

TABLE OF CONTENTS

<i>Preface</i>	v
<i>Preface to the Ninth Edition</i>	vii
<i>Table of Cases</i>	xxv
Chapter One INTRODUCTION	1
Free and Voluntary — The Concept of Oppression	4
Hypnosis	18
Threats, Inducements, Promises.	21
What Statements Concern the Court?	24
Incriminary-Exculpatory Statements — Duncan Instruction	27
Does Alibi Notice Constitute Statement of Accused?	28
The Possible Relation between the Reid Technique and False Statements	29
Incidence of False Statements on Wrongful Convictions	35
Chapter Two TAKING A STATEMENT	39
Persons in Authority	39
Those Engaged in Arrest, Detention and Prosecution	39
Masters and Servants	40
Psychiatrists	40
Psychiatrists and Protected Statements	43
Social Workers	47
Youth Workers	48
Police Informants (Pre-Charter and Post-Charter).	48
Parents and Guardians	51
Ambulance Attendants and Doctors	52
Detention Officials	52
Victims	53
Parents, Relatives and Friends of Victims	53
Undercover Officers	58
Foreign Attorneys.	61

Mr. Big Strategy	61
Will Mr. Big Strategy Survive Ministerial Review under Part XX1.1, s. 696.2, Criminal Code?	63
Persons Capable of Controlling Activities of Corrupt Police . . .	66
Insurance Adjusters	68
Respective Burden of Proof on Accused and Crown	68
The Warning	69
Purpose of Warning or Caution	69
Detention and Arrest: The Charter	74
Investigation Preceding Arrest or Detention: Absence of Constraint	79
Nature of Warning	100
Satisfying Obligation Under Section 10(a) of Charter	100
Substantive Obligation Under Section 10(b) of Charter: The Right to Counsel	101
Should Informational Component Include Counsel of Choice?	118
Suggested Forms of Warning	121
Inadequate Warning or Caution	124
Police Not Required to Assist Accused in Making Choices Under Charter	125
Police Not Required to Ensure the Quality of Counsel’s Advice.	125
The Right to Counsel to be Present During Interrogation . . .	126
Special Warning — Rights of Foreign Nationals Under Vienna Convention	127
Language Difficulties.	129
Trial Judge’s Oligation to Provide Version of Events in the Other Official Language	133
Confession by Person With Operating Mind	134
Obligation to Re-warn After Change in Jeopardy	135
Taking Formal Statements: Avoiding Atmosphere of Compulsion.	136
Oppression — Touching by Interviewer — Proximity to Accused and Physical Contact.	137
Statement “May Be” Given in Evidence	138
Exaggerating Evidence Gathered	138
Role of Officers at Taking of Statements	138
Accounting for Time During Interview	139
Duration of Detention for Questioning	141
What Should be Recorded.	143
Recollection of Past Conversation with Accused	143

TABLE OF CONTENTS

Right to be Informed of State of Investigation and Nature of Jeopardy	144
Leading Accused to Believe Role That of Witness Rather Than Suspect.	145
Form of Statement	146
Duration of Interview	147
Illegal Detention	148
Inducements	149
Written Apology by Accused Due to Police Inducements — Excluded	150
Spiritual Inducements	151
Intimidation	152
Confronting Suspect With Exhibit	153
Recording/Videotaping of Interviews	153
Reference to Accused’s Criminal Record During Videotaped Interrogation.	154
Re-enactment	154
Meeting the Requirements of Section 715.1 of the Criminal Code	154
Chapter Three STATEMENTS BY YOUNG PERSONS	157
Young Offenders Act	157
Admissibility of Statements Prior to Enactment of Section 56 of Young Offenders Act.	160
The Charter and Section 56 of Young Offenders Act.	163
Questioning Persons Over Eighteen About Offences Committed While Young Offender	163
Persons in Authority for Purposes of Section 56	165
The Waiver	168
Conflict Between Criminal Code and Young Offenders Act	183
Meaning of “Spontaneous” in Section 56(3) of Young Offenders Act	183
Meaning of “Statement” in Section 13.1(1) of Young Offenders Act	185
Videotaped Statement of Child and Section 715.1 of Criminal Code	185
Videotaped Statements Admitted under s. 715.1 of the Criminal Code Cannot Serve to Bolster Credibility of Complainant	187
Post Conviction and Sentence DNA Order for Young Offenders. .	187
Privilege Attaching to Parent and Child Communication.	191

Youth Criminal Justice Act 192
 Burden of Proof in Relation to the Waiver in s. 146, Y.C.J.A. 196
 Undercover Officer Not Bound by s. 146(2), Y.C.J.A. 198
 Curative Proviso of s. 146(2)(b)(iii) of Y.C.J.A. Requires Police
 to Explain Information Contained in Proviso of s. 146(2)(b). 199

**Chapter Four THE ACCUSED’S RIGHT TO REMAIN
 SILENT 201**

Right to Silence in Face of Incriminating Conversations 201
 Off-the-Record Statements. 211
 Restrictions on Comments by Counsel About Silence of
 Co-Accused 214
 Right to Silence in Pretrial Stage 216
 Self-Incrimination and Pretrial Custody. 218
 Right Against Self-Incrimination at Trial. 218
 Right to Silence at Trial 219
 Right to Silence and Alibi Exception 225
 Inferring Guilt From False Alibi 226
 No Adverse Inference — Failure to Make Timely Disclosure. 227
 Evidence of Fabrication or Concocted Statement and Inference
 of Guilt 228
 Right to Silence in Post-Conviction Stage 229
 Right to Silence When Required by Statute to Provide
 Information 230
 Special Investigations Unit (SIU) (Ontario) and the Right
 to Have a Lawyer Vet Police Notes 232
 Compulsion under Provincial Legislation — Motor Vehicle Act 233
 Right to Silence While “At Large”. 234
 Raising Section 7 Charter Issue for First Time on Appeal 235
 Introducing Different Positions on Appeal: General View of
 Appellate Courts 236

**Chapter Five THE RIGHT TO RETAIN AND INSTRUCT
 COUNSEL 237**

What is Arrest or Detention? 237
 Demand for Breath Test in Screening Device. 239
 Objective Test of Detention 240
 Directive by School Authority 242
 Roadside Screening 243
 Automobile Roadside Prohibition Regime (ARP) and
 s. 10(b) of Charter 247
 Random Stops of Vehicles Revisited 248

TABLE OF CONTENTS

Request for Co-ordination Test	252
Request for Sample for DNA Analysis	252
Discarded Straw — DNA	253
Standard of Proof to Establish Consent to DNA Sample	253
Order to Provide Samples of DNA upon Conviction.	254
Ex Parte DNA Orders (Post Conviction and Sentence)	256
Stay of DNA Orders Pending Conviction Appeal	257
Customs Searches	257
Pedestrian Identification	262
Approaching Youth on School Property? Arbitrary Detention?	267
Accused Running Away — Police Chasing	268
Questioning of Passengers	269
Initial Investigative Detention — Pat-Down Search — Common Law Power to Search Incident to Investigative Detention.	270
Request to Attend at Police Station.	271
Second or Subsequent Request to Attend at Police Station	284
Officer’s Safety Concerns.	285
Police Searches	286
Doctrine of Investigative Detention/Detention for Investigative Purposes	288
Private Citizen Not Agent of the State in Relation to Investigative Detention	310
Detention by Security Guard — Not Triggering Arbitrary Detention.	311
Police Stop of Vehicle Not Always Arbitrary Detention	311
Police Seeking Name of Passenger — No Detention	313
Conditions under which Roadblocks may Justify a Stop and Search of all Cars	314
Odour of Marijuana from Car — Objective Belief.	319
Less Expectation of Privacy in Vehicle	320
Police Good Faith as Factor in Applying s. 24(2) Charter	321
Police Arranging Purchase of Drugs to be Delivered in a Red Van — No Arbitrary Detention.	322
Pursuing Investigation When Accused Remanded in Custody	323
Holding for Questioning	323
Attempting to Reach Counsel	325
Detention by Non-Governmental Person	327
Touching Person After Entry of Dwelling	328
Entry After 911 Call	333
Principle of Vicarious Liability of Government Not Available Remedy Against Individual’s Charter Violation	334

Suspect Must be Informed of Right to Retain and Instruct	
Counsel Without Delay	335
Adequate Advice from Counsel	337
Tainting of Subsequent Statements	337
Police Must Grant Opportunity to Exercise Rights Guaranteed	
by Section 10(b)	341
Duty Under Section 10(b) Extends to Incriminating “Statements”	
and Incriminating “Evidence”	343
Obligation to Explain Right to Counsel	347
Refusal of Request for Counsel	349
Further Consultation Where More Serious Charges	
Contemplated	349
Contradictory Evidence	350
Right to Consult Counsel of Choice	351
Onus of Establishing Violation of Right to Counsel	354
Can Accused Waive Rights Under Section 10(b)?	356
Right to Have Counsel Throughout Police Interview	365
Right to be Informed of Specific Offence s. 10(a) Charter	371
Belittling or Denigrating Counsel’s Advice	372
Section 10(b) Charter Rights Include Right to Consult in	
Privacy	374
Privacy of Telephone Calls Made in Hospitals	377
Right to Privacy in Emergency Situations	378
Reasonable Expectation of Privacy	379
Lockers in Bus Depots	379
Sniffer Dogs	380
Briefcases	396
Airline Passenger List	396
Privacy in Utility Records — Digital Recording Ammeter	
(DRA)	397
Subjective Expectation to Privacy in School Provided	
Laptop	397
No Open-Ended Power to Search Hand Held Communication	
Devices Without Warrant	399
Privacy Right in Video Files	400
Section 487(1) of the Criminal Code - Impracticality of Warrant	
Under ss. 256 and 487	401
Opportunity to Exercise Right to Place Call to Counsel	402
Obstructive Accused	408
Failure to Exercise Rights in Diligent Manner	408
Reasonable Opportunity and Due Diligence in Consulting	
Counsel	412
Ensuring Accused Understands Right to Counsel	415

TABLE OF CONTENTS

Obligation to Re-Caution	417
Evidence Required to Support Denial Under Section 10(b)	419
Allowing Reasonable Interval Between Caution and Questioning	423
Police Obligation to Inform Counsel	424
Police Not Required to Disclose Reasonable and Probable Grounds for Demand.	425
Unsuccessful Attempt to Contact Counsel.	425
Can Police Question Suspect After Counsel Has Been Consulted or Retained?	427
Police Not Required to Wait for Arrival of Counsel	435
Rowbotham Order — the Right to Legal Aid Counsel at Trial . . .	439
Guidelines to Exercise of Right to Counsel	440
 Chapter Six THE VOIR DIRE — ITS PURPOSE AND NEED.	 445
General Rule	445
Exclusion of Evidence on Basis of Charter	446
Exceptions.	449
Statements Made When Refusing Breath Test.	449
Statements Made Under Police Services Act	449
Res Gestae Statements	451
Absence of Voir Dire.	453
Investigatory vs. Arrest Statements	457
Waiver of Voir Dire	461
Introducing the Statement	464
Testifying at Voir Dire	466
Order of Introduction of Statements	466
Exculpatory Post-Arrest Statements.	469
Voir Dire to Introduce Other Contested Evidence	470
Statements Admissible For/Against Accused	470
Trial judge may not Edit to Exclude Exculpatory Utterances. . . .	471
Witnesses at Voir Dire.	472
Calling All Witnesses — Not Always Absolute Rule	473
Placing Crown Witness at Disposal of Defence	476
Peripheral Witnesses	478
Cross-Examination of Accused at Voir Dire	479
False Statements and Post-Offence Behaviour as Evidence of Consciousness of Guilt.	480
Consciousness of Guilt not Established by Refusal to Participate in a Line-up.	487
Failure to Co-operate with the Police	487

Demeanour or State of Mind Evidence as Evidence of Consciousness of Guilt	490
Post-Offence Conduct - “consciousness of guilt” - Lack of Hesitation before Flight from Scene	492
False Alibi Evidence as Evidence of Consciousness of Guilt	494
Changing Appearance — Post-Offence Consciousness of Guilt	496
Asking Accused About Victim’s Motive to Fabricate	496
Voir Dire at Preliminary Inquiry	497
Admissibility Ruling of Preliminary Hearing Judge Not Binding at Trial	498
Standard of Proof of Voluntariness of Statements Required on Voir Dire	498
Role of Trier of Fact	498
Effective Assistance of Counsel	500
Ineffective Assistance of Counsel	502
Judge Entitled to Reverse an Inadmissibility Ruling to Restore Fairness	504
Inadmissible Statements Not Admitted for Any Purpose	506
Summary Ruling by Trial Judge on Admissibility - Reasons to Follow	507
Lack of Reasons for Judgment by Trier of Fact	508
Cross-Examination of Maker of Statement and Consideration of Section 13 of Charter	508
Proof Witness Aware of Legal Effect of Section 13 of Charter	517
Judicial Control of Proceedings	519
Interference by Trial Judge	525
Random Virtue Testing — Entrapment	526
Duty to Give Reasons in Support of Admissibility Ruling	527
Entrapment and Solicitor-Client Privilege	533
Right to Appeal Against Ruling on Voir Dire	534
Weight and Admissibility	534
Admissibility of Incomplete Statements	535
Incomplete Utterances Not Receivable Without Context	535
Publication Bans on Undercover Operational Methods Used to Obtain Confessions	537
Refusal at Trial to Disclose Investigative Techniques	540
Broadcasting Videotaped Statement of Accused	540
 Chapter Seven THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS	 543
Charter Application Procedure (Ontario)	543

