

The Admissibility of Statements

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Presented by:

Dino Bottos

DePoe & Bottos

Edmonton, Alberta

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THE ADMISSIBILITY OF STATEMENTS

“...Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.”

Wigmore on Evidence
(Chadbourn rev. 1970),
vol. 3, §§ 820b

I. INTRODUCTION

[1] One of the basic rights every individual enjoys in Canada is the right against self-incrimination. This right is protected by the common law confessions rule and by ss. **7, 10, and 13** of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”). This right is not absolute, however. Anglo-Canadian courts have long held that an out of court statement made by an accused, properly admitted, can be one of the most valuable pieces of evidence in reaching a proper verdict on the merits.

[2] Out of court statements made by accused persons vary greatly in nature, length, context, and importance. They are tendered by the prosecution for strategic reasons against an accused as an exception to the hearsay rule. Less often, these statements are tendered by the accused. Different rules govern the admissibility of statements depending on who seeks to introduce the statement, the purpose for its introduction, and the circumstances surrounding the giving of the statement. This paper will review the admissibility of an accused’s out of court statements in a criminal trial and the leading cases that bear on the subject.¹

II. WHAT IS A STATEMENT?

[3] A statement is defined broadly to include both oral and written communications or utterances, as well as the physical conduct and gestures of the accused.²

¹ The writer has relied on the cases listed herein as well as as their treatment and discussion in the following text books: 1) Steven Penny, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis, 2011) [Penny]; 2) *McWilliams’ Canadian Criminal Evidence*, 5th ed., S.C. Hill et al., eds. (Toronto: Canada Law Book, 2013) (looseleaf) [McWilliams]; and 3) D.M. Paciocco and L. Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law 2011) [Paciocco “Law of Evidence”]. These books serve as an excellent resource for any practitioner of criminal law.

² *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7; *R v Trochym*, [2007] 1 SCR 239, 2007 SCC 6; *R v HA*, [1994] OJ No 2279 (Gen Div); *R v Liu*, [2003] OJ No 74, 172 CCC (3d) 79 (ON SC); *R v Ansary*, 2001 BCSC 1333, 90 CRR (2d) 112; *R v B (S)*, 36 OR (3d) 516; 10 CR (5th) 302.

[4] An example of physical conduct found to be a statement is illustrated in *R v Coombs*.³ In that case the police attempted forcible entry into the accused's apartment against her wishes. The accused resisted entry by pushing the door shut. At trial, the prosecution attempted to tender her physical action as evidence of post offence conduct, arguing the pushing of the door was evidence of a consciousness of guilt. Veit J. found the act was a statement that had to be proven voluntary before being admitted.

[5] Although the distinction may be somewhat artificial, and at times difficult to tease apart, statements are generally considered either inculpatory or exculpatory in nature. An exculpatory statement tends to deny or raise a doubt about a material element of an offence, or is otherwise helpful to the defence. Inculpatory statements do the opposite. They not only include true confessions, but statements that an accused now facing trial or a preliminary inquiry may regret, such as telling a provable lie or one that is inconsistent with his testimony at trial, or a statement which reveals exaggeration, minimization, evasiveness, or even a poor memory.

[6] Generally speaking, the prosecution will be assisted in proving the case against an accused through the use of inculpatory statements, and tends to resist the defence from introducing exculpatory statements. Although the vast majority of *voir dire*s are contested on the admissibility of inculpatory statements, a brief overview of the admissibility of exculpatory statement by an accused is provided here for completeness.

III. EXCULPATORY STATEMENTS

[7] For the most part, out of court statements made by an accused cannot be tendered by the accused into evidence at his own trial.⁴ The prohibition extends to situations where the accused takes the stand and wishes to adopt a previous statement given to the police.⁵

[8] The rationale for this exclusionary rule is five fold:⁶

- (a) The statement is hearsay;
- (b) The statement may be fabricated due to its self serving nature;
- (c) Admitting such a statement would impair trial efficiency;

³ *R v Coombs*, 2003 ABQB 444, 335 AR 252 [*Coombs*].

⁴ *R v Stirling*, 2008 SCC 10 at paras 5, 7, [2008] 1 SCR 272 [*Stirling*]; *R v Grey*, 2013 BCCA 232 at para 43, 338 BCAC 121 [*Grey*].

⁵ *Ibid* at para 43.

⁶ *R v Liard*, 2015 ONCA 414 at para 45 [*Liard*].