SELF-INCRIMINATION IN THE CANADIAN CRIMINAL PROCESS

By Ed Ratushny

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Self-incrimination has never had such an authoritative and exhaustive treatment as in Ed Ratushny's *Self-incrimination in the Canadian Criminal Process.* The book is well documented and completely current, combining a philosophy of the law with researched authorities. Support for the propositions examined, and a commentary on proposals for reform by the various Law Reform Institutes in Canada, are also well researched. For comparison purposes, the existing propositions in various Commonwealth countries and recommendations by trial commissions, such as the Ouimet Commission, are set out in a clear, succinct and orderly fashion.

At the outset, the battle lines are drawn by the proposition put forward by Mr. Justice Edson Hains: "[T]he greatest obstacle to efficient criminal law enforcement in Anglo-American jurisdictions is the right of the accused to remain silent. It is a luxury society can no longer afford. . . .[T]he abolition of the right to remain silent is necessary to save an honourable profession from its own dishonour."[1]

Rather bluntly, the author demonstrates that the elaborate safeguards presented to an accused at trial are but mere window-dressing if the trial becomes "nothing more than an appeal from his interrogation by the police. . . ."[2]

In the first two Chapters, the author examines the broad context of self-incrimination in the scope of privilege in Canada. He makes the excellent point that if our Courts of Appeal continue to use Section 613 of the Criminal Code with seemingly careless abandon, and continue to refer to an accused remaining silent at his trial, then we may, in fact, be seeing a swing of the pendulum to the inquisitorial system.

As the author points out, "a rather ludicrous picture emerges. The accused need not testify and no comment may be made. However if you argue, on appeal, that comment has been made, you may be met with the response that there is 'no substantial wrong' because the accused did not testify!"[3]

Chapter 3 analyzes the law relating to pre-trial admissions. The author points out that statements made prior to trial are different from those made in the courtroom. At trial, the accused is represented by counsel and has full knowledge of the charge and evidence against him. He will decide at that point whether or not to make a statement. It is quite another thing for an accused who is in a police station when those matters are charged and are not documented, the evidence against him is not given to him, and he is often not aware of his legal rights to make a "voluntary" statement.

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1. E. Ratushny, *Self-incrimination in the Canadian Criminal Process* (1979) 7-8.
2. *Id.*, at 31.
3. *Id.*, at 76.

The author further demonstrates the corrosion of the right against self-incrimination by demonstrating that adopted admissions have now become any conduct which may be interpreted as consciousness of guilt, such as averting the eyes, coughing, crying, agitation and all similar matters subjectively interpreted by the Crown for the Court. In these modern days of automation, of course, the reaction of an accused who is asked to participate in a lie detector test is admissible, even though the evidentiary value of the test itself has been highly discredited in Canada.[4]

Other topics in this area include the statutory obligation of a driver to make an accident report under *The Highway Traffic Act.*[5]

Again and again the author points out the fallacy of protecting the accused by detailed procedures and strict evidentiary rules at trial and the hypocrisy of such a system when no such protection is provided at the pre-trial stage. It is in the latter stage that interrogation frequently occurs in secret after counsel has been denied, and suspects or accuseds are deliberately or innocently misled about the evidence against them. The author emphasizes that the most important testimony — the accused's version of the events surrounding the charge — comes to the court second-hand, through police, after a secret and closed interrogation.

Various solutions are offered by the author and rejected. For instance, the *Miranda*[6] decision, obligating the police to inform an accused of his right to counsel, is rejected almost out-of-hand by pointing out that this has had only a marginal influence. All *Miranda* has done is move the battle ground from determining whether the confession itself was voluntary, to whether the waiver of the right to counsel was voluntary.

The suggestion has been made that if an accused does not testify and make a statement, that fact should be used as evidence against him in Court. The author indicates that if the suspect is informed that adverse inferences may be drawn from a failure to respond, the possibility of innocent persons blurting out ridiculous responses is greatly enhanced. Also, if false entries in police officers' notebooks are a problem, certainly the danger of untrue allegations of silence could be a larger problem. The author strongly asserts that if an accused is not required to respond in Court until after he knows the case he has to meet, why should it be any different in the pre-trial procedures.

The author concludes that no statement whatsoever made by an individual to a police officer should be admissible at trial and that the custody of persons awaiting trial should be completely removed from the police and given to custodial officers under the supervision of the Courts. Finally, the absence of any pre-trial obligation to respond to allegations should be continued, subject to certain statutory exceptions.

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4. *Phillion* v. *The Queen* (1977), 14 N.R. 371, 74 D.L.R. (3d) 136, 37 C.R.N.S. 361, 33 C.C.C. (2d) 535 (S.C.C.); *The Royal Commission into Metropolitan Toronto Police Practices* (Morand J. Commissioner, 1976).

5. R.S.M. 1970, c. H60.

6. *Miranda* v. *Arizona* (1966), 384 U.S. 436.

The author goes on to spend considerable time on the need to eliminate police station custody. This idea follows proposals advanced by the Manitoba Law Reform Commission,[7] and would require police officers to deliver arrested persons *forthwith* to detention centres under the control of officials other than the police. Thus, the exact time of delivery to the detention centre would be recorded and available for public scrutiny. Further dealt with are the Manitoba Law Reform Commission's ideas on police questioning such as setting out separate interview rooms with large windows, hours of interviewing, the availability of legal counsel for accused persons, and the like. In addition, reform would be necessary to make statements made to custodial officers inadmissible because of the danger of compromising their role.

The author strongly recommends that an absence of pre-trial obligations be strengthened by statutory provisions requiring no adverse inference to be drawn from any accused's refusal to co-operate in an investigation in which he is a suspect.

Of a more incidental nature is the obligation of citizens to provide their names and addresses under certain circumstances. The author suggests that a failure to identify oneself when reasonably requested to do, should be specifically defined as constituting the offence of obstructing a peace officer in the execution of his duty, contrary to Section 118 of the *Criminal Code.* However, it would seem that this rather harsh provision could be more aptly dealt with, if necessary, by way of an amendment to a provincial statute, to avoid all the ramifications that follow criminal convictions.

The author further suggests that the present rule allowing a Motion of no Evidence to be presented at the close of the Crown's case be repealed and replaced with a Motion that there is no case to meet. If the Judge finds there is no case to meet, the accused would be acquitted. If the Judge finds there is a case to meet, he will so advise the accused and a conviction will be entered unless sufficient evidence is presented to destory that case.

Unfortunately, the author fails to recognize that once the Judge has ruled that he would convict the accused on the evidence presented by the Crown, he becomes like an Advocate in defending his ruling. Also, this would give the accused the impression that the Judge is no longer impartial. It would encourage the spectre of forced, facetious and even perjured testimony, in the attempt to rebut the finding that there was a case to meet.

In presenting his work, the author has demonstrated an enormous amount of resourcefulness, drawing on not only old practices, but also very modern stratagems. This is a work that experienced counsel and those who wish to develop their foundation and experience in criminal matters must read and reread, for an understanding of the text is an understanding of our present day court system and how it ought to operate.

7. The Manitoba Law Reform Commission, "Comment on the Law Reform Commission of Canada's Law of Evidence Project Study Paper on *Compellability of the Accused and the Admissibility of His Statement*" (1974), 39 Man. B. News 172.