⁹⁴ Wigmore, *op. cit.*, footnote 74, Vol. 6, ss.1745-1764, entitled "Spontaneous Exclamations (*Res Gestae*)", deals with evidence identified by the "shibboleth *res gestae*" (S.1745) and admissible as an exception to the hearsay rule. Ss. 1766-1792, entitled "Hearsay Rule Not Applicable (Verbal Acts, *Res Gestae*, etc.)" deals with, *inter alia*, evidence identified as *res gestae* but admissible as original evidence, not as an exception to the hearsay rule. The important point, however, is that these sections of Wigmore deal with declarations, whether hearsay or non-hearsay, by declarants generally; they are not concerned with statements by an accused.

⁹⁵ *R. v. Mahoney*, *supra*, footnote 74; *R. v. Clark*, *ibid.*, involved evidence of a declaration by the victim of the crime alleged.

rule? The Privy Council held that such evidence could be admitted either as original evidence or as an exception to the hearsay rule.⁹⁶ However, the important point for present purposes is that the Privy Council proceeded on the basis that the declaration in the fact situation in *Ratten* was made by the wife of the accused.⁹⁷ Even if the words spoken had been found to be those of the accused in an hysterical state, which seems to have been contemplated by their Lordships as a possibility,⁹⁸ the accused's statement would have been made to a telephone operator, who was not a person in authority under the circumstances. Again, on its facts, *Ratten* did not deal with the admissibility of a statement by an accused to a person in authority.

The vast majority of the cases cited by the Task Force in the parts of its Report which are relied upon in the Working Paper did not involve a statement by an accused, whether to a person in authority or otherwise.⁹⁹ Cases cited that did involve statements by an accused were cases in which evidence of the statement was either offered by the accused or elicited by counsel for the accused in the cross-examination of Crown witnesses.¹⁰⁰

⁹⁶ *Ratten v. The Queen*, *supra*, footnote 74, at pp. 388-389 (A.C.), 806 (All E.R.).

⁹⁷ Of course it is impossible to know precisely what findings of fact the jury made at trial. All that we know is that the jury found the accused guilty of murdering his wife. However, his evidence was that he had not telephoned the police. The evidence of the telephone operator was that she had received a call from the home of the accused, where his wife was shot, and the caller said "Get me the police please". The telephone operator testified that the caller was a woman. The Privy Council held that they had to "proceed with the appeal on the basis that the jury was properly directed that, on the evidence, they might find that the telephone call . . . was made by the deceased woman"; *ibid.*, at pp. 387 (A.C.), 805 (All E.R.).

⁹⁸ A police officer described the voice of the accused shortly afterwards as "hysterical, with a high inflexion—substantially the same description as was used by the [telephone operator]" to describe the voice of the caller; *ibid.*, at pp. 386 (A.C.), 804 (All E.R.).

⁹⁹ Many of the cases cited involved declarations by the victim of a crime but, as indicated, none involved a statement by an accused: *R. v. Beddingfield*, *supra*, footnote 74; *R. v. Belliveau* (1978), 41 C.C.C. (2d) 52 (N.S. App. Div.); *Brassard v. The King* (1911), 17 R.L.N.S. 491 (Que. C.A.); *Chapdelaine v. The King*, [1935] S.C.R. 53; *R. v. Garlow* (1976), 31 C.C.C. (2d) 163 (Ont. H.C.); *Ref. re R. v. Latta* (1976), 30 C.C.C. (2d) 208 (Alta. App. Div.); *R. v. Leland*, *supra*, footnote 74; *R. v. Mulligan* (1973), 23 C.R.N.S. 1 (Ont. H.C.), affirmed (1974), 26 C.R.N.S. 179 (Ont. C.A.); *Penney v. The Queen*, [1979] 2 S.C.R. 1014; *R. v. Presley*, [1976] 2 W.W.R. 258 (B.C.S.C.); *Ratten v. The Queen*, *supra*, footnote 74; *Teper v. The Queen*, *ibid.*; *R. v. Workman*, [1963] 1 C.C.C. 297 (Alta. App. Div.), affirmed [1963] S.C.R. 266, [1963] 2 C.C.C. 1 (S.C.C.). The report of *R. v. Walkem* (1908), 14 C.C.C. 122 (B.C.S.C.), does not indicate clearly just what the impugned evidence was; in particular, it is not possible to tell whether the impugned evidence was a statement by the accused.

¹⁰⁰ *R. v. Graham*, [1974] S.C.R. 206, (1972), 7 C.C.C. (2d) 93 (S.C.C.); *R. v. Keeler*, [1977] 5 W.W.R. 410 (Alta. App. Div.); *Phillion v. The Queen*, [1978] 1 S.C.R. 18, (1977), 33 C.C.C. (2d) 535 (S.C.C.) (in addition, in this case the statement by the accused had been made during a polygraph examination and, therefore, the case raised the special concerns of the courts when dealing with evidence of statements obtained by "special form(s) of interrogation", to use the expression of Beetz J. in *Horvath v. The*

The Working Paper itself refers directly to one additional case involving evidence of an accused's statement which was offered by the defence.¹⁰¹ In summary then, the authority cited in the sections of the Report of the Task Force relied upon by the Working Paper does not include one case in which the impugned evidence was a statement by an accused to a person in authority offered by the Crown against the accused. Thus, we have authority relied upon by the Working Paper which has nothing to do with the law concerning the admissibility of statements by an accused to a person in authority.¹⁰²

(3) *Canadian cases: Spencer, and related authority*

The Working Paper relied on two Canadian lines of authority, *R. v. Spencer*¹⁰³ and a group of related cases, and *R. v. Graham*¹⁰⁴ and a group of related cases. Read superficially, *Spencer*, *R. v. Toulany*,¹⁰⁵ *R. v. Mayer*,¹⁰⁶ and the decision of the Appeal Division of the Nova Scotia Supreme Court in *Erven*¹⁰⁷ may appear to admit evidence of an accused's statement on the basis that it was *res gestae*. However, a closer reading of these judgments makes it clear that the true basis of decision in each case is that the substantive requirement of voluntariness may be satisfied by meeting the *res gestae* requirements of spontaneity and contemporaneity with the main act. In such a situation, the voluntariness of the accused's statement being "obviously" satisfied on the facts, it is unnecessary for the court to meet the usual procedural requirement of conducting a *voir dire* to determine voluntariness. Therefore, this line of authority adheres

Queen, *supra*, footnote 14, at pp. 422 (S.C.R.), 421 (C.C.C.); *R. v. Risby* (1976), 32 C.C.C. (2d) 242 (B.C.C.A.), affirmed, [1978] 2 S.C.R. 139, (1978), 39 C.C.C. (2d) 567 (S.C.C.); *R. v. Schwartz* (1978), 40 C.C.C. (2d) 161 (N.S. App. Div.) (in addition, in this case the statement by the accused had not been made to a person in authority).

¹⁰¹ *R. v. Klippenstein* (1981), 57 C.C.C. (2d) 393 (Alta. C.A.). This case was not referred to in the Report of the Task Force. It is important to note, however, that even though it was counsel for the defence who was offering the evidence of the statements by the accused, with the agreement of counsel for the Crown, the trial judge was still concerned as to whether he should conduct a *voir dire* to determine voluntariness; *ibid.*, at p. 396.

¹⁰² I emphasize that I am not critical of the Report of the Federal-Provincial Task Force: the Task Force was considering, in the parts of its Report relied upon by the Working Paper, the admissibility of *res gestae* declarations in general and was not considering the admissibility of statements by an accused. I am, however, critical of the Working Paper of the Commission for, in my submission, inappropriately citing this part of the Report of the Task Force in support of its analysis of the relationship between declarations admissible as part of the *res gestae* and statements by an accused.

¹⁰³ (1973), 16 C.C.C. (2d) 29 (N.S. App. Div.).

¹⁰⁴ *Supra*, footnote 100.

¹⁰⁵ (1973), 16 C.C.C. (2d) 208 (N.S. App. Div.).

¹⁰⁶ (1976), 16 N.S.R. (2d) 404 (N.S. App. Div.).

¹⁰⁷ (1977), 21 N.S.R. (2d) 653 (N.S. App. Div.).

to the exclusivity of the voluntariness requirement. In any event, any doubt perhaps cast upon the exclusivity of the voluntariness requirement by these cases may be ignored, since they are no longer persuasive authority; in particular, the concept of "obvious voluntariness" was clearly jettisoned by Dickson J. in *Erven*.¹⁰⁸ Let us examine *Spencer*, *Toulany*, and *Mayer* briefly.

In *Spencer*, the accused was charged with possession of hashish for the purpose of trafficking. At his trial, a police officer testified as to a statement made by the accused to the officer at the time the officer was searching the house rented by the accused. No objection was taken to the admissibility of this evidence and no *voir dire* was conducted. The Appeal Division of the Nova Scotia Supreme Court, dismissing the appeal of the accused against conviction,¹⁰⁹ held that a statement by an accused to a person in authority may be admissible without a *voir dire* to determine voluntariness if it is apparent that the statement is "obviously voluntary". One situation in which "obvious voluntariness" may be established is if the statement forms part of the *res gestae*.¹¹⁰ The *res gestae* route does not exist as an alternative to the voluntariness route, but may be a means of satisfying it. In such a case, the usual procedural requirement of a *voir dire* is unnecessary. However, the substantive requirement of voluntariness remains as the test of admissibility.

In arriving at its decision, the Appeal Division relied upon the judgment of the Supreme Court of Canada in *R. v. Graham*.¹¹¹ MacKeigan C.J.N.S. for the Court, after saying that there may be situations in which the holding of a *voir dire* to determine voluntariness is unnecessary, stated:¹¹²

One such exception to or qualification of the rule requiring a *voir dire* to establish voluntariness is indicated in the dicta of Mr. Justice Ritchie in *R. v. Graham*

However, it is submitted that *Graham* is entirely distinguishable from the fact situation in *Spencer* and, indeed, from any situation in which evidence of an accused's statement is offered by the Crown against the accused. *Graham* involved a situation in which the accused's statement was elicited by counsel for the accused in the cross-examination of a Crown witness. In such a case the evidence is not being offered against the accused and the voluntariness requirement does not apply.¹¹³ The Appeal Division also relied upon the judgment of the Supreme Court in *R. v. John*.¹¹⁴ However, as even MacKeigan C.J.N.S. admitted,

¹⁰⁸ *Infra*, text accompanying footnote 155.

¹⁰⁹ The appeal against sentence was allowed: *supra*, footnote 103, at pp. 37-38.

¹¹⁰ *Ibid.*, at pp. 33-35.

¹¹¹ *Supra*, footnote 100.

¹¹² *Supra*, footnote 103, at p. 33.

¹¹³ *Graham* and its progeny are considered *infra*, text commencing at footnote 126.

¹¹⁴ [1971] S.C.R. 781, (1970), 2 C.C.C. (2d) 157.

" . . . John . . . was not, of course, a case involving a *res gestae* statement . . . ".¹¹⁵ In *John*, the statement in question had been made to the police by the accused when he was in custody several days after the victim of the alleged manslaughter had gone missing. In summary, *Spencer* does not detract from the voluntariness requirement. With respect, it merely confuses it, and its reliance on inappropriate authority renders suspect its value as authority.

In its judgment delivered five days later in *R. v. Toulany*¹¹⁶ the Appeal Division of the Supreme Court of Nova Scotia, consisting of the same three judges who decided *Spencer*, again held that a statement by an accused to a person in authority may be admitted as part of the *res gestae* without a *voir dire* to determine voluntariness, at least in situations in which the statement was "obviously voluntary" and made at a purely investigatory stage of police activity. The accused had been convicted at trial on charges of possession of stolen property, including a camera and equipment. At trial, a police officer testified that he located the camera and equipment in the bottom of a dresser in the accused's room. Over the objection of counsel for the accused, the police officer was permitted to testify, without a *voir dire* having been conducted to determine voluntariness, that the accused then said that he had bought the camera in London, England. At trial the accused gave a different explanation as to how he had acquired the camera. The court, relying on *Graham*, held the statement admissible, since it had been made contemporaneously with the finding of the accused in possession of the camera. However, once again voluntariness was nevertheless recognized as the determinative requirement; at the conclusion of his judgment, Coffin J.A. for the court, stated:¹¹⁷

In any event it appears to me that in view of the obvious voluntariness of this statement in question and having in mind the ruling of Ritchie J., the statement was admissible. In reaching this conclusion, I am also accepting the ruling of MacKeigan, C.J.N.S., in the very recent opinion delivered in *R. v. Spencer* . . .

The "ruling of Ritchie J." referred to by Coffin J.A. is the judgment of Ritchie J. in *Graham*. As already indicated with respect to *Spencer*, it is submitted that reliance on *Graham* is inappropriate. Further, the concept of "obvious voluntariness" and the somewhat uncertain notion that the requirement of voluntariness may not apply with the same rigour to statements made at a "purely investigatory stage of police activity" as opposed to custodial statements, have both been clearly overruled.¹¹⁸ Thus, as with *Spencer*, it is submitted that *Toulany* is of little continuing significance.

¹¹⁵ *Supra*, footnote 103, at p. 34.

¹¹⁶ *Supra*, footnote 105.

¹¹⁷ *Ibid.*, at p. 221.

¹¹⁸ *Infra*, text commencing at footnote 126.

In *R. v. Mayer*,¹¹⁹ the accused had been convicted at trial on a charge of possessing hashish for the purpose of trafficking. The accused, Mayer, had been tried in respect of the same alleged facts as the accused, Erven, who was tried in a separate trial, the two having been apprehended together. The impugned evidence was the same as that in *Erven*.¹²⁰ The Appeal Division of the Nova Scotia Supreme Court cited *Spencer* and, in particular, reiterated its position that voluntariness might be met by satisfying the *res gestae* requirements.¹²¹ MacDonald J.A., for the court, stressed the substantive requirement of voluntariness as the test for admissibility of an accused's statement and did not come as close to suggesting that the *res gestae* route was an alternative as had the court in *Toulany*.¹²² The primary holding of the court was with respect to the procedural requirement of the *voir dire* to determine voluntariness; a *voir dire* is not required if the voluntary nature of the statement is "otherwise established"¹²³ or if the holding of a *voir dire* would constitute an "unnecessary farce".¹²⁴

In summary, *Spencer*, *Toulany* and *Mayer* were primarily concerned with whether a *voir dire* to determine voluntariness is required in all cases in which the Crown offers evidence of an accused's statement. They suggest that a *voir dire* is not always necessary. This is essentially consistent with the judgments in *Erven*. On the substantive question of what test determines the admissibility of an accused's statement, these cases adhered to the voluntariness requirement. However, to the extent that they suggest that the voluntariness test may be met by satisfying the *res gestae* requirements, it is submitted that they are no longer good law in view of the judgments in *Erven* and their misapplication of *Graham*.¹²⁵ In any

¹¹⁹ *Supra*, footnote 106.

¹²⁰ *Infra*, text commencing at footnote 143.

¹²¹ *Supra*, footnote 106, at p. 425.

¹²² *Ibid.*, at pp. 426-427, referring to *R. v. Sweezy* (1974), 20 C.C.C. (2d) 400 (Ont. C.A.). However, in that case, Martin J.A., for the court, while holding that a *voir dire* is not always necessary (*ibid.*, p. 417), reaffirmed the voluntariness rule (*ibid.*, p. 404) and found it unnecessary to decide whether satisfaction of the *res gestae* criteria meets the voluntariness requirement (*ibid.*, pp. 414-416). See also *R. v. Rushton* (1974), 20 C.C.C. (2d) 297 (Ont. C.A.).

¹²³ *Ibid.*, at p. 426.

¹²⁴ *Ibid.*, at p. 427, referring to *R. v. Spencer*, *supra*, footnote 103.

¹²⁵ S.I. Bushnell was of the opinion that this result followed from the judgment of de Grandpré J., for the court, in *Powell v. The Queen*, *supra*, footnote 67; see Comment (1975-76), 18 C.L.Q. 404, at pp. 412-413. After *Erven v. The Queen*, A.D. Gold wrote that "... *res gestae* as an independent head of admission [for evidence of an accused's statement] finds support in *Spencer* and ... *Toulany* ... These cases must be taken to have been rejected by at least the plurality in *Erven* ...": Comment (1978-79), 21 C.L.Q. 167 at p. 174. Similarly, Schragger, *loc. cit.*, footnote 73, at pp. 469-471:

... it appears that in Canada *res gestae* is not a sufficient ground of admissibility for suspects' statements ... Thus the confession rule has perhaps been elevated to a higher plane than other exceptional grounds for the admissibility of hearsay. That is to say that on the basis of *Erven* it is not sufficient that a statement made by an

event, these cases certainly do not say that the *res gestae* criteria exist as an alternative to voluntariness for determining the admissibility of an accused's statement.

(4) *Canadian cases: Graham and related cases*

A line of cases,¹²⁶ which originated in the context of the doctrine of recent possession,¹²⁷ has admitted evidence of an accused's statement to a person in authority as part of the *res gestae*. However, in these cases, the statement was an exculpatory one offered in evidence by the accused, not the Crown. Therefore, the policies served and the interests protected by the voluntariness rule¹²⁸ were not involved, and there was no need to test the statement for voluntariness.

The judgments in the Supreme Court of Canada in *R. v. Graham*¹²⁹ are the progenitors of this authority. The accused, who had been apprehended by the police in possession of recently stolen goods, was charged with possession of stolen property. The Crown relied upon the doctrine of recent possession. This presumption operates only in the absence of a reasonable explanation by the accused accounting for his possession. The accused did not testify at trial. However, his counsel, during the cross-examination of an investigating police officer, elicited evidence that the accused had made a statement explaining his possession immediately upon being apprehended.¹³⁰ Ritchie J. held that this evidence was admissible, even though the accused had not testified, since "[e]xplanatory statements made by an accused upon his first being found 'in possession'

accused to a person in authority be admissible on some ground (*e.g. res gestae*); . . . When viewed in conjunction with *Piché*, the decision in *Erven* reflects an attitude in the Canadian Supreme Court that any out-of-court statement made by an accused to a person in authority can be tendered only if admissible under the confession rule. This is so even if the statement is adduced for some non-hearsay purpose, as in *Piché*, or if admissible on some other ground, as in *Erven*.

¹²⁶ Notably *R. v. Graham*, *supra*, footnote 100; *R. v. Newton*, [1977] 1 S.C.R. 399, (1976), 34 C.R.N.S. 161; *R. v. Risby*, *supra*, footnote 100.

¹²⁷ On a charge of stealing goods or being in possession of stolen goods, an accused found in possession of recently stolen goods is presumed, respectively, to have stolen them or to have known that they were stolen, unless he gives a reasonable explanation for his possession which is believed: see, for example, *R. v. Proudlock*, [1979] 1 S.C.R. 525, at p. 548, (1978), 43 C.C.C. (2d) 321, at p. 325, per Pigeon J.

¹²⁸ *Supra*, Part I.

¹²⁹ *Supra*, footnote 100. See also *R. v. McKenzie*, [1974] S.C.R. 233, (1972), 7 C.C.C. (2d) 112. *Graham* and *McKenzie* were charged and tried jointly.

¹³⁰ The accused had been found in a hotel room where an attaché case containing recently stolen jewelry was found behind a chesterfield. Immediately upon being found in possession of the stolen goods, the accused had stated, "I have never seen it [the attaché case] before in my life."; *ibid.*, at pp. 209 (S.C.R.), 95 (C.C.C.). In addition, the trial judge allowed counsel for the accused to elicit from the officer evidence concerning another related statement the accused had made as he was being taken out of the hotel.

constitute a part of the *res gestae* and are necessarily admissible in any description of the circumstances under which the crime was committed".¹³¹ Laskin J. concurred in separate reasons similar to those of Ritchie J. He emphasized the requirement that the statement must have been made contemporaneously with the accused having been found in possession of the recently stolen goods in order for it to be admissible in cross-examination. He stated:¹³²

If the trial judge rules that the statement in explanation was sufficiently contemporaneous, it becomes admissible, and will blunt any inference of guilty knowledge if it is found as a fact that the explanation was one that might reasonably be true.

At trial counsel for the accused had indicated that he also wished to examine the officer about a written statement which the accused had made at the police station approximately two hours after he had been apprehended in possession of the stolen goods. The essence of this statement was that the accused had been on a mission to recover the goods which had been stolen from a friend. Ritchie J. held that this statement was inadmissible since the accused had had an opportunity to devise an explanation in the time between being apprehended in possession of the stolen goods and making the statement at the police station. The statement was therefore caught by the general rule against self-serving statements. If the accused wished this explanation to go in evidence, he would have to testify and have his credibility tested in cross-examination.¹³³ Spence J. concurred in the result arrived at by Ritchie and Laskin JJ. but for different reasons, holding that the written statement made at the police station was inadmissible because the Crown had not intended to rely upon the doctrine of recent possession.¹³⁴ Thus, at least on the trial of a charge of possession of stolen property in which the Crown is relying upon the doctrine of recent possession, evidence of an exculpatory statement made by an accused contemporaneously with his being found in possession of the stolen property is admissible at the instance of the accused and the question of voluntariness does not apply.

In *R. v. Newton*,¹³⁵ the Supreme Court held that there is no obligation on the Crown to lead any explanation made by the accused before it may rely on the doctrine of recent possession. However, the court affirmed the position it had taken in *Graham*, stating that counsel for the

¹³¹ *Ibid.*, at pp. 214 (S.C.R.), 99 (C.C.C.). Martland, Pigeon and Judson JJ. concurred in the reasons of Ritchie J.

¹³² *Ibid.*, at pp. 216 (S.C.R.), 108-109 (C.C.C.). Hall J. concurred with the reasons of Laskin J.

¹³³ *Ibid.*, at pp. 214 (S.C.R.), 99 (C.C.C.).

¹³⁴ *Ibid.*, at pp. 229-231 (S.C.R.), 106-108 (C.C.C.).

¹³⁵ *Supra*, footnote 126.

accused is entitled to elicit such evidence. For example, Dickson J. stated:¹³⁶

If the accused has offered an explanation to the police, it is open to his counsel, if the accused does not wish to testify, to cross-examine the police witnesses for the purpose of bringing forth evidence of the explanation.

In *R. v. Risby*,¹³⁷ the accused was convicted at trial on a charge of possession of marijuana for the purpose of trafficking. The accused had been found sitting in the back seat of a car on a package containing marijuana. Counsel for the accused, in cross-examination of the police officer who had found the accused, attempted to have the officer testify as to an exculpatory statement made by the accused immediately upon his being found sitting on the package. The trial judge ruled that this evidence was inadmissible. The British Columbia Court of Appeal, relying upon *Graham*, ruled that the trial judge had erred and ordered a new trial. The Crown's appeal to the Supreme Court of Canada was dismissed. Laskin C.J.C., for the court, briefly stated:¹³⁸

We are all of the opinion that the answer of the accused was admissible in this case as part of the *res gestae* and that what was said by Ritchie J. in *R. v. Graham* . . . as to *res gestae* is not limited to cases of possession of recently stolen goods.

Thus, the limits of *Graham* were extended. However, *Risby* was a case in which possession was an element of the offence alleged, albeit not a case involving a charge of possession of stolen goods in which the Crown was relying upon the doctrine of recent possession. Does *Graham*, as expanded in *Risby*, apply perhaps to cases other than ones in which possession is an element of the offence? There is no authority clearly indicating the answer to this question.¹³⁹

¹³⁶ *Ibid.*, at pp. 402 (S.C.C.), 170 (C.R.N.S.).

¹³⁷ *Supra*, footnote 100. See also *R. v. Barnes* (1979), 3 W.C.B. 383 (B.C.C.A.); *R. v. Klippenstein*, *supra*, footnote 101.

¹³⁸ *Ibid.*, at pp. 139 (S.C.C.), 567 (C.R.N.S.).

¹³⁹ However, at least one case suggests that *Graham* may apply in cases other than those in which possession is an element. In *R. v. Keeler*, *supra*, footnote 100, the accused was charged with rape and the main issue was consent. At trial, counsel for the accused called a police officer to testify as to a statement made by the accused to the officer about five hours after the alleged rape occurred. Counsel for the accused offered this evidence to show that the statement the accused had made then was consistent with the testimony of the accused before the jury. Over the objection of counsel for the Crown, the trial judge allowed the evidence. On appeal, the Supreme Court of Alberta, Appellate Division, held that the evidence ought not to have been admitted since, *inter alia*, the statement did not constitute part of the *res gestae*. The court had considered *Graham* and, presumably, if the offered statement had been part of the *res gestae*, it would have been admissible. That is, the principles in *Graham* would have been applicable in a case in which possession was not an element of the offence charged. See, in particular, *ibid.*, at pp. 413, 415. See also *Re Depagie and the Queen* (1975), 27 C.C.C. (2d) 456, at pp. 463-464 (Alta. T.D.); *quaere* whether the explanation was inadmissible in cross-examination because of the nature of the charge, namely forcibly seizing another person, or because the statement did not satisfy the *res gestae* criteria of spontaneity and contemporaneity? There are undoubt-

In any event, the important point for present purposes, it is submitted, is that to rely upon *Graham* and its progeny in support of an assertion that the *res gestae* criteria should be available as an alternative to voluntariness when the Crown is offering evidence of an accused's statement is wrong. This is precisely what the Appeal Division of the Nova Scotia Supreme Court came close to saying in the cases considered in the preceding section.¹⁴⁰ *Graham* and related cases have nothing whatsoever to do with situations in which the Crown offers evidence of an accused's statement. Rather, they deal explicitly with situations in which the accused elicits evidence of an exculpatory statement made by him contemporaneously with the main event in question.¹⁴¹ In both *Graham* and *Risby*, the accused's statement was elicited by the accused, not the Crown.¹⁴² Thus, *Graham* and its progeny do not represent an exception to the voluntariness requirement. Rather, they simply represent a situation in which the voluntariness rule does not apply because the evidence is not being offered by the Crown.

(5) *Erven analyzed*

The authority cited by the Working Paper does not therefore support the view of the law taken in it. That leaves *Erven v. The Queen*¹⁴³ as the leading case on point. It has already been suggested that the judgment of Dickson J. in that case makes it clear that the *res gestae* route to admissibility does not exist as an alternative to the voluntariness requirement for evidence of an accused's statement.¹⁴⁴ The Working Paper admits the importance of this judgment,¹⁴⁵ but attaches significance to the fact that while Dickson J.'s reasons were concurred in by three other judges,

edly some "loose ends" in this area; see F. Kaufman, *The Admissibility of Confessions* (3rd ed., 1979), p. 15.

¹⁴⁰ *Supra*, text commencing at footnote 103.

¹⁴¹ Clause 62(2) of Bill S-33 would appear to prevent counsel for the accused from eliciting statements now admissible under *Graham* unless the accused testifies. Clause 62(2) provides: "Where a statement referred to in paragraph (1)(i) [of clause 62] is a self-serving statement made by an accused, it shall be received in evidence on behalf of the accused *only if he testifies, and he shall not adduce it by way of cross-examination.*" (emphasis added). The Working Paper, *op. cit.*, footnote 2, refers to clause 62(2) in endnote 26.

¹⁴² In *Newton* there was in fact no evidence of any explanation by the accused in the evidence before the court.

¹⁴³ *Supra*, footnote 1.

¹⁴⁴ *Supra*, text accompanying footnotes 69 and 86.

¹⁴⁵ The Working Paper, *op. cit.*, footnote 2, states at page 9: "In the Supreme Court the clearest dicta on the issue are those of Mr. Justice Dickson in *Erven v. The Queen* . . .". Similarly, the Working Paper states at p. 81, in endnote 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*."

Pratte J. wrote a concurring judgment and Ritchie J. dissented.¹⁴⁶ The impact of these other judgments thus needs examination.

In *Erven* the accused was convicted at trial of possession of hashish for the purpose of trafficking. At trial a police officer testified that he had questioned the accused and a companion on Crescent Beach, that the companion had said that they were involved in search and rescue work and were on the beach collecting soil samples and that the accused had agreed with this statement. This statement of the accused, offered in evidence by the Crown against the accused, was admitted at trial without a *voir dire* being held to determine whether the statement had been made voluntarily. However, the Appeal Division of the Nova Scotia Supreme Court held that the evidence had been properly admitted since the statement was "completely voluntary" and "voluntariness [was] . . . so abundantly obvious as to render a *voir dire* a superfluity".¹⁴⁷ I emphasize that the statement was not admitted on the basis of its being part of the *res gestae*, that possibility having not even been considered by the Appeal Division, but rather on the basis that the statement was "obviously voluntary". The Appeal Division was waiving the usual procedural requirement of a *voir dire* on the basis that it would have been a "superfluity" on the facts of the case. It was not, however, in any way questioning the clear substantive requirement that the statement of the accused must be voluntary to be admissible against him.¹⁴⁸

¹⁴⁶ Beetz J. concurred with Pratte J.; Martland and Pigeon JJ. with Ritchie J. This question is of particular concern since the Working Paper, *ibid.*, in endnote 29, refers to the judgments in *Erven* as follows: "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* . . . and *R. v. Graham* . . . 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*." There are several problems with these comments. First, there is absolutely no analysis of the judgments of Dickson, Pratte and Ritchie JJ. into the two distinct, albeit inter-related issues considered, namely the substantive requirement of voluntariness and the procedural requirement of the *voir dire*. Second, *Risby*, *Graham*, and related authority, considered *supra*, text commencing at footnote 126, do not make available to the Crown, as implied, the *res gestae* route to admissibility, since those cases involved evidence of an accused's statement which was being offered by the accused as part of his defence. Third, the point of distinction for present purposes in considering *Risby*, *Graham* and related authority is, as indicated, which party—Crown or accused—is offering the evidence of the accused's statement, not whether the charge involves possession; at least one case, *R. v. Keeler*, *supra*, footnote 139, indicated that *Graham* may apply in cases in which possession is not an element.

¹⁴⁷ *R. v. Erven*, *supra*, footnote 107, at pp. 661, 663, per MacKeigan C.J.N.S. for the court. The first reference is in a quotation from *R. v. Mayer*, *supra*, footnote 106, at p. 427, per MacDonald J.A. for the court.

¹⁴⁸ The Appeal Division did rely on earlier decisions of that court in which the *res gestae* route had been approved, at least as a means of satisfying the voluntariness requirement. See, notably, *R. v. Spencer*, *supra*, footnote 103; *R. v. Toulany*, *supra*, footnote 105; *R. v. Mayer*, *supra*, footnote 106.

In the Supreme Court, Pratte and Ritchie, JJ. agreed with Dickson J. that voluntariness is the substantive test for the admissibility of an accused's statement. Dickson J.'s statement of this rule has already been reproduced.¹⁴⁹ Pratte J., while concurring on "narrower grounds",¹⁵⁰ clearly agreed on the requirement of voluntariness, stating:¹⁵¹

In my opinion, the statement made on the beach by appellant to Const. Botham was not admissible in evidence unless it was proven by the prosecution to have been made voluntarily . . .

Similarly, Ritchie J., while dissenting in the result, said:¹⁵²

I think it to be established that the burden rests upon the Crown to satisfy the trial judge that all statements made by the accused which it seeks to introduce in evidence against him have been freely and voluntarily made . . .

Thus, all nine judges of the Supreme Court of Canada agreed on the requirement of voluntariness. This is not surprising in view of the clearly established position of this rule in Canadian criminal evidence.

In a passage already reproduced,¹⁵³ Dickson J. held that statements by an accused could not be admitted as part of the *res gestae* as an alternative to testing them for voluntariness: "[they] should not slip in . . . under the pretext that they form part of the *res gestae*; . . . they are subject to the . . . requirement of voluntariness". Pratte and Ritchie JJ. said nothing as to the relationship between evidence of an accused's statement and *res gestae* evidence. However, it is submitted that it follows from their clear statements that voluntariness is the test for admissibility of an accused's statement that such evidence, if not voluntary, could not be admissible *via* the alternative route of *res gestae*. The judgments of Pratte and Ritchie JJ. are entirely consistent with that of Dickson J. on the substantive question of the test for admissibility of an accused's statement. The only difference is that Pratte and Ritchie JJ. chose not to explicitly consider the *res gestae* problem since it was unnecessary to their judgments in this case. Dickson J. explicitly stated what is necessarily implicit in the judgments of Pratte and Ritchie JJ. Therefore, it is submitted that all nine judges rejected the availability of the *res gestae*

¹⁴⁹ *Supra*, text accompanying footnote 69. Further, Dickson J. emphasized that the voluntariness requirement "applies with as much force to statements made during investigation as to statements made after the accused person is in custody"; *Erven v. The Queen*, *supra*, footnote 1, at pp. 934 (S.C.R.), 106 (C.C.C.). This adopted the view expressed in *R. v. Sweezey*, *supra*, footnote 122, per Martin J.A. for the court, and effectively overruled contrary suggestions in *R. v. Spencer*, *supra*, footnote 103, at p. 36; *R. v. Toulany*, *supra*, footnote 105, at p. 221; *R. v. Mayer*, *supra*, footnote 106, at p. 246.

¹⁵⁰ *Supra*, footnote 1, at pp. 956 (S.C.R.), 101 (C.C.C.). In particular, Pratte J. did not consider the relationship between evidence of an accused's statement and *res gestae* evidence.

¹⁵¹ *Ibid.*, at pp. 957 (S.C.R.), 102 (C.C.C.).

¹⁵² *Ibid.*, at pp. 951 (S.C.R.), 81 (C.C.C.).

¹⁵³ *Supra*, text accompanying footnote 86.

route to admissibility, as an alternative to the voluntariness hurdle, when dealing with evidence of an accused's statement.

There are however clear differences among the judgments of Dickson, Pratte and Ritchie JJ. Aside from the obvious difference between the result arrived at by Dickson and Pratte JJ. and that of Ritchie J. the differences relate to, first, the law on the procedural requirement of a *voir dire* to determine voluntariness and, second, the application of the law, both the substantive requirement of voluntariness and the procedural requirement of a *voir dire*, to the facts in the case.

Dickson J. stated that a *voir dire* to determine voluntariness is "always necessary" since, in his view, "[o]nly in this way can fairness to the accused be assured".¹⁵⁴ He expressly rejected the idea that an accused's statement could be "obviously voluntary", and stated:¹⁵⁵

Nor can I accede to the second proposition which found favour with the Appeal Division [of the Nova Scotia Supreme Court], namely, that a *voir dire* is unnecessary where a statement is "obviously voluntary" or "volunteered", or where the voluntariness of a statement is "apparent from the circumstances under which it was made", or when it can be "abundantly established in some other way", absent a *voir dire* . . .

Pratte J. was of the view that conducting a *voir dire* is "the normal procedure",¹⁵⁶ while Ritchie J. said that where "counsel for the accused objects to the admission of . . . statements [by the accused] without the holding of a *voir dire*, the trial judge should require one to be held".¹⁵⁷ However, all three agreed that the failure to hold a *voir dire* would not necessarily provide grounds for holding a new trial.¹⁵⁸

On the facts, the judgments differed as to whether or not this was an appropriate case for the application of the curative provision of the Criminal Code.¹⁵⁹ Dickson J. decided that it was not.¹⁶⁰ Pratte J. also held that

¹⁵⁴ *Supra*, footnote 1, at pp. 943 (S.C.R.), 97 (C.C.C.).

¹⁵⁵ *Ibid.*, at pp. 935 (S.C.R.), 91 (C.C.C.). In so stating, Dickson J. rejected earlier statements in *Spencer*, *Toulany* and *Mayer* which had countenanced "obvious voluntariness"; see, *supra*, text commencing footnote 103.

¹⁵⁶ *Ibid.*, at pp. 957 (S.C.R.), 102 (C.C.C.).

¹⁵⁷ *Ibid.*, at pp. 951 (S.C.R.), 81 (C.C.C.).

¹⁵⁸ *Ibid.*, at pp. 947 (S.C.R.), 101 (C.C.C.), per Dickson J.; at pp. 958 (S.C.R.), 103 (C.C.C.), per Pratte J.; at pp. 955-956 (S.C.R.), 83 (C.C.C.), per Ritchie J.

¹⁵⁹ *Supra*, footnote 27, s.613(1), which provides in part:

(1) On the hearing of an appeal against a conviction . . . the court of appeal . . .

(b) may dismiss the appeal where . . .

(iii) notwithstanding that the court is of the opinion that on any ground . . . [upon which an appeal may be allowed] the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; . . .

¹⁶⁰ *Supra*, footnote 1, at pp. 947 (S.C.R.), 101 (C.C.C.).

the trial judge erred in not conducting a *voir dire* and, further, that there was inadequate evidence of the circumstances surrounding the making of the accused's statement to enable him to conclude that, had a *voir dire* been held, the result would necessarily have been the same. That is, he was unable to say that, had a *voir dire* been held, the statement would necessarily have been found to be voluntary, and concluded that this was not an appropriate case for the application of the Code's curative provision.¹⁶¹ Ritchie J. disagreed and held that "[e]ven if a *voir dire* had been held, there was, in [my] opinion, nothing which could raise a doubt in the mind of the trial judge as to the voluntary character of the answers given by the accused",¹⁶² and, further, that there was ample other evidence to support the finding of guilt, thus rendering this case one in which it would be appropriate to apply the Code's curative provision.

In summary, in *Erven* all nine judges held that voluntariness is the test for the admissibility of an accused's statement and, a *fortiori*, held, explicitly or implicitly, that that test is the exclusive test for admissibility; *res gestae* does not co-exist as an alternative. The differences in the judgments of Dickson, Pratte and Ritchie JJ. do not touch these points.

(6) *Conclusions on existing law*

None of the authority relied upon by the Working Paper¹⁶³ in any way casts doubt upon Dickson J.'s statement in *Erven* to the effect that the *res gestae* route to admissibility does not exist as an alternative to the Crown when offering evidence of an accused's statement to a person in authority. Nor do the judgments of Pratte and Ritchie JJ. in *Erven* detract from Dickson J.'s statement on the *res gestae*. There is no Canadian authority which states that the *res gestae* criteria are available as an alternative route to admissibility for evidence of a statement by an accused to a person in authority when that evidence is offered by the Crown against the accused. There are judgments, whose persuasive value must now be seriously questioned, which suggest that satisfaction of the *res gestae* requirements may meet the voluntariness requirement. Even so, the voluntariness requirement remains the exclusive test for admissibility of an accused's statement when offered by the Crown. Bill S-33 would work a fundamental change in this law: the Bill would make the *res gestae* requirements, as formulated in clauses 62(1)(f)-62(1)(i), an alternative route to admissibility for evidence of an accused's statement. If the criteria of any one of clauses 62(1)(f)-62(1)(i) were satisfied, the statement of the accused would be admissible against him, whether or not the statement had been made voluntarily. Clause 64 of the Bill specifically recog-

¹⁶¹ *Ibid.*, at pp. 959 (S.C.R.), 103 (C.C.C.).

¹⁶² *Ibid.*, at pp. 955 (S.C.R.), 84 (C.C.C.).

¹⁶³ *Op. cit.*, footnote 2.

nizes this, its requirement of voluntariness applying to a statement by an accused "other than one to which paragraph 62(1)(f),(g),(h) or (i) applies".¹⁶⁴

(7) *Should the existing law be changed?*

Having concluded that Dickson J.'s statement does represent the law on the relationship (or, more precisely, lack of relationship) between evidence of an accused's statement and evidence admissible as part of the *res gestae*, the next question is should the law remain as it is or should it be made over into what clauses 62(1)(f)-62(1)(i) and 64 of Bill S-33 suggest it should be? It is submitted that the current law should not be changed. The Working Paper states that clauses 62(1)(f)-62(1)(i) and 64 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" and "require an exercise in classification" in order to determine whether a statement was covered by clauses 62(1)(f)-62(1)(i) or not.¹⁶⁵ With respect, present law already provides intellectual rigour and an exercise in classification; is the offered evidence a statement by an accused to a person in authority? Further, the present classification is fair; the special concerns arising with all statements by an accused to a person in authority are met by the voluntariness requirement. The provisions of Bill S-33 would in some cases endanger the interests protected by the voluntariness requirement since that requirement would not apply to all statements by an accused to a person in authority. The present confusion in the law exists, not with respect to the initial question of classification, but with respect to the application of the *res gestae* criteria to declarations by persons other than an accused¹⁶⁶ and with respect to the misapplication of certain lines of cases.¹⁶⁷ Even if current law were not "intellectually rigorous", would such rigour be justifiable if it could be attained only at the expense of endangering the principles served by the voluntariness rule?

Judgments in the Supreme Court of Canada considered earlier have explicitly identified three principles underlying the voluntariness rule, namely ensuring the trustworthiness of an accused's statement, protecting the civil liberties of the individual during interrogation by a person in authority, particularly his right to remain silent, and maintaining public respect for the administration of criminal justice.¹⁶⁸ The criteria of the *res*

¹⁶⁴ By comparison, note that the Young Offenders Act, S.C. 1980-81-82-83, c.110, s.56(3) creates a "spontaneous statement" route to admissibility. However, s.56(2)(a) of the Act also applies to such statements; they must also be voluntary to be admissible. Thus, spontaneity is not an alternative route to admissibility.

¹⁶⁵ *Op. cit.*, footnote 2, p. 10.

¹⁶⁶ *Supra*, footnote 84 and text accompanying footnotes 94, 95.

¹⁶⁷ Notably *Graham* and its progeny, considered, *supra*, text commencing at footnote 126, and *Spencer* and related authority, considered, *supra*, text commencing footnote 103.

¹⁶⁸ *Supra*, Part I.

gestae exception to the hearsay rule serve only one of these purposes, the concern with trustworthiness.¹⁶⁹ Admitting an accused's statement as part of the *res gestae* would not meet the additional policy objectives which should be fostered in a free society and which are protected by the voluntariness rule. "Clarity of principle" would not be achieved by the combined effect of clauses 62(1)(f)-62(1)(i) and 64 of Bill S-33; rather, they would detract from the policy objectives—the principles—well served by the voluntariness rule.

Conclusion

In conclusion, the Working Paper's laudable recommendations concerning police interrogation of suspects are not matched by its statement of the present law concerning the admissibility of statements by an accused to a person in authority. The Law Reform Commission assumed that Bill S-33, or something very similar to it, would soon be enacted into law¹⁷⁰ and may have attempted to state the "present law" as being "Bill S-33 law". This, of course, is not the case. Bill S-33 does not state the law as it now stands, it has not been enacted¹⁷¹ and, indeed, may never be the law in view of the considerable opposition expressed to the Bill, particularly by the criminal defence Bar.¹⁷² It is submitted that the opposition to Bill S-33 is well founded. Bill S-33 is not innocuous legislation merely codifying existing law on the admissibility of statements by an accused. First, its provisions would admit into evidence some statements by an accused without the Crown having to establish their voluntariness. Second, it would cut back the full and generous meaning given to involuntariness by the Supreme Court of Canada. In so doing, it would impinge upon principles of fundamental justice crafted in Canadian courts and presently enjoyed by Canadians.

¹⁶⁹ *Supra*, text commencing at footnote 76.

¹⁷⁰ The Working Paper, *op. cit.*, footnote 2, states, at page 3:

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. (Emphasis added).

As I have indicated in this article, Bill S-33 is not "faithful" to existing common law in two very important respects.

¹⁷¹ The Bill died when the first session of the 32nd Parliament ended on November 30, 1983. The Bill was not re-introduced during the second session of that Parliament.

¹⁷² For example, the Canadian Bar Association has opposed the Bill: see National, March 1983, p. 19, April 1983, pp. 1-2, July/August, pp. 3, 5; the submission of the Association to the Standing Senate Committee on Legal and Constitutional Affairs, June 22, 1983, published in Senate of Canada: Proceedings of the Standing Committee on Legal and Constitutional Affairs, first session, 32nd Parliament, Issue No. 68 (June 28, 1983).