Case Name:

R. v. Colquhoun

IN THE MATTER OF The Highway Traffic Act, R.S.O. 1990, c. H.8
Between
Her Majesty the Queen, and
Blain C. Colquhoun, defendant

[2002] O.J. No. 349

Ontario Court of Justice
Provincial Offences Court - St. Thomas, Ontario

Quon J.P.

Heard: July 19 and October 4, 2001.
Judgment: January 31, 2002.

(175 paras.)

Application to exclude evidence under s. 24(2) of the Charter for infringement of s. 7 - protection against self-incrimination.

Charge: S. 199(1) Highway Traffic Act - Fail to report accident

Cases Considered or referred to:
R. v. Bakker, [1986] O.J. No. 2705, 41 M.V.R. 190 (Ont. Prov. Ct.) per Geiger J.
R. v. Corbett, [1988] S.C.J. No. 40 (S.C.C.).
R. v. DaCosta, [2001] O.J. No. 2392 (Ont. Sup. C.J.) per Wein J.
R. v. Fitzpatrick, [1995] 4 S.C.R. 154, 102 C.C.C. (3d) 144 (S.C.C.).
R. v. Harripersad, [2001] O.J. No. 3639 (Ont. Sup. C.J.) per Seppi J. at Brampton.
R. v. Hicks (1988), 42 C.C.C. (3d) 394, 64 C.R. (3d) 68, 37 C.R.R. 151 (O.C.A.).
R. v. Jones (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229.
R. v. Marshall, [1961] S.C.R. 123 (S.C.C.).
R. v. Mitchell, [2000] O.J. No. 735 (Ont. C.J.) per Reinhardt J. at Toronto.
R. v. Naces, [2001] O.J. No. 3854 (Ont. C.J.) per Horkins J. at Toronto.
R. v. Sarkonak (1990), 23 M.V.R. (2d) 45, 53 C.C.C. (3d) 542, 63 Man. R. (2d) 174 (Q.B.).
R. v. Slopek (1974), 21 C.C.C. (2d) 362 (Ont. C.A.) per Gale C.J.O., Brooke and Martin JJ.A.
R. v. Stillman, [1997] S.C.J. No. 34 (S.C.C.).

R. v. White, [1999] S.C.J. No. 28 (S.C.C.).
R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.).
R. v. Wray, [1971] S.C.R. 272 (S.C.C.).
R. v. Zalai, [2000] O.J. No. 3294 (Ont. C.J.), per Oates J.P. at Toronto.
Reference re Motor Vehicle Act (British Columbia) S. 94(2), [1985] 2 S.C.R. 486, S.C.J. No. 73 (S.C.C.).

Statutes, Regulations and Rules cited:

Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, ss. 7, 11(d), 24(1), 24(2).
Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12, ss. 95(3), s. 109.
Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 91(27).
Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 31, 199(1), 199(2), 214(1).
Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 61(7).
Provincial Offences Act, R.S.O. 1990, c. P.33, s. 8(1), 12.
General regulation of Highway Traffic Act (R.R.O. 1990, Reg. 596): am. O. Reg. 537/97, s. 11.

Authorities referred to:
Sharpe and Swinton, The Charter of Rights and Freedoms (1998) (Irwin Law, Toronto: 1998), chap. 13(A)).

Counsel:

M. Smith, for the prosecution.
S. Thibadeau, agent, for the defendant.

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QUON J.P.:--

1. INTRODUCTION

1 In certain situations, the Charter provides protection against self-incrimination. For example, a person is immune from having certain information that he or she had been compelled to give under a provincial regulatory statute subsequently being used in a criminal prosecution, as it would violate the principle of fundamental justice that an accused cannot be compelled to incriminate himself or herself. Particularly, a person involved in an automobile accident in Ontario is compelled by the Highway Traffic Act, R.S.O. 1990, c. H.8, to provide certain information in an accident report to a police officer. Afterwards, the state ordinarily cannot use that compelled information in a criminal prosecution against that person. It, however, is arguable whether the same statutorily compelled statement may be used in a regulatory prosecution.

2 The common law also provides protection against self-incrimination if the trial would be rendered unfair by the admission of the incriminating evidence.

3 In the instant case, the defendant, a paralegal, is charged for failing to report an accident under the Highway Traffic Act. The evidence that would prove the defendant drove the vehicle involved in an accident directly comes from his own statement given to a police officer investigating the accident. The defendant submits that he felt compelled to identify himself as the driver, as he knew, due to his familiarity with the Highway Traffic Act, that anyone involved in an accident had to furnish its particulars to the police upon request. For that reason the defendant argues, admitting the inculpatory statement would be a breach of the principles of fundamental justice protected under s. 7 of the Charter and therefore seeks its exclusion under s. 24(2) of the Charter. To support his argument, the defendant relies on R. v. White, [1999] S.C.J. No. 28 (S.C.C.), in which it was held that a statutorily compelled statement could not be used in a criminal prosecution.

4 In addition, a secondary issue arose in the voir dire to determine the voluntariness of the defendant's inculpatory statement. The defendant argued that he had not made the statement voluntarily because he had been compelled by statute to make that statement. Thus, a determination has to be made under two notions of voluntariness. First, whether the defendant was coerced by the police to make an inculpatory statement and secondly, whether the statement made for an accident report was freely made, since he had been compelled to furnish information for that report by statute or face a penalty for failing to fulfill that obligation.

2. FACTUAL BACKGROUND

5 The defendant has been charged under s. 199(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8, for failing to report an accident at 7:10 a.m. on April 8, 2001, in which he was the driver of a motor vehicle involved in an accident at Water Tower Line in the County of Elgin.

6 On April 8, 2001, at 8:19 a.m., Constable Karl Johnston of the St. Thomas Police Force received a radio call to attend a motor vehicle accident in the vicinity of Water Tower Line, just off Dalewood Drive in the City of St. Thomas.

7 Shortly after Johnston and another police officer arrived at the Water Tower Line and Dalewood Drive site, the tow truck driver they were intending to meet arrived and directed them to the location of the accident. At the site of the accident, Johnston observed a vehicle in a ravine thirty feet below the level of the roadway. The area surrounding the accident was comprised of heavy brush and some trees.

8 Johnston described the damage he saw on the vehicle in the ravine. There was damage to the driver's side door, the front end and the roof. This damage was possibly caused from hitting trees, as several tree limbs had been sheered off. The front window was shattered. In addition, the rear left tire was jammed up inside the frame. Bloodstains were seen on the door and on the middle frame between the front and rear doors. Heavy condensation was on the windows. The front driver's door window frame was bent at a 45-degree angle. The front quarter panel and front bumper had been sheered off. The front hood was kinked, bent in, and up.

9 The vehicle was a four-door 1989 blue-coloured Ford with license plate AJWS674 and VIN #1FABP36X0KK142615. Johnston had looked in the glove box of the damaged vehicle and located the ownership and insurance documents for the vehicle. He stated that the ownership and insurance documents matched up with the license plate and that the ownership for the vehicle had come back in the name of the defendant with a London address.

10 The officer did not locate the driver of the vehicle at the scene of the accident and made a note that the driver had failed to remain. However, information from the tow truck driver led the officer to an address of 19 Johnson Place, apartment No. 4., in St. Thomas. Johnston testified he was concerned with the damaged vehicle owner's health and to what had happened to the vehicle.

11 When the officers arrived at 19 Johnson Place, Officer Johnston first spoke with an individual named Jamie Smith at 9:52 a.m., who directed the officer to the apartment where Blain Colquhoun, the defendant, was located.

12 Officer Johnston then spoke to Colquhoun in the apartment at 10:01 a.m. Johnston stated he knew who Mr. Colquhoun was at this time because he had known Colquhoun from the courthouse and from the local area.

13 Johnston also stated he had not given the defendant any caution before seeking answers from him about the accident. He also stated he had not concluded he would charge the defendant with an offence before meeting the defendant, and that he was only investigating the motor vehicle accident that occurred earlier. He had only been trying to ascertain who the driver of the wrecked vehicle had been and had not been engaged in a criminal investigation at the time he spoke with the defendant. Moreover, Johnston stated that the defendant had not been a suspect for any criminal prosecution or investigation.

14 The defendant testified that it took approximately 30 minutes to walk from the accident scene to 19 Johnson Place. He had arrived at his friend's residence at approximately 7:00 a.m. He had no difficulty walking and only had a few bumps and bruises. The defendant then called Loveday Towing shortly after arriving there to have his vehicle towed. The defendant's friend, Jamie Smith, accompanied the tow-truck driver to the scene of the accident. The defendant did not call the St. Thomas police or any other police force at anytime to report the accident. When the defendant's friend had returned from the accident scene, he informed the defendant that the police had been notified about the accident and would be arriving at the scene. The defendant testified that he had no reason why he could not call the police to make an accident report except that he believed that the tow-truck driver had called the police about the accident, and since they were on the way to the accident scene, he didn't feel there was any need for him to contact them as they had already been notified. He also testified that he did not hide his whereabouts from the tow-truck driver. The defendant also stated he believed the police would arrive at 19 Johnson Place and waited for them to arrive to take his statement for an accident report. He also testified that he knew the telephone number for the St. Thomas Police.

15 The defendant also testified that when Officer Johnston had asked him about his involvement in the motor vehicle accident, he felt compelled to give a statement to Johnston because of his familiarity with the Highway Traffic Act and the courts. He stated he knew the statute required him to furnish particulars of the accident to the police officer when that officer made such a request to him. He stated he believed that his obligation to furnish particulars began when Johnston asked him specifically about his involvement in the accident. However, the defendant also stated that Johnston had asked him questions about the accident of a general nature. The defendant also gave an indication that he knew about his right to remain silent and stated that if he knew he was going to be charged with an offence he would have not said anything to Johnston.

16 A voir dire had been conducted on the first day of trial to determine the voluntariness of the statements given by the defendant to Officer Johnston. The defence argued that because the defendant felt compelled to give a statement to Officer Johnston for an accident report under s. 199(1) of the Highway Traffic Act, he did not make that statement voluntarily. There was no evidence of police coercion and in that sense, his statement was given voluntarily. On the issue the statement was not given voluntarily because of compulsion by statute, I had ruled that the statement was given voluntarily to Officer Johnston based on the ruling the Court of Appeal of Ontario made in R. v. Slopek (1974), 21 C.C.C. (2d) 362, per Gale C.J.O., Brooke and Martin JJ.A. The Court of Appeal held that a statement made under the compulsion of a statute does not render the statement involuntary since the term "voluntary" in relation to statements made by an accused to a person in authority is based on whether the statement had been obtained by promises or threats. I also relied on R. v. Marshall, [1961] S.C.R. 123 (S.C.C.) that made the same finding. Furthermore, I stated that I was only considering the voluntariness of the defendant's statement under a promise or threat scenario and that its admissibility in the face of violating a principle of fundamental justice would be decided at the end of the proceeding. I also decided that the second part of the voluntariness issue based on a statutory compulsion to make the statement should be considered under the purview of the Charter, and my decision that the defendant's statements were made voluntarily would be subject to change, since R. v. Slopek and R. v. Marshall were decided prior to the advent of the Charter.

17 I then allowed the prosecution to enter the defendant's statement made to Officer Johnston in the trial proper. Officer Johnston summarized what the defendant had told him at 19 Johnson Place. The defendant had informed Johnston that he had crawled out of his vehicle and went to his friend's residence. He denied drinking any alcohol, that he was travelling at 60 kilometers per hour and that he had just lost control of his vehicle, possibly due to the wetness of the road. He also informed Johnston of his reason for not reporting the accident himself. His friend had attended the accident scene with the tow-truck driver and his friend told him the police had been called by the tow-truck driver. Therefore, the defendant concluded that he did not need to call the police to report the accident. He also told Johnston that the two empty beer cans in his vehicle were from a client, but refused to divulge the client's name to Johnston. He also stated he had left a party at 9:30 p.m. to pick up a female on Queen Street in London. However, he never picked her up and returned at 11 p.m. He had no explanation as to why there was a condensation built-up on the windows of the vehicle. Because of this conversation, Johnston charged the defendant for failing to report an accident.

18 The defence was asked on July 19, 2001, the first trial date, if they had filed the proper notices under s. 109 of the Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12, since they wanted to have evidence excluded under s. 24(2) of the Charter. They replied that they had not. Then on October 4, 2001, the same question was asked if they had filed notices of constitutional question under s. 109. They again replied they had not. It was the defence's belief that they did not have to give notice under s. 109 if they were seeking to exclude evidence under s. 24(2) of the Charter.

19 The trial began on July 19, 2001. It was then adjourned to August 30, 2001. However, the prosecution sought a subsequent adjournment and the matter was set over to October 4, 2001. The trial matter was then completed on October 4. Judgment was reserved and scheduled to be rendered on January 31, 2002.

3. ISSUES

20 Did the defendant have a reasonable opportunity to report the accident?

21 Did the defendant make a statement under a statutory duty to report?

22 Would the admission of the defendant's statutorily compelled statement in a regulatory proceeding for failing to report an accident violate the principle against self-incrimination under s. 7 of the Charter?

23 Would the admission of the statutorily compelled statement render the trial unfair under the common law?

24 Would the defendant's inculpatory statement given under statutory compulsion be considered to be involuntarily made under the auspices of the Charter?

4. ANALYSIS OF FACTS AND LAW

25 The defendant is charged for not fulfilling his statutory duty to report an accident. As the driver of a vehicle involved in an accident the defendant was required to report the accident on his own accord. The prosecution submits that the defendant failed to make this report required under the Highway Traffic Act in a timely fashion.

26 Paradoxically, the defendant now seeks to have the information he believes he had been compelled by law to furnish for an accident report to a police officer, excluded in a trial for failing to give that same information to the police in a timely fashion. Specifically, the defendant seeks to have his statement that he was the driver of a vehicle involved in an accident ruled inadmissible. On the other hand, the prosecution does not seek to use this incriminating evidence to prosecute the defendant on a criminal charge. It is sought to be used in a regulatory prosecution of the defendant for not reporting the accident to the police.

27 The defendant relies on the rule against self-incrimination as a principle of fundamental justice protected by s. 7 of the Charter to exclude the incriminating statement. He also argues that R. v. White, [1999] S.C.J. No. 28, provides the basis for his argument that the statutorily compelled information he gave to a police officer preparing an accident report should not be admitted, as its entry would violate his s. 7 Charter right.

28 The defendant faces the charge of failing to report an accident under s. 199(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8:

> 199(1) Every person in charge of a motor vehicle or street car who is directly or indirectly involved in an accident shall, if the accident results in personal injuries or in damage to property apparently exceeding an amount prescribed by regulation, report the accident forthwith to the nearest provincial or municipal police officer and furnish him or her with the information concerning the accident as may be required by the officer under subsection (3).

29 If the amount of the apparent damage to a vehicle involved in an accident exceeds $1000, then the driver of that vehicle is obligated to report the occurrence of that accident without delay. This threshold amount is prescribed in s. 11 of the General regulation (pertaining to the Highway Traffic Act), R.R.O. 1990, Reg. 596, as amended by O. Reg. 537/97. From Officer Johnston's evidence, the damage to the defendant's vehicle appeared to be extensive and exceeding the $1000 criterion. For that reason, the driver of the vehicle that ended up in the ravine on Water Tower Line on April 8, 2001, would have been required by law to report that accident to the nearest police officer forthwith and to furnish that officer with the requisite information concerning the accident.

(a) Reasonable opportunity to report an accident

30 At this stage, before considering if there would be a violation of s. 7, it is necessary to ascertain whether the defendant had a reasonable opportunity to report the accident to the nearest police officer prior to Officer Johnston arriving at 19 Johnson Place, since s. 199(1) commands reporting "forthwith". If the defendant did not have a reasonable opportunity to report, then the prosecution would not make out its charge. Factors that would determine whether there was a reasonable amount of time or opportunity for the defendant to fulfill his obligation to report the accident, include the remoteness of the location of the accident, the seriousness of the injuries sustained by the defendant, the location of the nearest police station, the mental state of the defendant after the accident, the availability of a telephone, the office hours of the nearest police station or accident reporting centre, and the defendant's familiarity with the Highway Traffic Act.

31 The meaning of the term "forthwith" as pertaining to s. 199(1) was considered in R. v. Bakker, [1986] O.J. No. 2705, 41 M.V.R. 190 (Ont. Prov. Ct.) per Geiger J. The court there held that the term "forthwith" in the accident reporting provision under s. 173, as it was enumerated then, meant "as soon as practical". That is, was it possible or practical, in the circumstances, to contact the police to report the accident?

32 The defendant was charged for failing to report the accident at 7:10 a.m. Officer Johnston testified that he had received a radio call at 8:19 a.m. to investigate an accident on Water Tower Line. Officer Johnston did not speak to the defendant until 10:01 a.m. The difference between that call and the time Officer Johnston spoke to the defendant at 10:01 a.m. is one hour and 42 minutes.

33 The defendant also testified that after crawling out of his vehicle at the accident scene, he had walked for 30 minutes before he reached his friend's residence at about 7:00 a.m. This happened to be the closest location of a telephone, which in the defendant's view, he could utilize. His friend's residence was located at 19 Johnson Place in St. Thomas. Once there, the defendant said he telephoned Loveday Towing and gave them the location of his vehicle. The tow-truck driver from Loveday Towing consequently made a call to the St. Thomas Police Department about the occurrence of the accident. It appears Loveday Towing had been called at about 7:10 a.m. That information concerning a traffic accident was subsequently relayed to Officer Johnston at 8:19 a.m.

34 The evidence indicates that at no time between the time of the accident at about 6:30 a.m. to the time the defendant was located and spoken to at 10:01 a.m., did the defendant make any effort to call or to report on his own volition that he was involved in a traffic accident to the nearest police officer. The St. Thomas Police Department would be the location of the nearest municipal police officer for the purposes of reporting the accident.

35 The defendant also testified that he knew the telephone number of the St. Thomas Police Department and that he could have telephoned them about the accident. However, the defendant testified he had believed that Loveday Towing had contacted the police and therefore felt there was no need for him to contact the police personally, as the police would have been already notified about the accident. In addition, the defendant stated that he made no secret of his presence at 19 Johnson Place to the tow-truck driver and expected the police to attend at his location to take an accident report.

36 First of all, the evidence shows that defendant was able to walk away from the scene of the accident and that he was able to use a telephone to call Loveday Towing to tow his vehicle. Secondly, there is no evidence that the defendant was incapacitated by any injuries sustained in the accident. Nor, is there evidence that he was ill, unconscious, or taken to a hospital. Therefore, the defendant was not injured, medically incapable, or physically prevented from contacting the police and making the report, after placing the call to the towing company and before his conversation with Officer Johnston at 10:01 a.m.

37 Under s. 199(1), the defendant is personally responsible and obligated to make the accident report, and only if he is incapacitated by injury can someone else fulfill that obligation. Under such a scenario, s. 199(2) of the Highway Traffic Act would allow a passenger in the defendant's vehicle to make that accident report. In this case, there was no evidence a passenger had been with the defendant, nor the need for someone else to report the accident as the defendant was not injured or unable to report the accident himself.

38 Moreover, under the defendant's timeline he would have been involved in the accident at about 6:30 a.m., which would make the time nearly 3.5 hours from the occurrence of the accident until Officer Johnston arrived. This interval would have allowed enough time for the defendant, if he was physically able, to personally attend or by telephone make an accident report to the St. Thomas Police Station. As well, the defendant, a traffic court paralegal, admitted he is familiar with the Highway Traffic Act, appears before the Provincial Offences Court nearly everyday, and admits he knew of his personal duty and obligation to report the motor vehicle accident and to furnish the police with its particulars.

39 I have had a difficult time understanding how someone who is a traffic court paralegal and familiar with the traffic courts, could interpret s. 199(1) in such a way that his personal obligation to report an accident could be fulfilled by another person not directly connected to the accident. This would require the tow-truck driver furnish the police with details about the accident only personally known by the defendant. Hence, in trying to understand the defendant's argument or logic for not calling the police to report an accident after he arrived at 19 Johnson Place, I would have to accept that he is at the same time, both familiar with the Highway Traffic Act and ignorant of his obligation to personally report the accident to the police forthwith or to immediately return to the accident scene. If I accept the latter, then perhaps the defendant is not competent to appear in court as a traffic agent.

40 Furthermore, the defendant contends that he had felt compelled to make a statement to Officer Johnston for the report because he had been aware of his statutory obligation to furnish the accident particulars upon request, yet tells Officer Johnston he believed that someone else could fulfill his obligation to personally report the accident to the police. If he had felt compelled under the Highway Traffic Act at 10:01 a.m. to make a statement to Officer Johnston, then why did he not feel compelled to pick up a telephone at 7:00 a.m., after arriving at 19 Johnson Place, to notify the police about the accident? His excuse had been that someone else already reported on his behalf, he was not going anywhere and that he expected the police to arrive at his location to take an accident report.

41 In pondering these two queries, it has caused me to have doubts about the defendant's sincerity in this case. Thus, I find that the defendant's comments that he believed that it was not necessary for him to report the accident to the police because of the tow-truck driver's involvement and that he had been waiting for the police to approach him, fallacious, self-serving and contrived, and inevitably undermines his credibility.

42 The evidence further shows the defendant was passive or quiescent in his statutory obligation to report the accident to the police and only furnished details of the accident after Officer Johnston had approached him at 19 Johnson Place. There is no evidence that the defendant was at anytime proactive in fulfilling his obligation to report the accident after its occurrence.

43 In conclusion, I find it was neither impractical nor impossible for the defendant to have reported the accident. Within a half an hour of the accident, the defendant had access to a telephone. He also knew the telephone number for the St. Thomas Police, he was not injured, he had nearly three hours to call the police before Officer Johnston arrived, he was physically capable of making the report, he was familiar with the Highway Traffic Act as a paralegal, and cognizant of his duty to report the accident. Also, I find there was the absence of a logical reason for not reporting the accident. Therefore, for these reasons the prosecution has shown that the defendant had a reasonable opportunity to report the accident but failed to do so.

44 Although the prosecution has made a prime facie case that the defendant failed to report an accident, it is necessary before deciding the final outcome of this case to determine whether his inculpatory statement should be excluded for infringing the principle against self-incrimination under s. 7. The burden is on the defendant to establish on a balance of probabilities that his s. 7 Charter right would be violated if the statement that he was the driver of a vehicle involved in the accident were to be admitted at trial.

(b) Did the defendant make a statement pursuant to a statutory duty to report an accident?

45 However, before proceeding with the s. 7 question, the defendant has to show on a balance of probabilities that his statement was made under statutory compulsion. In fact, the Supreme Court held in R. v. White, [1999] S.C.J. No. 28 at para. 113 that:

> The burden of proof lies on the defendant who challenges the admission of a statement to demonstrate on a balance of probabilities that the statement was made pursuant to a duty to report created by the statute.

46 This would be easily answered if a person telephones or attends at the nearest police station voluntarily and makes an accident report, or is approached by a police officer at the scene of an accident and furnishes particulars of the accident to a police officer. In the case at bar, neither of these occurred. Since Officer Johnston had initiated the contact with the defendant at a location other than the accident scene or at a hospital, it is not apparent whether the defendant did give a statement under a statutory duty to report.

47 To be clear that a person was giving the accident report under statutory compulsion and not of free will for some other reason or purpose, Iacobucci J. in White at para. 75 established the test for finding whether the defendant had been compelled under the statute to make the report when doing so. He held that it depended on whether at the time the accident was reported by the driver, that the driver had given the report on the basis of an honest and reasonably held belief that he or she was required by law to report the accident to the police officer taking the report:

> the test for compulsion under s. 61(1) of the Motor Vehicle Act is whether, at the time that the accident was reported by the driver, the driver gave the report on the

> basis of an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given.

48 The defendant contends that from his perspective, when Officer Johnston approached him, he subjectively believed and felt compelled to make a statement to Johnston under s. 199(1), because of his familiarity with the Highway Traffic Act, experience in the traffic courts, and knowledge of a duty to furnish particulars about the accident to a police officer upon request. Nevertheless, was he making the statement under a duty to report pursuant to s. 199(1) or was he simply responding to questions posed by a police officer investigating an accident? This distinction, however slight, may not be consequential when a lay person is the one before the court. In the defendant's situation, because of his occupation, this distinction has significant impact and is a factor in determining whether he had an honest and reasonably held belief of being under a statutory compulsion to make a statement for an accident report. A lay person on the other hand generally believes there is an obligation to talk to the police about an accident, whether compelled by statute or not.

49 In R. v. DaCosta, [2001] O.J. No. 2392 (Sup. C.J.), Wein J. at para. 17 opined that the average driver understands that he or she has an obligation to report the occurrence of a traffic accident and talk to the police about it:

> As was noted in the decision of Justice Southin in the British Columbia Court of Appeal in Regina v. White (dissenting in the result), the obligation by statute to report involvement in a motor vehicle accident is a well known obligation even if the average citizen does not know all precise details of the statutory requirement. Drivers in general know that they have to report an accident and that they have to "talk to the police" about it.

50 Horkins J. in R. v. Naces, [2001] O.J. No. 3854 (Ont. C.J.), at para. 22 also referred to most drivers being educated about their duties and responsibilities of the licensed activity of driving and have a notion of their duty to report the details of an accident:

> The fact that driving is a licensed activity supports the assumption that most drivers have been educated as to their duties and responsibilities and therefore will have at least a vague notion that they are subject to a statutory duty to report the details of an accident.

51 In considering a driver's belief of being compelled to report, Iacobucci J. in R. v. White at para. 78, also held that it is not necessary that the driver actually be under a specific statutory duty to report in order to corroborate the driver's belief, as long as there was in existence a general statutory duty to report accidents. The driver's belief then could be reasonably justified:

> I would note that the requirement that a driver's honest belief be reasonably held does not necessarily mean that the driver must have had, as a strict matter of law, a statutory duty to report the accident. ... Clearly, the existence of a general statutory duty to report accidents is a critical factor in determining the reasonableness of a driver's belief that he or she was required to do so.

52 It is also noteworthy in this case that s. 200 of the Highway Traffic Act describes what actions are required of a driver involved in an accident. The driver's duty after an accident includes remaining at the accident scene or to immediately return to that scene. In the defendant's case, there is evidence that the accident occurred in an isolated locale, it was early in the morning where little traffic goes by, and the defendant had to walk 30 minutes to a friend's residence in search of a telephone. Still, he did not return to the scene of the accident immediately, although his friend had informed him that the police had been notified and would be attending at the accident scene. That section also requires the defendant to give certain information to a police officer upon request. That section reads:

> 200(1) Where an accident occurs on a highway, every person in charge of a vehicle or street car that is directly or indirectly involved in the accident shall,
>
> (a) remain at or immediately return to the scene of the accident;
> (b) render all possible assistance; and
> (c) upon request, give in writing to anyone sustaining loss or injury or to any police officer or to any witness his or her name, address, driver's licence number and jurisdiction of issuance, motor vehicle liability insurance policy insurer and policy number, name and address of the registered owner of the vehicle and the vehicle permit number.

53 Objectively and notably in this case, the defendant could no longer be considered to be doing the act of reporting, since it was Officer Johnston who approached the defendant first, after the defendant had forsaken the reasonable opportunity to contact the police to report the accident. To be more specific, the defendant was not in the act of voluntarily reporting an accident. Instead, his involvement with Officer Johnston could be categorized as being in the process of responding to questions during a police investigation of an accident.

54 At para. 74 in White, Iacobucci J. wrote that individual drivers have an interest in knowing when one is required to speak and when one is permitted to exercise the right to remain silent in the face of police questioning since not all answers to police questions are compelled under statute or protected under s. 7 of the Charter:

> A declarant under s. 61 of the Motor Vehicle Act will be protected by use immunity under s. 7 of the Charter only to the extent that the relevant statements may properly be considered compelled. Accordingly, the driver has an interest in knowing with some certainty precisely when he or she is required to speak, and when he or she is permitted to exercise the right to remain silent in the face of police questioning. Conversely, the ability of the state to prosecute crime will be impaired to the extent of the reporting requirement under s. 61 of the Motor Vehicle Act. Thus the public, too, has a strong interest in identifying with some certainty the dividing line between the taking of an accident report under s. 61, on the one hand, and ordinary police investigation into possible crimes, on the other. When will a driver's answers to police questioning cease to be protected by the use immunity provided by s. 7 of the Charter?

55 It is also not unreasonable to infer that the defendant, because of his occupation, would have known about his right to remain silent, especially when he had about 3 hours to reflect about the accident, about his rights and about the consequences of not calling the police to report the accident when he arrived at 19 Johnson Place at about 7:00 a.m. or not returning immediately to the accident scene. In fact, he did testify that he would have remained silent if he knew he was going to be charged. Iacobucci J. in White at para. 76, also held that a driver could give the accident report freely on the basis of other motivating factors then under the compulsion of an accident report:

> The requirement that the accident report be given on the basis of a subjective belief exists because compulsion, by definition, implies an absence of consent. If a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to police on the basis of motivating factors other than s. 61 of the Motor Vehicle Act.

56 Officer Johnston testified that he was investigating an accident, and not conducting an inquiry for possible crimes. He had been concerned about the health of the driver involved in the vehicular accident and was seeking information on what had happened to the defendant's vehicle. Also, he stated that he had not formed the opinion to lay any charges before he had spoken to the defendant, although he had written in his notes that the vehicle's driver had failed to remain, since no driver was found at the accident scene. Johnston did not know who the driver had been. It was not until the defendant had actually identified himself as the driver of the vehicle, and only at that point, would he have been under any potential jeopardy. Since the defendant was only charged for failing to report the accident under regulatory legislation and not for any other derivative charge stemming from giving the statement, it would not have been mandatory for a caution to be rendered, unless Johnston was conducting a criminal investigation, or intending to lay a criminal charge.

57 However, if Johnston had been investigating a crime and not just simply the accident, and had cautioned the defendant, then the defendant would have been placed under a situation of choosing to speak or not to speak to an uniformed officer posing questions for a criminal investigation. Still, the prosecution submits the defendant was not a suspect in a criminal investigation. Even if he had been required under statute to furnish information to the police about the accident, the prosecution submits, the defendant would have known about his right to remain silent, could have exercised it and informed the officer to leave. The defendant however stated his obligation to furnish information about the accident began when Officer Johnston asked him about the accident and only after his obligation to speak to the police about the accident was completed then he could have asked the police to leave.

58 In R. v. White at para. 80, Iacobucci J. also commented on the possible actions a police officer could take to distinguish between investigating a crime and taking an accident report:

> Thus the Act defines the statutory duty to report an accident to police in vague terms. At the same time, the discretion to determine what information is necessary to a written accident report is vested exclusively in the police officer taking the report. The driver is largely subject to the will of this officer with respect to determining what constitutes a compelled statement. Provided that the police have offered no indication to the driver that the statutory requirements for the reporting of an accident have been satisfied, it will likely be reasonable for a driver to assume that he or she continues to be subject to a statutory duty to speak to police. Accordingly, as a practical matter, it will be very important for the police of-

> ficer who takes an accident report while simultaneously investigating a crime to delineate clearly for the declarant the start and end points of the accident report. For example, it may be useful for police to tell the driver that they will postpone the taking of an accident report until after they have questioned, or attempted to question, the driver. Alternatively, as discussed above, police may wish to tell the driver that they intend to secure the details of the accident report from sources other than the driver, thus terminating the statutory duty to report.

59 In this case, Officer Johnston did not inform the defendant that the details of the accident report would be secured from other sources or that the taking of the accident report would be postponed until the police questioned the defendant. Regardless, there is no evidence that Officer Johnston was simultaneously investigating a crime. He was only investigating the motor vehicle accident.

60 In R. v. Hicks (1988), 42 C.C.C. (3d) 394, 64 C.R. (3d) 68, 37 C.R.R. 151, the Court of Appeal of Ontario held at pp. 406-7 that the police have the right and duty to ask appropriate questions of someone as long as his or her constitutional rights have not been infringed:

> The right to remain silent does not preclude appropriate police questions. The police have the right and duty to ask appropriate questions; provided constitutional rights have not been infringed, the answers given are admissible in a criminal prosecution if they are proven beyond a reasonable doubt to have been voluntary in the traditional sense defined by Lord Sumner in Ibrahim v. The King, [1914] A.C. 599.
>
> Given these circumstances, the respondent was not detained at the material time (as the trial judge ruled), and the answer given was voluntary in the traditional Ibrahim sense as not having been obtained by coercion or other oppressive conduct. The police were merely performing their duty of investigating a fatal accident, and clearly they were not attempting to extract a confession from the respondent. The interview room did not constitute a coercive environment and the single question asked by the police officer was not intimidating or inducing.

61 Despite there being a distinction in someone actually reporting an accident with someone just cooperating with a police investigation, at some point during a police officer's investigation or line of questioning, the officer's primary purpose changes from conducting an investigation to obtaining information for an accident report. Again, even this distinction may be negligible. This metamorphosis occurs once the investigating officer believes the person being questioned is involved in the accident or has some information potentially relevant concerning the accident.

62 Even though the defendant did not approach the police first to make an accident report, once the investigating officer believes the defendant has some knowledge about the accident in question, the officer is no longer conducting a pre-report investigation of an accident, but begins collecting or obtaining information from the defendant for an accident report. The defendant believed that he had still been under a duty to furnish particulars concerning the accident under s. 199(1), although his duty to voluntarily report without facing a penalty had been extinguished or usurped by the officer approaching the defendant and commencing an accident investigation away from the accident scene. In addition, it should be taken into account that the defendant had failed to report when he had a reasonable opportunity to do so. Although the defendant is subject to a penalty for not reporting forthwith, his obligation to furnish particulars of the accident to a police officer upon request under s. 199(1), or even s. 200, continued, and the defendant's argument of being compelled to make a statement under statute is not misguided.

63 In addition, the Supreme Court in R. v. White, established the criteria that the declarer of a statement in a compulsory reporting situation must have an honest and reasonably held belief that the statement had to be given under statute. This test was developed to ensure that an inculpatory statement voluntarily made would not be excluded if the declarer had made the statement without feeling compelled to do so by statute. This ensured that a person would be prevented from escaping liability by arguing that he or she made the inculpatory statement under statutory compulsion and attempt to have the incriminating evidence excluded when he or she in fact, freely confessed to committing the offence.

64 This was confirmed by L'Heureux-DubÈ J. in her dissenting opinion in which she agreed with Iacobucci J. on the requirement of the declarer of a statement having a reasonable belief of being compelled under statute to make a report. This requirement, she believed, struck the right balance between societal and individual interests. She said at para. 109 in White that:

> The requirement of reasonableness strikes the right balance between protecting the individual against self-incrimination and protecting society's interest in the proper administration of justice and the search for truth.

65 However, whether the defendant honestly believed he was compelled under statute to furnish a statement to the police about the accident, is for his part not entirely plausible, considering his status as a traffic court paralegal and his knowledge of the right to remain silent. He may have been simply setting up his R. v. White immunity shield argument in case the police were unable to discover he was the driver from independent sources. That is to say, the defendant identifies himself as the driver and confesses to committing some traffic offence to the police officer making an accident report. Then, if he is charged, he has it excluded under s. 7 as a statutorily compelled statement used to incriminate. This speculation is made in light of him holding off reporting the accident within a reasonable time, his occupational status and the fact these statements were not given immediately at the accident scene where there may have been psychological factors at play. However, this is only conjecture on my part and there is no evidence to support my conclusion beyond a reasonable doubt.

66 Certainly for the average driver or lay person, there is a general belief that one is compelled to give particulars of an accident to the police or is obligated to talk to the police about it, whether the belief comes from knowledge of the statute or a general desire to cooperate with the police. Therefore, even for someone like the defendant who is familiar with the traffic courts, and is clearly more knowledgeable than a lay person and should have known about his right to remain silent, I recognize it would be difficult for most people to refuse to cooperate with the police. Most people, in my opinion, would feel bound to give information to a police officer investigating an accident that they are directly involved in. Although the defendant had passed the stage when he could report without penalty, he was still under the compulsion of s. 199(1) or s. 200 to furnish details about the accident to Officer Johnston upon request. Therefore, at the time Johnston formed the opinion that the defendant was involved or had relevant information about the accident, Johnston was gathering information for an accident report and not for a criminal investigation. The defendant is correct in believing that he was still bound to give particulars concerning the accident at the moment Officer Johnston requested information about the accident. As such, the defendant has convinced me on a balance of probabilities that during his conversation with Officer Johnston, the defendant gave a statement under a duty to report created by statute, and that this belief was honest and reasonably held.

(c) The R. v. White argument and the "use immunity shield" contained in the Motor Vehicle Act of British Columbia

67 The defense submits R. v. White, [1999] S.C.J. No. 28 (S.C.C.) supports his argument that allowing the prosecution to enter a statement given by the defendant for a statutorily compelled accident report violates the rule against self-discrimination as a principle of fundamental justice contained in s. 7. The Supreme Court of Canada held in R. v. White that the information statutorily compelled to be given in an accident report could not be used against that person in a criminal prosecution since its admissibility would violate the right against self-incrimination. However, in the instant case the defendant is facing a prosecution under a provincial offences statute and not a charge under the Criminal Code.

68 It is worth noting at this point, before getting too far into the s. 7 analysis, that the British Columbia legislation considered in R. v. White prohibited the state from using the compelled information given in an accident report for future provincial prosecutions. This "use immunity" provision or "shield", however, allowed for two exceptions in which the accident report or its contents could be used as admissible evidence. The two instances where such use is permissible are for proving compliance with reporting an accident or for prosecuting someone making a false statement in the report. This "use immunity shield" is contained in s. 61(7) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288. That section provides:

> 61(7) The fact a report has been made under this section is admissible in evidence solely to prove compliance with this section, and the report is admissible in evidence on the prosecution of any person for the offence of making a false statement therein, but neither the report nor any statement contained in it is admissible in evidence for any other purpose in a trial or proceeding arising out of the accident referred to in the report.

69 At para. 13 in R. v. White, the Supreme Court referred to s. 61(7) of the British Columbia statute and noted the existence of two exceptions to the use immunity provision:

> Section 61(7) of the Act supplements the reporting scheme by creating use immunity for the declarant in relation to the information provided pursuant to s. 61(1). The declarant is protected against self-incrimination by a statutory guarantee that, with two exceptions, neither the report nor any information contained in it is admissible in a trial or proceeding arising out of the accident.

70 Now, how would these two exceptions in a British Columbia statute apply to the defendant's argument for not admitting into evidence the contents of his accident report, especially when he is charged under Ontario law? Simply, it was this British Columbia legislation that contained the "use immunity" provision that ended up before the Supreme Court of Canada in R. v. White. This same statute, on the other hand, provided for the admission of an accident report to prove compliance with making the report, as an exception to the ban against using the report in a prosecution arising out of the accident.

71 Although, s. 61(7) does not expressly refer to using the report in a prosecution of someone for failing to report an accident, I interpret the wording in that section restricting the report to be only "admissible in evidence solely to prove compliance" is broad enough to also include admitting the report to prove non-compliance, as the same result would occur from using the report when some-one has not reported. That is, when the report is submitted to prove compliance and nothing is in the report to show that there had been compliance, then there is rebuttable presumption that the driver had not reported. Therefore, if my construction of that section is correct, then a driver in British Co-lumbia who had not reported an accident as required, would be subject to the accident report or a statement contained in it, being used against him or her in a trial to prove non-compliance with the reporting requirement.

72 Clearly then, because the legislators in British Columbia had included exceptions to the bar against using self-incriminating evidence furnished in an accident report for future proceedings, they intended that accident reports or information in these reports could be used in only extraordi-nary circumstances, such as proving compliance with reporting accidents. Although the Ontario Highway Traffic Act does not have a similar "use immunity shield" like s. 61(7) of the British Co-lumbia Motor Vehicle Act, I am persuaded by the action of the legislators in British Columbia, who on one hand found it necessary in fulfilling some regulatory objective, to provide immunity to peo-ple making accident reports in British Columbia from having those reports used against them, yet decided that two matters were too important to fall under the immunity shield and therefore ex-empted them. From that inference, I am also convinced that there should be no bar or immunity shield to prevent the use of a statutorily compelled accident report in proving compliance with re-porting an accident or, in other words, using it to prove a failure to report an accident under the Highway Traffic Act in Ontario.

73 Additionally, Iacobucci J. in R. v. White, concluded that the Crown's desire to use the inculpa-tory statement made under the guise of an accident report for a criminal proceeding was not con-templated by the regulatory scheme provided in the Motor Vehicle Act of British Columbia. He based this conclusion on the existence of the s. 61(7) "use immunity" provision that revealed an in-tention to use accident reports only for non-litigious purposes and not to use the compelled accident report to incriminate the driver. Ergo, the accident report in R. v. White was not intended to be used to incriminate the driver for most offences under the British Columbia statute. However, it also log-ically follows that since s. 61(7) did provide two litigious purposes as exemptions, this report could be used to incriminate the driver for those two designated purposes of proving compliance and for prosecuting a false statement made in the report. His Lordship made this conclusion in para. 60 of White:

> The inclusion of s. 61(7), extending use immunity in relation to the contents of an accident report in subsequent proceedings against the driver, reveals an inten-tion to use accident reports in order to gather information only for non-litigious purposes. In other words, the partnership between the individual driver and the state does not encompass the use of the compelled accident report to incriminate the driver. The fact that the statements in this case are sought to be introduced in criminal rather than regulatory proceedings simply serves to accentuate the fact

that the Crown seeks to use the statement for a purpose that was never contemplated as being a component of the regulatory regime.

74 Based on that reasoning, the defendant's argument for the application of the R. v. White immunity shield, which applies to criminal prosecutions and possibly to some regulatory prosecutions, does not however shield the defendant from having a statutorily compelled statement being used against him in a provincial regulatory prosecution for failing to report an accident. It only makes sense that the "use immunity shield" should not bar the report being admissible in a prosecution of someone making a false statement within an accident report or for proving non-compliance of making that accident report. Without a penalty or the ability to use accident reports to prove a failure to report, it would be very difficult to make the public comply with reporting accidents or to enforce such compliance.

75 In concluding that it is necessary to use the report in a proceeding to prove someone failed to report an accident, I also considered the effect of allowing the report to be excluded for all single-vehicle accident scenarios. In a parallel situation to the defendant's scenario, where someone is involved in a single vehicle accident and tries to evade making an accident report, and then is eventually found by a police officer and furnishes an inculpatory statement, that person's statement that he was the driver, under the defendant's argument, would not be admissible in a prosecution for failing to report an accident. The logical effect or ultimate result in accepting the defendant's argument of excluding the inculpatory statement, would in effect encourage all drivers involved in single-vehicle accidents not to report an accident, since if they purposely evaded reporting and they are not found out by the police then they would escape any penal consequences and the regulatory scheme's goal of road safety would be thwarted. Even if discovered, that person would only have to make the inculpatory statement under the guise of a statutorily compelled accident report and argue at trial for its exclusion based on the principle against self-incrimination under s. 7. Thus, everyone involved in single-vehicle accidents would know that they do not have to worry about reporting any accidents, since if they didn't and not get caught, they would be escape any punishment or penalty. And, if they were caught and confessed, the proof that they were driving would be excluded under s. 7 in a trial for failing to report an accident. Therefore, there would be no encouragement to report or any disincentive in not reporting, unless the report is considered admissible in this type of regulatory proceeding.

76 However, before deciding whether the defendant's inculpatory statement given within an accident report can be ultimately used to prove non-compliance of reporting an accident under s. 199(1), I will have to consider whether the admissibility of this statement from the report would violate the rule against self-incrimination as a principle of fundamental justice under s. 7 within the context of compulsory reporting of automobile accidents and the aim of securing road safety under a regulatory regime.

(d) R. v. Fitzpatrick and the use of statutorily compelled statements in a prosecution of a regulatory offence

77 The defendant is charged with contravening a provincial regulatory offence under the Highway Traffic Act. This is legislation enacted by the Legislature of Ontario and is governed by the Provincial Offences Act, R.S.O. 1990, c. P.33, which contain the procedural rules that govern the prosecution of regulatory offences in Ontario.

78 In contrast to the R. v. White decision, the Supreme Court in R. v. Fitzpatrick, [1995] 4 S.C.R. 154, 102 C.C.C. (3d) 144 (S.C.C.), allowed information given in a statutorily compelled report to be used in a prosecution of an offence under a provincial regulatory regime. La Forest J., writing for the court in Fitzpatrick, concluded that the principle against self-incrimination in the context of a prosecution under a particular regulatory regime should not be applied as rigidly as it might be in the context of a purely criminal offence. He also held at p. 166 that it is not contrary to fundamental justice to convict someone of a regulatory offence on the basis of a compulsory statutory report given by that person, when this report had been required to be submitted as an implicit condition of participating in that regulated industry:

> It is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on the basis of a record or return that he or she is required to submit as one of the terms and conditions of his or her participation in the regulatory sphere. In this context, the balance between societal and individual interests under s. 7 of the Charter suggests that the principle against self-incrimination should not be applied as rigidly as it might be in the context of a purely criminal offence.

79 The defence at trial had strenuously argued that the charge before the court was a criminal matter or at least a quasi-criminal matter. However, unless the defendant can show that s. 199(1) of the Highway Traffic Act is provincial legislation which encroaches upon the exclusive jurisdiction of the federal government under s. 91(27) of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, to enact criminal statues, then the provincial offences charge the defendant faces is not a criminal charge. It is a regulatory or public welfare offence that is enacted by the Ontario Legislature and is governed by its own procedural rules. Therefore, the defendant's argument that the present matter is a criminal offence is frivolous and inapplicable.

80 La Forest J. in R. v. Fitzpatrick also referred to Cory J.'s comments in R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161 (S.C.C.), that constitutional standards developed in the criminal context cannot be automatically applied to regulatory offences and that the courts must be careful not to automatically apply rules respecting self-incrimination developed in the criminal sphere. Obviously, this is exactly what the defendant seeks from this Court, a liberal application of the scheme developed in R. v. White that prevented statutorily compelled statements given under a regulatory statute from being used in a criminal prosecution, to also apply to regulatory prosecutions. His Lordship's reference is found at p. 157 in Fitzpatrick [emphasis is mine below]:

> In particular, in Wholesale Travel, supra, at p. 243 C.C.C., p. 211 D.L.R., Cory J. held that "a Charter right may have different scope and implications in a regulatory context than in a truly criminal one", and that "constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences". These comments must be borne in mind in approaching the appellant's claims, for it is made in the context of a detailed regulatory regime that governs state conservation and management of the fishery. In this regulatory environment, we must be careful to avoid automatically applying rules that have been developed respecting self-incrimination in the criminal sphere.

81 Moreover, the Supreme Court of Canada has held there is no blanket prohibition against the use of statutorily compelled statements in prosecutions. That is, each case has to be determined individually and any claim for a Charter infringement has to be considered in the context of the circumstances of the alleged breach and in the context of the breach in relation to the purpose of the Charter right. La Forest J. at p. 154 of Fitzpatrick reviewed Iacobucci's holding in R. v. Jones (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229 and wrote that Iacobucci J. did not conclude that the principle against self-incrimination is absolute. Inevitably, La Forest J. held that the compulsory reports in Fitzpatrick could be used to prosecute the maker of the reports.

> Iacobucci J. accepted that there is a "principle against self-incrimination" that exists as a principle of fundamental justice under s. 7 of the Charter. Nowhere, however, did he suggest that this principle is absolute.

82 At paras. 50-52 in R. v. White, the Supreme Court made reference to the Fitzpatrick decision which had elaborated on the purposes and concerns that are legally relevant in determining the ambit of the protection against self-incrimination under s. 7 [emphasis is mine below]:

> Fitzpatrick involved enforcement proceedings in the regulatory context of the commercial fishery in British Columbia. The regulatory aspect of the case provided an opportunity for the Court to elaborate in a more detailed fashion on the types of contextual factors that are legally relevant in determining the ambit of the residual protections against self-incrimination provided by s. 7. ...
>
> In finding that the admission of the accused's oral and written statements at his trial would not violate the principle against self-incrimination, La Forest J. carefully reviewed the purposes and concerns underlying the principle against self-incrimination, as expressed throughout the Court's jurisprudence on the topic, and concluded that none of these purposes or concerns was meaningfully brought into play in the circumstances. In particular, La Forest J. focussed upon four main factors: (1) the lack of real coercion by the state in obtaining the statements; (2) the lack of an adversarial relationship between the accused and the state at the time the statements were obtained; (3) the absence of an increased risk of unreliable confessions as a result of the statutory compulsion; and (4) the absence of an increased risk of abuses of power by the state as a result of the statutory compulsion.

83 The Supreme Court of Canada in R. v. Fitzpatrick allowed the statutorily compelled statements to be used to prosecute a commercial fisherman (or woman) for overfishing under a provincial offences statute because there had been the lack of real state coercion, the lack of an adversarial relationship between the state and the defendant at the time the compelled statements were taken, the absence of an increased risk of unreliable confessions, and the absence of an increased risk of abuses of power by the state.

84 In conclusion, the criminal precedent or standard that prevents the use of statutorily compelled statements in criminal prosecutions does not necessarily prevent its use in prosecutions under a regulatory statute. Thus, the fact that the prosecution seeks to use inculpatory information statutorily compelled to be given in an accident report in a regulatory prosecution cannot be automatically ruled inadmissible based on criminal precedents involving self-incrimination or the R. v. White "use immunity shield". Moreover, the Supreme Court held in R. v. Fitzpatrick that it is not contrary to fundamental justice to convict someone of a particular regulatory offence on the basis of a compulsory statutory report given by that person.

(e) Whether the admissibility of the defendant's statement would violate the principle against self-incrimination under s. 7

85 If admitting the inculpatory statement from the compelled report would infringe the defendant's right to life, liberty or security of the person guaranteed under the Charter and the infringement did not accord with the principles of fundamental justice, then a s. 24 or s. 11(d) remedy to exclude the statement would be available.

86 The principle against self-incrimination is a tenet of fundamental justice contained in s. 7 of the Charter. Section 7 states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

87 In Reference re Motor Vehicle Act (British Columbia) S. 94(2), [1985] 2 S.C.R. 486, S.C.J. No. 73 (S.C.C.), at pp. 512-513, Lamer J. speaking for the majority of the Supreme Court on the meaning of the principles of fundamental justice wrote:

> Consequently, my conclusion may be summarized as follows:
>
>> The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.
>
> Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.
>
> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
>
> ...
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

> Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

88 The analysis in determining whether s. 7 has been infringed consists of three main stages concluded Iacobucci J., writing for the majority of the Supreme Court of Canada in R. v. White. At para. 38 he stated:

> The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles: see R. v. S.(R.J.), [1995] 1 S.C.R. 451, at p. 479, per Iacobucci J. Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

89 Justices Sharpe and Swinton in their tome, "The Charter of Rights and Freedoms (1998)", in chapter 13(A) discuss the structure for analyzing a s. 7 claim:

> The courts have settled on the basic structure for analysis of a section 7 claim. First, it is necessary for the person claiming a violation of rights to show that the right he or she seeks to protect falls within the meaning of "life, liberty or security of the person" and that that right has been infringed. This, however, is insufficient by itself to make out a section 7 claim. For example, a person convicted of a criminal offence and sentenced to jail suffers a lost of liberty. But a loss of liberty, standing alone, is not contrary to the Charter guarantee. The rights claimant must proceed to the second stage and show that the denial of a right protected by section 7 is contrary to the principles of fundamental justice. As will be seen, this phrase has been generously interpreted to include norms of substantive as well as procedural justice.
>
> If the claimant establishes both that the right is included in the words "life, liberty and security of the person" and that the violation of the right is contrary to the "principles of fundamental justice", the party seeking to uphold the law being challenged will have an opportunity to show that the violation is a reasonable limit under section 1. However, section 7 contains its own internal qualifier. To make out a claim, it must be shown not only that the right to "life, liberty and security of the person" has been infringed, but also that the denial of rights is contrary to the principles of fundamental justice.

1. Existence Of A Real Or Imminent Deprivation Of Life, Liberty, Security Of The Person

90 In deciding if there would be a breach of s. 7, there must be a real and imminent deprivation of life, liberty or security of the person, if the inculpatory statement were to be admitted in a regulatory trial. First, is there the potential or possibility that the defendant may be incarcerated if convicted of failing to report an accident under the Highway Traffic Act, a provincial offences statute? The Highway Traffic Act contains a general penalty provision in s. 214(1) that states:

> 214(1) Every person who contravenes this Act or any regulation is guilty of an offence and on conviction, where a penalty for the contravention is not otherwise provided for herein, is liable to a fine of not less than $60 and not more than $500.

91 There is no provision within the Highway Traffic Act that speaks to incarceration or imprisonment upon being convicted of a traffic offence under Part I of that Act. Moreover, the out-of-court set fine (including costs) set by the Chief Justice of the Ontario Court of Justice[1] for a Part I prosecution under the Provincial Offences Act, R.S.O. 1990, c. P.33, for committing the offence of failing to report an accident under the Highway Traffic Act is $90.

92 In the case at bar, the defendant was charged with a Part I offence with the set fine (with costs) of $90. However, the $90 set fine is only available to the defendant as an out-of-court settlement under s. 8(1) of the Provincial Offences Act, if he wishes to dispose of the matter without a trial. Once he seeks a trial he then becomes liable for a fine as determined by s. 12 for a Part I offence under the Provincial Offences Act. Section 12 provides:

> 12(1) Where the penalty prescribed for an offence includes a fine of more than $500 or imprisonment and a proceeding is commenced under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or $500, whichever is the lesser.

> Other consequences of conviction

> (2) Where a person is convicted of an offence in a proceeding initiated by an offence notice,

> (a) a provision in or under any other Act that provides for an action or result following upon a conviction of an offence does not apply to the conviction, except,
>
> (i) for the purpose of carrying out the sentence imposed,
> (ii) for the purpose of recording and proving the conviction,
> (iii) for the purposes of the demerit point system under the Highway Traffic Act,
> (iv) for the purposes of section 47 of the Highway Traffic Act, and
> (v) for the purposes of section 16 of the Tobacco Control Act, 1994; and
>
> (b) any thing seized in connection with the offence after the service of the offence notice is not liable to forfeiture.

93 Under the Provincial Offences Act, the potential penalty upon a conviction for contravening s. 199(1) of the Highway Traffic Act does not include the court being directly able to impose a sentence of imprisonment. Section 12 of the Provincial Offences Act only allows for a monetary fine up to a maximum of $500 or less, if the offence provision provides for a lower amount than $500. The general penalty under the Highway Traffic Act only refers to a monetary fine up to a maximum of $500. As such, the defendant is only exposed to a maximum monetary fine of $500 upon conviction and administratively predetermined demerit points.

94 Therefore, s. 7's right to liberty does not come into play in this case. The right to life obviously does not apply. Thus, the only category left to consider is the defendant's right to security of the person. Besides having his physical integrity being secure, under the principle of self-incrimination in s. 7, from forced or unwanted intrusions, this right also includes a protection from arbitrary state intrusion into his personal sphere. Specifically, both the state and the individual have an interest in ensuring individual privacy, human dignity and personal autonomy or freedom.

95 Nevertheless, will the defendant's right to security of the person be affected if the statutorily compelled statement is admitted to prove his culpability in a regulatory prosecution? The individual right to privacy and human dignity, and the right not to being conscripted against oneself is a value desired in a free society and is protected by the Charter under certain instances. In this case, the evidence in the accident report sought to be entered by the prosecution would clearly incriminate the defendant. His statement identified him as the driver of the vehicle involved the accident on Water Tower Line. The only other personal information made by the defendant for the accident report concerned his excuse for not reporting the accident personally. Although it may be the defendant's desire not to make public his involvement in a vehicular accident, he has already been charged for not reporting that accident, and he himself revealed his involvement by telephoning a towing company to tow his wrecked vehicle. Regardless, the harm envisioned to his right to privacy or the affront to his human dignity and human autonomy by having his statutorily compelled statement admitted in the trial is not inconsequential. Although the inculpatory statement is not as personal as evidence on his alcohol consumption or on who may have been in his vehicle at the time of the accident, it still is incriminating evidence that indicated he had been the driver involved in a motor vehicle accident. His ability or freedom to personally choose whether to admit or not to admit being the driver was taken away by the compulsory reporting requirement.

96 The defendant's right to security of the person would thereupon be affected by the admission of the inculpatory statement given under statutory compulsion. Upon conviction, the defendant would be subject to a monetary penalty under Part I of the Provincial Offences Act. In addition, he would also be subject indirectly to demerit points administratively imposed by the Ministry of Transportation.

97 It is should also be noted that, if the defendant, when he first arrived at 19 Johnson Place, and after telephoning the towing company, had telephoned the St. Thomas police he would have fulfilled his statutory duty to report an accident. Instead, the defendant, without reasonable cause or justification, consciously chose not to immediately telephone the police, although he knew of his obligation to report an accident. Thus, he voluntarily put himself into this predicament to some degree.

98 It is therefore evident, even under these circumstances, that his right to feeling secure may be infringed by the state compelling him to furnish accident particulars to the police and then subject-ing him to a trial where this incriminating accident report that he was compelled to furnish would be admitted and used against him.

2. The Principle Against Self-Incrimination In The Regulatory Context

99 Iacobucci J. at paras. 45-47 and 48 of R. v. White, affirmed the importance of considering the principle against self-incrimination from the context in which the right is asserted under s. 7 of the Charter. His Lordship also indicated that the principle of self-incrimination does not provide absolute protection against all uses of information obtained by statutory compulsion. Furthermore, His Lordship stressed the importance of balancing societal interests with individual interests under s. 7 and that in some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state [emphasis is mine below]:

> That the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The residual protections provided by the principle against self-incrimination as contained in s. 7 are specific, and contextually-sensitive ... the parameters of the right to liberty can be affected by the context in which the right is asserted. The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue ...
>
> this Court has always expressly limited the application of the principle against self-incrimination to cover only the specific circumstances raised by a given case ... a court must begin "on the ground", with a concrete and contextual analysis of the circumstances, in order to determine whether the principle against self-incrimination is actually engaged on the facts.
>
> The contextual analysis that is mandated under s. 7 of the Charter is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person has occurred in accordance with the principles of fundamental justice. As this Court has stated, the s. 7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice in Canadian society.
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> ...
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> It is the balancing of principles that occurs under s. 7 of the Charter that lends significance to a given factual context in determining whether the principle against self-incrimination has been violated. In some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state. This was the case, for example, in Fitzpatrick, supra, where the Court emphasized the relative

> absence of true state coercion, and the necessity of acquiring statements in order to maintain the integrity of an entire regulatory regime. In other contexts, a reverse situation will arise ... In every case, the facts must be closely examined to determine whether the principle against self-incrimination has truly been brought into play by the production or use of the declarant's statement.

100 The notion that s. 7 does not provide absolute protection against all uses of statutorily compelled information was reiterated by Wein J. in R. v. DaCosta, [2001] O.J. No. 2392 (Sup. C.J.) at para. 25 [emphasis is mine below]:

> In Regina v. White, the Supreme Court of Canada analyzed the scope of the protections provided by the principle against self-incrimination as contained in Section 7 of the Charter in the context of the admissibility of statements given as a result of statutory compulsion. The Court held that while use immunity provisions created by provincial motor vehicle legislation cannot extend directly to proceedings under the Criminal Code, as it would be ultra vires the province to restrict the admissibility of evidence in criminal matters, the principle of self-incrimination guaranteed by Section 7 did provide a protection against uses of information compelled by statute or otherwise. The majority held that while Section 7 does not provide absolute protection against all such uses of information, in the context of that particular case, involving a pure criminal offence, the protections did lead to the conclusion that the use of the statements would violate the Charter. Accordingly, the evidence was properly ruled inadmissible under s. 24(1) of the Charter.

101 In addition, La Forest J. at p. 157 in R. v. Fitzpatrick (1995), 102 C.C.C. (3d) 144, stressed the importance of contextual analysis of the principle against self-incrimination and that this principle will vary depending on the circumstances:

> The importance of a contextual analysis in considering the principle against self-incrimination has been underlined by the Chief Justice in Jones, supra, at pp. 367-8 C.C.C., pp. 659-60 D.L.R. He there observed that this principle is "a general organizing principle of criminal law from which particular rules can be derived (for example, rules about non-compellability of the accused and admissibility of confessions)". The rules that flow from the application of this "general organizing principle" will vary with the circumstances. It is therefore important to focus on these circumstances each time a new application of the principle against self-incrimination is considered. Iacobucci J., we saw, was mindful of this in S.(R.J.), supra. At p. 45 C.C.C., p. 633 D.L.R., he stated:
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>> I have suggested above that certain specific enumerations of the Charter reflect a unifying principle against self-incrimination. It stands only to reason, however, that this principle may demand different things at different times; the parameters of the principle may be found in disparate rights.

102 Furthermore, Iacobucci J. at para. 43 of R. v. White in his discussion of the definition and principle against self-incrimination referred to two of the key purposes of the principle, namely the protection against unreliable confessions and abuses of power by the state:

> The definition of the principle against self-incrimination as an assertion of human freedom is intimately connected to the principle's underlying rationale. As explained by the Chief Justice in Jones ... the principle has at least two key purposes, namely to protect against unreliable confessions, and to protect against abuses of power by the state. There is both an individual and a societal interest in achieving both of these protections. Both protections are linked to the value placed by Canadian society upon individual privacy, personal autonomy and dignity ... A state which arbitrarily intrudes upon its citizens' personal sphere will inevitably cause more injustice than it cures.

3. Would The Imminent Deprivation Of Security Of The Person Caused By Admitting The Statutorily Compelled Statement Accord With The Principles Of Fundamental Justice?

103 The Supreme Court of Canada in R. v. White and in R. v. Fitzpatrick, considered four principal factors in determining whether the admissibility of the defendant's or the accused's statutorily compelled statement would violate the principle against self-incrimination protected by s. 7 of the Charter. These four factors are: the level of state coercion in obtaining the statements, the existence of an adversarial relationship between the defendant and the state at the time the statements were obtained, the increased risk of unreliable confessions as a result of the statutory compulsion and the increased risk of abuses of power by the state as a result of the statutory compulsion.

(i) State coercion over defendant making statement for an accident report

104 Iacobucci J. at paras. 53-55 of R. v. White reviewed the field of endeavour found in R. v. Fitzpatrick that was governed by regulatory legislation and determined that someone opting to participate in the commercial fishery would have given his or her free and informed consent to abide by the rules and obligations imposed by the legislation, including submitting compulsory reports. Furthermore, the reports were made before any investigation had been commenced. However, in R. v. White, the same was not true. Iacobucci determined that although driving is also a regulated activity, driving was a necessary endeavour unlike engaging in commercial fishing. He also noted that although the state should not be perceived as coercing drivers to report vehicular accidents, the concern with protecting human freedom was not completely absent in this reporting context. Nevertheless, Iacobucci J. held that the issue of the driver giving free and informed consent in making a statement for an compulsory accident report would be a neutral factor in determining whether the principle against self-incrimination had been violated [emphasis is mine below]:

> In Fitzpatrick, La Forest J. emphasized that the obligations created by the provincial fisheries regulations at issue in that case were imposed upon the accused with his free and informed consent. The accused had a free choice whether or not to participate in the commercial fishery. When he did choose to participate in the fishery, he was informed of his reporting obligations, of the penalties for non-compliance with fisheries regulations, and of the possibility that any reports he might make could be used against him. He was properly deemed to be aware of

> this information. It could not be said that, by regulating the commercial fishery as it did, the state was coercing the accused to incriminate himself.
>
> In this case, the Crown makes submissions to the same effect. Driving is a regulated activity. All drivers are required to obtain a licence to drive. In so doing, the Crown states, they give free and informed consent to all of the rules of the road, including the requirement to report a motor vehicle accident. In such a context, the Crown submits, it cannot be said that a driver is coerced to provide an accident report when the occasion to do so does arise. In support of this proposition, the Crown relies upon, inter alia, statements regarding the voluntary nature of driving contained in the decisions of this Court in Dedman v. The Queen, [1985] 2 S.C.R. 2, Hundal, [1993] 1 S.C.R. 867, supra, and R. v. Finlay, [1993] 3 S.C.R. 103.
>
> I agree with the Crown that drivers are deemed to be aware of their responsibilities on the road, and that driving is properly understood as a voluntary activity in the sense described by this Court in the cases cited by the Crown. However, driving is not freely undertaken in precisely the same way as one is free to participate in a regulated industry such as the commercial fishery. Driving is often a necessity of life, particularly in rural areas such as that where the accident occurred in this case. When a person needs to drive in order to function meaningfully in society, the choice of whether to drive is not truly as free as the choice of whether to enter into an industry. While the state should not be perceived as being coercive in requiring drivers to report motor vehicle accidents, the concern with protecting human freedom which underlies the principle against self-incrimination cannot be considered entirely absent in this context. As I view the matter, the issue of free and informed consent must be considered a neutral factor in the determination of whether the principle against self-incrimination is infringed by s. 61 of the Motor Vehicle Act.

105 Therefore, because the case at bar also concerns the making of an accident report under motor vehicle legislation as had occurred in R. v. White, the Supreme Court's ruling on the issue of state coercion in relation to compulsory accident reporting in British Columbia is telling. In White, the Court had decided that the accused gave her free and informed consent to abide by all the rules of the road and the scheme of regulating the driving of motor vehicles, including state compulsion to report accidents. It should be remembered that in White, a person reporting an accident under that legislation had the protection of the "use immunity shield" over any self-incriminating statements, making it virtually free of risk to report. More importantly, the effect of state coercion or compulsion on an individual to report in British Columbia would be less consequential than it would be for an individual in Ontario. The Supreme Court determined in the White case that state coercion in reporting accidents would be a neutral factor in determining whether the principle against self-incrimination had been violated. However, since the Ontario legislation does not provide a "use immunity shield" to someone reporting an accident here, the state compulsion to report and the risk of prosecution for regulatory offences based on inculpatory information reported, has greater impact than in did in the White scenario, and leads me to conclude under the circumstances of this case, that the defendant's free and informed consent to furnish information, is not wholly neutral and is a factor in deciding whether the principle against self-incrimination has been violated.

(ii) Whether there was an adversarial relationship at the time the police obtained the defendant's statement for an accident report

106 Iacobucci J. reviewed the relationship between the state and the accused under the respective regulatory regimes found in R. v. Fitzpatrick and R. v. White. His Lordship found in Fitzpatrick that at the time the compulsory reports were made, the state and the individual were not in an adversarial relationship, but in a partnership to conserve fish stock. Conversely, he held at paras. 56-60 in R. v. White, that the police officer and the accused driver were in a "potentially" adversarial relationship at the time of the taking or giving of the accident report.

107 His Lordship concluded the difference between not finding the existence of an adversarial relationship in Fitzpatrick and finding one in White depended on whether the statutorily compelled reports were essential to the regulatory scheme. In the regulation of commercial fisheries, the reports were essential. However, the use of accident reports in criminal proceedings was not an essential component of the regulatory scheme in British Columbia. In deciding that the use of these reports were not essential to the regulatory scheme in British Columbia, Iacobucci J. reasoned that the inclusion of the "use immunity shield" in the legislation revealed an intention to use accident reports only for non-litigious reasons. He found they were not intended to be used to incriminate drivers. Except, as previously mentioned, for the two exceptions of proving compliance and for prosecuting false statements in the report. Iacobucci's finding that these reports were not essential in criminal proceedings under the regulatory scheme in British Columbia does not necessarily mean that it is non-essential for regulatory proceedings under the Highway Traffic Act in Ontario. Since, the Highway Traffic Act does not specifically exclude the use of accident reports in criminal or regulatory proceedings, it can be at least inferred that accident reports can be used in regulatory proceedings, since the White decision only exclude their general use for criminal proceedings [emphasis is mine below]:

> A key factor in the Court's reasoning in Fitzpatrick was that the accused and the state were not in an adversarial relationship at the specific time that the self-incriminatory statements were made. The hail reports and fishing logs were made in a context that was entirely free of psychological or emotional pressure for the accused, at a time when the accused was not under investigation by fishing authorities. Moreover, the hail reports and fishing logs were required by the state for the useful purpose of calculating fish stocks in order to determine appropriate fishing quotas. As noted by La Forest J., the accused and the fishing authorities could properly be seen, in exchanging information about the quantity of harvest in this way, as partners in the greater collective endeavour of conserving fish stocks and correspondingly conserving the commercial fishery. La Forest J. emphasized that the hail reports and fishing logs were an essential component of this conservation scheme.
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> The situation is very different under the Motor Vehicle Act. It is true, as the Crown suggests, that drivers and the state do participate in a form of partnership aimed at securing safe roads for the benefit of all citizens. The reporting requirement in s. 61 of the Act has the valid purpose of permitting the compilation of road safety information and accident statistics: see, e.g., Walker v. The King,

> [1939] S.C.R. 214, at p. 220. Yet the driver who provides an accident report under s. 61 is not in the same situation as the commercial fisher who radios in or documents the quantity of the day's catch.
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> The provincial decision to vest the responsibility for taking accident reports in the police has the effect of transforming what might otherwise be a partnership relationship into one that is potentially adversarial. Very often, the police officer who is receiving the accident report is simultaneously investigating a possible crime, in relation to which the driver is a suspect. At the same time that the officer is required by s. 61(4) of the Motor Vehicle Act to obtain information about the accident from the driver, the officer may equally be required or inclined to inform the driver of possible criminal charges and of the driver's legal rights under the Charter, including the right to remain silent. The result is seemingly contradictory instructions from police. Importantly, also, the driver is generally in the officer's immediate physical presence. The result is, quite unlike the situation in Fitzpatrick, a context of pronounced psychological and emotional pressure.
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> ...
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> Another important distinction between this appeal and Fitzpatrick, in so far as the existence of a partnership relationship is concerned, is that there is no suggestion in this case that the use of accident reports in criminal proceedings is an essential component of the regulatory partnership created by the Motor Vehicle Act. Under the fisheries regulations that were at issue in Fitzpatrick, the use of reports of daily fish harvests in the prosecution of overfishing was found to be essential to the integrity of the entire regulatory regime -- a regime that was beneficial to both the state and the accused as a commercial fisher. In contrast, under the Motor Vehicle Act, it is clear that the province of British Columbia does not consider the use of accident reports in subsequent legal proceedings to be essential at all. The inclusion of s. 61(7), extending use immunity in relation to the contents of an accident report in subsequent proceedings against the driver, reveals an intention to use accident reports in order to gather information only for non-litigious purposes. In other words, the partnership between the individual driver and the state does not encompass the use of the compelled accident report to incriminate the driver. The fact that the statements in this case are sought to be introduced in criminal rather than regulatory proceedings simply serves to accentuate the fact that the Crown seeks to use the statement for a purpose that was never contemplated as being a component of the regulatory regime.

108 In considering the psychological pressures and the close proximity of the police during the taking of the accident report, was there an adversarial relationship between Officer Johnston and the defendant? I find that nearly 3 hours had elapsed from the time the defendant arrived at 19 Johnson Place until Officer Johnston arrived to investigate the traffic accident. The defendant was not as psychologically vulnerable as someone who would still be at the scene of the accident or who is unfamiliar with the workings of the Highway Traffic Act. He had nearly 3 hours to decide what to do next and consider the ramifications of not personally reporting forthwith or returning to the accident scene immediately.

109 It can also be seen in R. v. White that Iacobucci J. did make a finding that there was a form of partnership between the individual driver and the state aimed at securing safe roads for the benefit of all citizens, and the reporting requirement had the valid purpose of permitting the compilation of road safety information and accident statistics. However, he stated this partnership in the White case did not extend to the use of the compelled accident report to incriminate the driver because of the prohibition against using the contents of the report in subsequent proceedings against the driver. Except, as indicated earlier, s. 61(7) allowed the report to be used for proving compliance with reporting and for prosecuting false statements made in the report.

110 For a situation in a regulatory proceeding, where it was decided that there was an adversarial relationship between the state and the individual in a derivative prosecution based on the contents of an statutorily compelled accident report made under the Highway Traffic Act, see R. v. Zalai, [2000] O.J. No. 3294 (Ont. C.J.), a decision from my learned colleague, Oates J.P. In that case, the defendant Zalai had been charged for careless driving after making a statement for an accident report taken at the scene of the accident.

111 The R. v. Zalai case concerned a defendant who was still at the accident scene when the defendant gave a statement to a police officer preparing an accident report. The defendant in the case at bar had left the accident location and gave his statement to a police officer preparing an accident report at another location. The defendant therefore had the time to reflect and consider how he should act and proceed in regards to the motor vehicle accident. The defendant in R. v. Zalai would have been in a more heightened emotional state at an accident scene than someone like the defendant who is being interviewed at a friend's residence nearly three hours later. Furthermore, the defendant in Zalai was not a paralegal nor did he give evidence that he was familiar with the Highway Traffic Act or the courts. In addition, Zalai had been charged with an offence of careless driving that is distinct to being charged for failing to give an accident report. Therefore, R. v. Zalai is distinguished on the facts to the case at bar.

112 Therefore, I conclude that although Iacobucci J. in R. v. White held that the partnership of state and individual drivers for securing road safety did not encompass the use of the report to incriminate the driver where the "use immunity shield" applied, that same partnership under the British Columbia legislation did contemplate the use of the compelled accident report to incriminate the driver when proving compliance with reporting and prosecuting the making of false reports, since these two situations had been excluded from the protection of the "use immunity shield". Hence, I conclude that Iacobucci J.'s finding that there is potentially an adversarial relationship during the taking of an accident report, only applies conceivably to situations where the report may be used against the defendant in a derivative prosecution under the Highway Traffic Act, but does not exist when the defendant is directly being charged for failing to report an accident. I also find that the partnership between the state and an individual in securing road safety does contemplate that the contents of an accident report could be used to incriminate the driver under a charge of failing to report an accident under the Highway Traffic Act. My conclusion is supported by the Supreme Court's holding in Fitzpatrick that it is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on statutorily compelled statement.

(iii) Whether there is an increased risk of unreliable confessions because of the use of accident reports as evidence in regulatory prosecutions.

113 Iacobucci J. on the issue of unreliable confessions held at paras. 61-62 of R. v. White [emphasis is mine below]:

> In Fitzpatrick, the Court found that the hail reports and fishing logs could not properly be characterized as "confessions" for the purpose of the confessions rule. The Court also found that, even if these reports were confessions, the use of these oral and written reports as evidence in regulatory proceedings for overfishing did not increase the likelihood of the reports' being falsified. La Forest J. noted that there was probably already an incentive to submit false hail reports and fishing logs -- a danger which was combatted to some degree by the prosecution of those who submit such false statements. He also could not envision an alternative scheme which would permit more reliable statements while still achieving the objectives of the regulatory regime.
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> Under the Motor Vehicle Act, the prospect of unreliable confessions is very real. In particular, accident reports under the Act are frequently given directly to a police officer, i.e., to a person in authority whose authority and physical presence might cause the driver to produce a statement in circumstances where he or she is not truly willing to speak: see R. v. Hodgson, [1998] 2 S.C.R. 449, at para. 24, per Cory J. The driver who reasonably believes that he or she has a statutory duty to provide an accident report under the Motor Vehicle Act will likely experience a significant "fear of prejudice" if he or she does not speak. At the same time, there may be a strong incentive to provide a false statement, given the serious consequences which the driver may feel will flow from telling the truth, even if the truth does not in fact support a finding that a criminal offence was committed. It is reasonable to expect that this fear of prejudice and incentive to lie would be dissipated if the driver could be confident that the contents of the accident report could never be used to incriminate him or her in criminal proceedings. A rule which granted use immunity in criminal proceedings would thus serve to enhance rather than impair the effectiveness of the statutory reporting scheme, as was suggested by Esson J.A. in the Court of Appeal below. Indeed, it is possibly for precisely this purpose that the province originally enacted the use immunity set out in s. 61(7).

114 Iacobucci J. concluded that obtaining reliable accident reports to fulfill and enhance the regulatory purpose would be best served if there were a "use immunity shield" applying to the accident report for criminal proceedings. He also believed that drivers experience a fear of prejudice if they do not talk to the police when they know they have a statutory duty to report an accident. In addition, his Lordship found there may be a strong incentive for drivers involved in accidents to provide false statements considering the serious consequences that could result from telling the truth. This is why he believed that providing a prohibition against using these reports for criminal prosecutions would enhance the reliability of these reports, which then would fortify the regulatory objective of safer roads.

115 His Lordship in examining the decision in Fitzpatrick concluded that even if the reports were confessions, the permitted use of these inculpatory reports as evidence in prosecutions for overfishing would not provide a greater incentive for someone to make a falsified report as his Lordship believed that such an incentive already existed to misstate the amount of fish caught. Allowing the reports to be used as evidence therefore would not increase the risk of unreliable reports. The provision of penalties for making false reports would somewhat combat the incentive to falsely report the amount of fish caught. His Lordship saw no other option available in preventing unreliable reports and still maintain the regulatory objective of conservation of fish stock.

116 In the present case, the defendant was not being investigated for a criminal charge at the time he spoke to Officer Johnston. Secondly, the defendant was a traffic court paralegal at the time, and would be familiar with the courts and generally his rights, which a lay person would not have the same knowledge advantage when speaking to a police officer. The defendant would not have had the same fear of prejudice in talking to a police officer.

117 However, barring the use of accident reports as evidence in Ontario for criminal proceedings and possibly other prosecutions under the Highway Traffic Act would not necessarily encourage reliable accident reports. Unless the report is also provided "use immunity" from being used as evidence in insurance actions or claims, there would be no incentive for a driver to make a reliable accident report, even if he knew the report wouldn't be used in a regulatory prosecution. An individual involved in an accident would still be affected by the actions of insurance companies over his or her insurance premiums, and would still have the same incentive to misstate the truth for an accident report. Therefore, I conclude that allowing these statutorily compelled accident reports to be used as evidence in regulatory proceedings under the Highway Traffic Act would not create a greater incentive for people to make unreliable reports in order to avoid prosecutions. The same incentive to make false reports, even if barred from being used in regulatory proceedings, would still be present because these reports are not exempt from being used in civil actions.

118 From these reasons, even if accident reports were provided a "use immunity shield" for regulatory prosecutions under the Highway Traffic Act, there would not be an increased risk in unreliable confessions contained in these accident reports. In reflection, there also would likely be a decrease in individuals reporting, if the "use immunity shield" were allowed to prevent the admissibility of the report from being used against someone charged for failing to report an accident. Therefore, I do not find that allowing the "use immunity shield" to apply to the contents of an accident report for proving compliance with making an accident report is appropriate.

(iv) Whether there is an increased risk of abuse of power by the state because of the use of statutorily compelled accident reports to incriminate drivers for failing to report accidents.

119 On the issue of whether there would be an increased risk of abuse of power by the state, if compulsory accident reports were allowed to be used within criminal prosecutions, Iacobucci J. at paras. 63-66 of R. v. White wrote that:

> The final major concern underlying the principle against self-incrimination that was addressed by the Court in Fitzpatrick was the concern that permitting the use of compelled statements in order to incriminate commercial fishers would increase the likelihood of abusive conduct by the state. La Forest J. found that it was not abusive for the state to prosecute overfishing on the basis of true reports that fishers were required to complete as a condition of their voluntary participation in the commercial fishery. He noted, as I mentioned above, that the alterna-

> tive to compulsory self-reporting would be far more intrusive, since the state would be required to investigate overfishing by increasing patrols and vessel searches. La Forest J. also relied upon the fact that there is a minimal expectation of privacy in daily hail reports and fishing logs. He noted that using the information contained in these reports could not be seen as an affront to human dignity, since nothing in the reports divulged information of a personal or private nature.
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> In the present case, again, the possibility is real and serious that permitting the use of compelled accident reports within criminal proceedings might increase the likelihood of abusive conduct by the state. In taking accident reports from drivers, police would have a strong incentive or perhaps an unconscious inclination to overemphasize the extent of the statutory duty to report an accident under the Act, in order to obtain relevant information. The effect of such an overemphasis might be to circumvent or defeat a driver's s. 7 right to remain silent when under investigation for a criminal offence. One can easily imagine the situation of a driver who, confused by the apparent inconsistency between the duty to report and the right to remain silent, would provide a more extensive statement to police than legally required under the Act. Conversely, in a situation where all statements made by the driver under compulsion of the Act are subject to use immunity, police are more likely to conduct an independent investigation rather than to use the compulsory accident reporting system as a source of information.
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> Finally, it should be noted that an accident report is not at all analogous to the hail reports and fishing logs in Fitzpatrick, which La Forest J. compared to business records in so far as they were impersonal lists in which the declarant had little expectation of privacy. The spontaneous utterances of a driver, occurring very shortly after an accident, are exactly the type of communication that the principle against self-incrimination is designed to protect. They are a personal narrative of events, emotions, and decisions that are extremely revealing of the declarant's personality, opinions, thoughts, and state of mind. The dignity of the declarant is clearly affected by the use of this narrative to incriminate. I would note that, while it is well established that there is a reduced expectation of privacy in a vehicle generally, compared to the expectation of privacy in a dwelling, this fact is largely irrelevant to the analysis here. The question in this case involves the expectation of privacy that a declarant has in a confession. The fact that the confession has to do with a car is entirely incidental.

120 It is understandable and desirable that the state not be allowed to use the accident report device to encourage individuals to incriminate themselves for the purpose of a criminal prosecution. In the present regulatory case, I find the abuse of power by the state would be minimal. The state is not prosecuting the defendant under the Criminal Code or for a more serious Highway Traffic Act infraction. Although the defendant stated, he felt compelled to make a statement because of his familiarity with the statute that required him to make an accident report, he is not a lay person. Despite the defendant not being a member of the provincial bar, he testified that he is familiar with the courts and knew of his rights to remain silent. Also, at the time the statement was obtained from the defendant, I find that there was no evidence of abusive behavior or pressure tactics employed by the police in obtaining the defendant's confession that he was the driver of the vehicle involved in the accident. The defendant like most people is aware of the obligation to report an accident. Although the defendant's occupation as a traffic court paralegal presupposes he knew about the consequences of not reporting forthwith, he still failed to comply with the reporting obligation.

121 I can however envision that the average driver or lay person when confronted by questions concerning the accident, while at the accident scene may feel pressured to answer police questions. However, in the defendant's situation, he was armed with the knowledge of the right to remain silent and he was away from the emotional pressures of being at the accident scene. These two factors in itself prevent the police from taking advantage of any psychological or mental distress felt by a driver involved in an accident who chooses to remain at the accident scene, unlike the defendant.

122 Consequently, I conclude there would also be absent an increased risk of abuse of power by the state in the context of using a statutorily compelled statement against someone charged for failing to report an accident, since the public generally believe they have the obligation to report accidents and the only concern for a police officer laying that charge would be to decide if an individual had a reasonable excuse or opportunity for not reporting forthwith. Thus, the sole piece of incriminating evidence intended to be used by the prosecution in a charge for failing to report an accident, would be that the individual making the incriminating statement was the driver of a vehicle involved in an accident. Drivers are compelled to make accident reports and the jeopardy they face for not complying is a monetary fine for not making that report.

4. Balancing The Interests Under S. 7 In The Context Of Reporting An Accident Under S. 199(1) Of The Highway Traffic Act

123 It is also necessary to consider the relevant interests under s. 7 in order to decide if there will be an infringement of the principle against self-incrimination in the context of the duty to report an accident under s. 199(1). In balancing the public interest and the individual interest, I have to consider the purpose of compiling accident reports and the need to compel individual drivers involved in accidents to report such accidents. Then, these societal interests have to be balanced against the individual interest in the principle against self-incrimination, viewed in the context of having a statutorily compelled report containing inculpatory evidence used to prosecute someone for failing to report an accident in the regulatory sphere.

124 Iacobucci J. at para. 43 of R. v. White discussed the importance of balancing interests under s. 7:

> The contextual analysis that is mandated under s. 7 of the Charter is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person has occurred in accordance with the principles of fundamental justice. As this Court has stated, the s. 7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice in Canadian society.

125 The particular public and individual interests relating to compulsory reporting under provincial motor vehicle legislation needed to be balanced under s. 7 were also considered by Iacobucci J. in White. He first stressed that the balance between societal interest in discovering truth and the individual interest against self-incrimination in criminal prosecutions was attainable with the advent of the "use immunity shield" to prevent statutorily compelled reports being admitted in criminal proceedings. However, he noted that the balance under the specific motor vehicle legislation in question did not concern strictly self-incrimination matters on one hand and effective criminal prosecutions on the other. Instead, the balance concerned the individual driver's interest against being compelled under provincial motor vehicle legislation to self-incriminate for criminal proceedings and the societal interest in highway safety. He considered these interests at paras. 70-72:

> The protection afforded by the principle against self-incrimination does not vary based upon the relative importance of the self-incriminatory information sought to be used. If s. 7 is engaged by the circumstances surrounding the admission into evidence of a compelled statement, the concern with self-incrimination applies in relation to all of the information transmitted in the compelled statement. Section 7 is violated and that is the end of the analysis, subject to issues relating to s. 24(1) of the Charter.
>
> I would emphasize that creating an immunity against the use of an accident report in subsequent criminal proceedings is itself a balancing between society's goal of discovering the truth, on the one hand, and the fundamental importance for the individual of not being compelled to self-incriminate, on the other. The granting of use immunity does not equate to the primacy of the principle against self-incrimination over other fundamental principles. As was explained in S.(R.J.), supra, at paras. 107-40, the grant of a use immunity permits the state to achieve the important objective of acquiring relevant information immediately, for a purpose unrelated to the investigation of specific crimes, while protecting the individual against jeopardy from the use of that information against him or her in penal proceedings at a later time. Notably, use immunity is a narrower protection against self-incrimination than "transactional immunity", whereby the individual is protected against subsequent penal proceedings per se, and is narrower too than a complete right to silence, whereby the individual would be protected against even having to speak to state authorities in the first place.
>
> Moreover, it must be recalled that the purpose of s. 61 of the Motor Vehicle Act is not to assist police in the investigation of specific crimes. The provinces are entitled to inquire into factual circumstances that may involve the commission of a criminal offence, but their jurisdiction does not extend so far as to trench upon the federal power under s. 91(27) of the Constitution Act, 1867 over the criminal law: see, e.g., Starr v. Houlden, [1990] 1 S.C.R. 1366. Accordingly, the balance which must be struck in the context of s. 61 of the Motor Vehicle Act is not between self-incrimination concerns, on the one hand, and the effectiveness of criminal prosecutions, on the other. Rather, the balance which must be struck is between a driver's right not to be compelled to self-incriminate in criminal proceedings, and the province's interest in highway safety. Particularly, as men-

> tioned, given that the province has indicated through s. 61(7) of the Act that it does not wish to be able to use the information contained in accident reports to incriminate drivers, the balance struck by the granting of a use immunity appears to be the most effective way of achieving valid public objectives without sacrificing the principle against self-incrimination.

126 Since this is not a criminal proceeding, but a regulatory one, the need to prohibit the use of the defendant's statement contained in the accident report for a regulatory proceeding may not be required when balancing the public interest in road safety and acquiring relevant information immediately, with the defendant's interest against being compelled under provincial motor vehicle legislation to self-incriminate for a regulatory proceeding. In addition, the Highway Traffic Act does not contain the same use immunity provision found in the provincial motor vehicle legislation discussed in R. v. White. The absence of a "use immunity shield" in the Highway Traffic Act also infers that there is not an evident societal interest in prohibiting compelled self-incriminating information from being used in a regulatory proceeding.

127 The public benefits from having all drivers of motor vehicles involved in an accident report the occurrence of the accident and its circumstances as soon as possible. This is a reasonable regulatory requirement. The system of compulsory reporting assists the data-gathering function for road safety information and accident statistics, the management of highway and road systems, and allows for planning and ensuring safer roads for motorists. This compulsory reporting ultimately protects and benefits the public and is a valid regulatory objective.

128 On the other hand, the individual interests do favour an individual not being compelled to assist the state in conscripting evidence against that individual through his or her own incriminating statements, especially for criminal proceedings. The protection of individual interests, namely individual privacy, autonomy and human dignity is highly valued in a democratic and free society.

129 One of the reasons for barring the state from using statutorily compelled accident reports in criminal proceedings is that the average individual believes he or she had to give information strictly for the preparation of an accident report, and for no other purpose. This person could not have reasonably envisioned that this statutorily compelled information would then be used against him or her for some unanticipated or other purpose, such as in a criminal prosecution. That is, one would not expect to ultimately aid the police in conscripting evidence against oneself for a criminal prosecution or for another unanticipated purpose, when they believed they were just fulfilling their duty to report an accident. However, the defendant is not the average individual. He is a traffic court paralegal. In addition, he is not facing a criminal charge with greater penal consequences, but a minor regulatory offence that contains only a relatively small monetary penalty.

130 Moreover, there is a public interest in individuals having to report accidents in order to achieve the regulatory objective of road safety that overrides the defendant's individual right to security of the person in this particular situation. In this situation, it is necessary in order to maintain the integrity of an entire regulatory regime to acquire statements for accident reports. Thus, the importance of acquiring relevant information promptly for the public benefit and the interest in highway safety will outweigh the factors that favour protecting the individual against undue compulsion by the state, for this particular regulatory prosecution.

131 Once more, I'm mindful of La Forest J.'s pronouncement in Fitzpatrick at p. 166 in which he stated that the balancing of the societal and individual interests in a regulatory context implies that the principle against self-incrimination should not be as rigidly applied as it would be under a criminal context:

> In this context, the balance between societal and individual interests under s. 7 of the Charter suggests that the principle against self-incrimination should not be applied as rigidly as it might be in the context of a purely criminal offence.

132 I therefore find that the public interest in a regulatory prosecution of the offence of failing to report an accident to further the goal of highway safety overrides the defendant's interest against self-incrimination, and in privacy, personal autonomy and human dignity. The defendant faces a minor penalty under this regulatory scheme. He also is not in the same situation as a lay person, unfamiliar with the courts or the Highway Traffic Act. An average lay person's individual interest against self-incrimination when compared to the defendant's situation may have more weight in balancing the interests.

5. Outcome Of S. 7 Analysis

133 For the first stage of the s. 7 analysis, there exists no real or imminent peril to the defendant's right to life or liberty, and his right to feeling secure is minimally affected by this regulatory prosecution or by having his inculpatory statement admitted into evidence against him for the charge of failing to report. It is difficult to see how his right to security would be seriously infringed considering he is aware of the duty to report an accident and had a reasonable opportunity to report, but consciously chose not to. In addition, the prosecution is not seeking to have the inculpatory statement entered into a more serious regulatory offence that may affect his livelihood or a criminal prosecution where he may be subject to higher penalties. The defendant is facing a minor regulatory offence and his right to be secure is minimally affected by the use of a statutorily compelled statement against him. He is also aware that driving is a privilege under s. 31 of the Highway Traffic Act and that the rules of the road have to be followed in order to be able to drive in Ontario. Moreover, one of the rules is his compulsory duty to personally report an accident as soon as practical after its occurrence. The regulatory goal of compulsory reporting of accidents enhances road safety, which benefits the public. The public is also generally aware of their duty to report accidents. Using inculpatory information from these compelled reports to prosecute those who do not report promptly encourages compliance. The only incriminating evidence sought to be excluded concerns the person that is charged for failing to report promptly being the driver of the vehicle who was under a statutory duty to report. In this regulatory context, the public interest of road safety overrides the individual interest in personal autonomy and human dignity.

134 In addition, on examining the principle against self-incrimination in prosecuting someone for failing to report an accident, the Supreme Court in Fitzpatrick has held that it is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on the basis of a statutorily compelled statement. Moreover, when examining the defendant's special circumstances, he is not an average driver or lay person, but a traffic court paralegal that has familiarity with the Highway Traffic Act. Thus, he would be subjected to less apprehension regarding being convicted. Therefore, even if the defendant is minimally deprived of his right to security of the person, as it is in this case, this deprivation is in accord with the principles of fundamental justice, especially under this regulatory context.

(f) Charter remedy under s. 24(2)

135 The defendant in this case seeks to have the inculpatory statement excluded under s. 24(2) of the Charter. That provision under s. 24 provides:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

136 The defence was asked on the first trial date of July 19, 2001, if a Notice of Constitutional Question had been served properly according to s. 109 of the Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12. The defendant replied that the proper notices had not been served. Also, on the second date of trial on October 4, 2001, the defendant was asked if s. 109 had been complied with. Again, the defence stated they had not. I then referred them to the decision in R. v. Mitchell, [2000] O.J. No. 735 (Ont. C.J.), where Reinhardt J. confirmed at paras. 38-39 that a remedy under s. 24 could not be granted unless the mandatory notice requirements had been fulfilled:

> I have concluded that Ms. MacPherson is correct that the current provisions of Section 109 are mandatory, and that they may not be dispensed with by the Court pursuant to Rule 7(7) or any other Rule now found in the Rules currently applicable to proceedings under the Provincial Offences Act. Rule 7(7) of Regulation 200 [am. O. Reg. 505/93; O. Reg. 498/94] which permits the presiding Justice to dispense with notice on consent or where it would not be "unjust" to do so, has the identical language as Rule 6(7) of Regulation 200/80 filed March 17th, 1980, which predates the Canada Act 1982 (U.K.) c. 11; proclaimed in force 17 April, 1982. I agree with her that Section 7 is confined to "an application provided for by the Act or these rules" and that the Act referred to is the Provincial Offences Act. This is to be distinguished from the Charter. In the case of a Charter application, the Legislature of the Province of Ontario has seen fit to require written notice to be served on both the Provincial and Federal Attorneys General. In addition, there is a penalty provision built into Section 109(2):
>
>> "If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be." (Emphasis added)
>
> This specific reference to "remedy" encompasses applications seeking a judicial stay of proceedings, as found on the facts of this case. The reasoning in Regina v. F., 20 C.C.C. (3d) 334, as well and Re Carfrae Estates Ltd. 13 O.R. (2d) 537, tend to suggest that the legislature intended this notice provision to be mandato-

> ry. The penalty provision is also consistent with the provincial legislature intending the notice requirement to be mandatory.

137 The rules governing Constitutional questions or Charter applications are found in the Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12, s. 95(3) and s. 109. [my emphasis below]:

> 95.(3) Sections 109 (constitutional questions), 125, 126 (language of proceedings), 132 (judge sitting on appeal), 136 (prohibition against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the Provincial Offences Act and, for the purpose, a reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court (Provincial Division).
>
> 109.(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:
>
> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or a rule of common law in question.
> 2. A remedy is claimed under subsection 24(1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Ontario.
>
> (2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.
>
> (2.1) The notice shall be in the form provided for by the rules of court, or, in the case of a proceeding before a board or tribunal, in a substantially similar form.
>
> (2.2) The notice shall be served as soon as the circumstances requiring it become known, and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

138 If the defendant fails to comply with the notice requirements, then s. 109(2) states that the remedy sought shall not be granted. The defendant did not fulfill the notice requirement about any Charter question or Charter remedy that he was seeking from this Court. Therefore, if there is an infringement of a Charter right, then I am prohibited by statute under s. 109(2) from granting any remedy.

139 I had earlier stated in the proceeding that the defendant's position may have been correct that notice under s. 109 was not required for a s. 24(2) Charter remedy, as s. 109 was silent about requiring notice for a s. 24(2) remedy. However, after now considering that s. 24(2) is dependent on a s. 24(1) application, such notice is in fact required by the defendant, since s. 109 specifically addresses a s. 24(1) application. Consequently, I am statutorily prevented from granting the exclusion of any statement under s. 24(2) concerning any possible Charter infringement, as long as the notice requirements for a constitutional question have not been fulfilled. Therefore, if an exclusion of the inculpatory statement is warranted based on the principle against self-incrimination, it has to be found within the availability of a remedy under the common law relating to trial unfairness.

140 Moreover, a s. 24(2) remedy appears to be available only when the evidence was obtained after a breach of the Charter had occurred. In this case, the defendant's statement had been obtained under a valid regulatory statute requiring compulsory reporting of an accident. The statement was not coerced from or illegally obtained from the defendant.

141 Iacobucci J. in R. v. White discussed the appropriate sections of the Charter that could be used to exclude statutorily compelled statements. He found that a court could proceed by ss. 11(d) or 24(1) of the Charter. His conclusions were made at paras. 84-88 [emphasis is mine below]:

> The possibility of excluding evidence under s. 24(1) of the Charter was first addressed by this Court in R. v. Therens, [1985] 1 S.C.R. 613. Le Dain J., who dissented in the result in Therens, found that the court below had erred in holding that evidence obtained in violation of the accused's Charter rights could be excluded under s. 24(1). Le Dain J.'s reasons were focused upon the lower court's finding that there were two separate tests for the exclusion of evidence under s. 24, one test under s. 24(1) and another under s. 24(2), with an accused having the choice between the two types of remedy. Le Dain J. stated, at pp. 647-48:
>
>> I am satisfied from the words of s. 24 that s. 24(2) was intended to be the sole basis for the exclusion of evidence because of an infringement or a denial of a right or freedom guaranteed by the Charter. It is clear, in my opinion, that in making explicit provision for the remedy of exclusion of evidence in s. 24(2), following the general terms of s. 24(1), the framers of the Charter intended that this particular remedy should be governed entirely by the terms of s. 24(2). It is not reasonable to ascribe to the framers of the Charter an intention that the courts should address two tests or standards on an application for the exclusion of evidence -- first, [page 457] whether the admission of the evidence would bring the administration of justice into disrepute, and if not, secondly, whether its exclusion would nevertheless be appropriate and just in the circumstances. The inevitable result of this alternative test or remedy would be that s. 24(2) would become a dead letter.
>
> Estey J., writing for four (including himself) of the eight members of the Court who decided the appeal, agreed with Le Dain J. that s. 24(2) was the appropriate mechanism for the exclusion of the evidence in the particular case. Dickson C.J., and Lamer J. (as he then was), declined to comment on the possibility that evidence might be excluded under s. 24(1) rather than s. 24(2). The conclusion of the majority in Therens that evidence cannot be excluded as a remedy under s. 24(1) of the Charter, but must meet the test of exclusion under s. 24(2), was

acknowledged in R. v. Collins, [1987] 1 S.C.R. 265, at p. 276, per Lamer J., and R. v. Strachan, [1988] 2 S.C.R. 980, at p. 1000, per Dickson C.J.

The Court in Therens was dealing with evidence that had been obtained in violation of the accused's Charter rights. None of the members of the Court who wrote in Therens adverted to the possible exclusion of evidence obtained in conformity with the Charter but whose admission into evidence would itself violate the Charter. In my view, although there are statements in Therens to the effect that s. 24(2) is the only appropriate mechanism for the exclusion of evidence under the Charter, those statements should be understood in the specific context of the case, in which the lower court had found that there could be two separate tests for the exclusion of illegally obtained evidence under s. 24. Therens should not be seen as placing unnecessary limits on the power of a court to exclude evidence whose admission would render a trial unfair in contravention of one or more of the legal rights set out in the Charter.

The possibility that evidence may be excluded under s. 24(1) of the Charter where its admission into evidence in a criminal trial would violate s. 7 has been acknowledged by some members of the Court. In R. v. Harrer, [1995] 3 S.C.R. 562, the issue was addressed by McLachlin J., speaking for herself and Major J. She referred to the common law power of judges to exclude evidence whose admission would adversely affect the fairness of an accused's trial, and stated, at para. 42:

> In addition to the common law exclusionary power, the Charter guarantees the right to a fair trial (s. 11(d)) and provides new remedies for breaches of the legal rights accorded to an accused person. Evidence obtained in breach of the Charter may only be excluded under s. 24(2): R. v. Therens, [1985] 1 S.C.R. 613. Evidence not obtained in breach of the Charter but the admission of which may undermine the right to a fair trial may be excluded under s. 24(1), which provides for "such remedy as the court considers appropriate and just in the circumstances" for Charter breaches. Section 24(1) applies to prospective breaches, although its wording refers to "infringe" and "deny" in the past tense: Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441. It follows that s. 24(1) permits a court to exclude evidence which has not been obtained in violation of the Charter, but which would render the trial unfair contrary to s. 11(d) of the Charter.

La Forest J., who wrote for the majority of the Court in Harrer, stated at p. 579 that there was "no need to resort to" s. 24(1) as the mechanism for the exclusion of evidence whose admission would violate the Charter. He held that such evidence could be excluded on the basis of the trial judge's now constitutionally enshrined duty under s. 11(d) of the Charter to exercise his or her common law discretion in order to exclude evidence whose admission would render the trial unfair.

> The possibility of excluding evidence under s. 24(1) of the Charter was addressed again more recently in Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841. In concurring reasons, Lamer C.J. stated, at para. 24, that evidence may be excluded under a combination of ss. 7 and 24(1) of the Charter where the use of such evidence would affect trial fairness. Lamer C.J. cited on this point the decisions of the Court in Harrer, supra, as well as R. v. Terry, [1996] 2 S.C.R. 207, where the Court held that an accused may use ss. 7 and 11(d) of the Charter to obtain redress where the admission of evidence would violate the Charter. Speaking for the majority of the Court in Schreiber, L'Heureux-DubÈ J. stated, at para. 35, that she agreed with the Chief Justice that s. 7 may apply to justify excluding evidence where it is necessary to preserve the fairness of the trial. L'Heureux-DubÈ J. did not specifically advert to the possible role of s. 24(1).

142 Section 11(d) of the Charter provides:

> 11. Any person charged with an offence has the right
>
> ...
>
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

143 The Supreme Court in R. v. White actually excluded the statutorily compelled statement under s. 24(1) of the Charter after finding that its admission would infringe the principle against self-incrimination under s. 7. This also underscores the point that a remedy under s. 24(1) cannot be granted unless the notice requirements under s. 109 had been fulfilled.

144 In R. v. Stillman, [1997] S.C.J. No. 34, Cory J. for the majority of the Supreme Court of Canada at paras. 80-81, wrote that a self-incriminating statement obtained after a Charter breach, such as the statement being obtained after a denial of a right to counsel, then admitting that statement would make a trial unfair under s. 24(2) of the Charter:

> Evidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s. 10(b) of the Charter. The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of Charter rights which may render a trial unfair.
>
> In considering the application of s. 24(2), courts will be rightly concerned that there has been a breach of the rights of the accused which led to the compelled self-incrimination of the accused. Historically, the judicial misgivings relating to self-incrimination came from the abhorrence of conscripting an accused to incriminate himself by means of a confession. When the rule against self-

> incrimination first emerged, there was a very real concern that a confession sometimes obtained by torture or threats could well be unreliable. Over the years, forms of compulsion other than torture were recognized as being just as compulsive, just as insidious and just as abhorrently unfair. At the time when the principle against enforced self-incrimination evolved, a confession or statement was often the only evidence tendered by the state to prove the crime.

145 Therefore, any remedy still available to the defendant that would exclude the statutorily compelled statement must be found in the common law.

(g) Whether admitting the statutorily compelled statement would render the trial unfair under the common law

146 Iacobucci J. at para. 89 of R. v. White concluded that the statutorily compelled statement could be excluded either under s. 24(1) of the Charter or under a common law duty to exclude evidence whose admission would render the trial unfair:

> Although I agree with the majority position in Harrer, supra, that it may not be necessary to use s. 24(1) in order to exclude evidence whose admission would render the trial unfair, I agree also with McLachlin J.'s finding in that case that s. 24(1) may appropriately be employed as a discrete source of a court's power to exclude such evidence. In the present case, involving an accused who is entitled under s. 7 to use immunity in relation to certain compelled statements in subsequent criminal proceedings, exclusion of the evidence is required. Although the trial judge could have excluded the evidence pursuant to his common law duty to exclude evidence whose admission would render the trial unfair, he chose instead to exclude the evidence pursuant to s. 24(1) of the Charter. I agree that he was entitled to do so.

147 The principle of excluding evidence under the common law when the admission of that evidence would make the trial unfair was considered by the Supreme Court of Canada in R. v. Wray, [1971] S.C.R. 272. The majority in Wray held that the principle is not whether the admission of self-incriminating evidence would be unjust or unfair to the accused, but whether its admission would operate unfairly. Operating unfairly meant the probative value of the evidence was trifling to the main issue, yet prejudicial to the accused. It did not operate unfairly when the admissible evidence was relevant to the main issue and had substantial probative value, although it might operate unfortunately against the accused. Martland J. for the majority stated that:

> This development of the idea of a general discretion to exclude admissible evidence is not warranted by the authority on which it purports to be based. The dictum of Lord Goddard, in the Kuruma case, [1955] A.C. 197, appears to be founded on Noor Mohamed, and it has, I think, been unduly extended in some of the subsequent cases. It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the ac-

> cused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.

148 In R. v. Corbett, [1988] S.C.J. No. 40 (S.C.C.), McIntyre J. at para. 59 referred to R. v. Wray and stated that:

> The only support for the existence of such a discretion in the jurisprudence of this Court is found in R. v. Wray, [1971] S.C.R. 272, which recognizes a discretion to exclude otherwise admissible evidence where it would operate unfairly to the accused, and which is of little probative value but of serious prejudicial effect.

149 Therefore, in order for the court to exclude the defendant's statutorily compelled statement under the common law if its admission would operate unfairly, the statement must have little probative value, but be prejudicial to the defendant. The defendant's statement does have substantial probative value. It proves the defendant was the driver of the vehicle involved in the accident for which he failed to report promptly. Furthermore, the defendant's statement is admissible as evidence, since the Supreme Court in R. v. Marshall, [1961] S.C.R. 123, has held that statutorily compelled statements are voluntarily made statements. Therefore, the admission of the statutorily compelled statement does not operate unfairly against the defendant to make the trial unfair, although it operates unfortunately against the defendant's interest.

(h) Revisiting the voluntariness of the inculpatory statement

150 To reiterate, the defendant was not coerced by the police to make the inculpatory statement that he was the driver of the vehicle involved in an accident. However, the defendant submits that he felt compelled to give information to Officer Johnston who was preparing an accident report, as he knew that the Highway Traffic Act compels him to give information for such a report, thereby making his statement involuntary.

151 Iacobucci J. alludes in R. v. White, to the subjective belief of giving a report under statutory compulsion implied the absence of consent. It is this absence of consent that the defendant argues is the basis of his argument that his inculpatory statement was not given voluntarily to Officer Johnston. At para. 76 in White, his Lordship comments on the implied absence of consent when giving a statement compelled under statute:

> The requirement that the accident report be given on the basis of a subjective belief exists because compulsion, by definition, implies an absence of consent. If a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to police on the basis of motivating factors other than s. 61 of the Motor Vehicle Act.

152 Although R. v. Slopek (1974), 21 C.C.C. (2d) 362 and R. v. Marshall, [1961] S.C.R. 123, were decided prior to the advent of the Charter, and stand for the notion that statutorily compelled statements are not involuntarily in the sense that it is not made by promise or threat, I cannot envision how that has changed under the Charter for the specific charge of failing to report an accident. Iacobucci J.'s comment in R. v. White that people freely enter the regime governing the driving of motor vehicles in a province and consent to follow the rules governing this driving privilege, which includes a duty to report accidents and to furnish details, on the other hand implies they have given their free and informed consent to provide information for accident reports. Moreover, considering the defendant's occupation as a traffic court paralegal and his familiarity with the courts, also implies that he knew he was free to choose between remaining silent or to furnish information for an accident report as he was required by statute.

153 Martin J.A. in R. v. Slopek, writing for the Court of Appeal of Ontario held that the law was settled in Ontario that statutorily compelled statements are not involuntary:

> The law in Ontario, however has taken a different course. The law has, of course, been settled since the case of Walker v. The King (1939), 71 C.C.C. 305, [1939] 2 D.L.R. 353, [1939] S.C.R. 214, that the fact that a statement is made under the compulsion of a statute does not render the statement involuntary; that the term "voluntary" in relation to statements made by an accused to a person in authority is used in a special sense, namely, in a sense that the statement has not been obtained by promises or threats.

154 After reviewing the applicable precedents, considering the voluntariness issue under the Charter rubric and the circumstances surrounding when the defendant made his statement to Officer Johnston who was investigating an accident and preparing an accident report, and the defendant's personal situation, occupation and knowledge of the court system, I conclude that the defendant's statement was not involuntarily made because of statutory compulsion under the aegis of the Charter.

155 Moreover, in the context of whether the statutorily compelled statement should be considered to be involuntary under the Charter when that statement is intended to be used to incriminate the maker of the statement, I find that the compulsory reporting of accidents is required to fulfill the important regulatory objective of road safety which then favours the public interest overriding the individual interest against self-incrimination. My conclusion is predicated on Iacobucci J.'s comments in R. v. White in which he stressed the importance of balancing societal interests with individual interests under s. 7 and that in some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state.

5. CONCLUSION

Did the defendant have a reasonable opportunity to report the accident?

156 If the defendant did not have a reasonable opportunity to report the accident, then the prosecution would not make out its charge. Factors that would determine whether there was a reasonable opportunity for the defendant to fulfill his obligation to report, include the remoteness of the accident location, the seriousness of any injuries sustained by the defendant, the location of the nearest police station, the mental state of the defendant after the accident, the availability of a telephone, the office hours of the nearest police station or accident reporting centre, and the defendant's familiarity with the Highway Traffic Act.

157 The time that elapsed from the first opportunity the defendant had to report the occurrence of the accident to the time he was first questioned by the police was about 3 hours. During this period, the defendant made no effort to telephone or to personally attend at a police station to report the accident. He also had no lawful excuse why he could not report the accident during this three-hour period.

158 It was neither impractical nor impossible for the defendant to report the accident. Within a half an hour of the accident, the defendant had access to a telephone. He also knew the telephone number for the St. Thomas Police, he was not injured, he had nearly three hours to call the police before Officer Johnston arrived, he was mentally capable and physically able of making the report, he was familiar with the Highway Traffic Act, and cognizant of his duty to report the accident. Therefore, because it was Officer Johnston who approached the defendant about the accident, the defendant's passivity in contacting the police, the absence of a logical reason for not reporting the accident, and the defendant being capable of making a report, the prosecution has shown that the defendant had a reasonable opportunity to report the accident but failed to do so. Thus, without considering the Charter argument, the prosecution has made a prime facie case.

Did the defendant make a statement under a statutory duty to report?

159 If the defendant did not have a reasonable and honestly held belief that he was under a duty to report the accident, but made a statement to Officer Johnston voluntarily for another reason, then that inculpatory statement would not be protected by the principle against self-incrimination under s. 7 of the Charter. Certainly for the average driver or lay person, there is a general belief that one is compelled to give particulars of an accident to the police or is obligated to talk to them about it, whether that belief comes from knowledge of the statute or a general desire to cooperate with the police.

160 Although the defendant had passed the stage when he could report without penalty, he was still under the compulsion of s. 199(1) or s. 200 of the Highway Traffic Act, R.S.O. 1990, c. H.8, to furnish details about the accident to Officer Johnston upon request. Therefore, at the time Johnston formed the opinion that the defendant was involved or had relevant information about the accident, he would have begun gathering information only for an accident report, as he had not been investigating the defendant for any criminal charges. The defendant is correct in believing that he was still bound to give particulars concerning the accident at the moment Johnston requested information about the accident. As such, the defendant has proven on a balance of probabilities that he had an honest and reasonably held belief that he gave a statement to Officer Johnston under a statutory duty to report.

Would the defendant's inculpatory statement given under statutory compulsion be considered to be involuntarily made under the auspices of the Charter?

161 On the first part of the voluntariness issue concerning the defendant's inculpatory statement, there is no evidence that the police coerced or threatened the defendant to obtain the information for the accident report. In that sense, it was a voluntary statement. On the second part of the issue of whether the statement was involuntary because of statutory compulsion to furnish accident information to the police, I had preliminarily ruled it was voluntary. This was based on two pre-Charter decisions. The Court of Appeal of Ontario held in R. v. Slopek (1974), 21 C.C.C. (2d) 362, that a statement made under the compulsion of a statute does not render the statement involuntary since the term "voluntary" in relation to statements made by an accused to the police is based on whether the statement had been obtained by promises or threats. The Supreme Court also made the same finding in R. v. Marshall, [1961] S.C.R. 123. Since there was no existence of police misconduct in the defendant's case, then the statement was voluntarily made under both parts of the voluntariness issue.

162 However, the issue of voluntariness has to be reconsidered with the Charter in mind, since the Slopek and Marshall decisions had preceded the advent of the Charter. That is, would a statutorily compelled statement be conceptually a freely made statement under the Charter's umbra? This was indirectly canvassed by the Supreme Court in R. v. Fitzpatrick, [1995] 4 S.C.R. 154 and R. v. White, [1999] S.C.J. No. 28, where it considered the public interest in compulsory reporting with the individual interest in privacy, personal autonomy and human dignity. The Court in White determined that the principle against self-incrimination protected by s. 7, did not provide absolute protection against all uses of information that had been compelled by statute. In Fitzpatrick, the Court found a partnership between the state and the individual, which contributed to the absence of true state coercion. It also found the necessity of acquiring statements in order to maintain the integrity of an entire regulatory regime. The compulsory reporting or obligation to furnish information in the present case was mandated by ss. 199(1) and 200(1) of the Highway Traffic Act, a regulatory statute. The Supreme Court in White also considered the reporting requirement in the regulated activity of driving in which all drivers are required to have a license in order to drive. In order to obtain this license and the privilege to drive, the Court found that these drivers had given free and informed consent to all of the rules of the road, including the requirement to report an accident. In that context, it cannot be said that a driver is coerced to provide an accident report when the obligation arises. The Supreme Court did note however that the restriction of human freedom was not completely absent in the regulated activity of driving.

163 Furthermore, I find that the compulsory reporting of accidents is required to fulfill the important regulatory objective of road safety. To achieve that goal, there is a partnership between the state and the individual driver in accident reporting. These reports are essential to maintain the aim of safe highways. Thus, the public interest in road safety overrides the individual interest against self-incrimination, in the context of having the report admitted in a proceeding for failing to report an accident. My conclusion is predicated on Iacobucci J.'s comments in R. v. White in which he stressed the importance of balancing societal interests with individual interests under s. 7 and that in some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state. Therefore, statutorily compelled statements made under the Highway Traffic Act for the purpose of compiling accident reports are not involuntary when examined under the Charter.

Would the admission of the defendant's statutorily compelled statement in a regulatory proceeding for failing to report an accident violate the principle against self-incrimination under s. 7 of the Charter?

164 An infringement of s. 7 is made out, where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice. In order for the court to find an infringement of s. 7 in the present case, there must be proof that there would be a real and imminent deprivation of these rights, if the admission of the defendant's statutorily compelled statement were admitted into this regulatory proceeding, that would not accord with the principles of fundamental justice.

165 If the defendant were convicted of this particular Part I regulatory offence, s. 214(1) of the Highway Traffic Act and s. 12 of the Provincial Offences Act, R.S.O. 1990, c. P.33, subject him only to a maximum monetary fine of $500. There is no direct possibility he would receive a custodial sentence for failing to report an accident under s. 199(1). Therefore, the defendant's right to life and liberty interests would not be affected by the admission of this statutorily compelled report. His security interest, on the other hand, would be affected by the admission of this compelled statement. Specifically, his individual right to privacy, personal autonomy and human dignity would be affected by having a statement he was statutorily compelled to make to the police, subsequently used to incriminate him in a regulatory proceeding. This security interest, however, is only marginally affected, since driving is a regulated activity in which drivers give their free and informed consent to obey the rules of the road, including compulsory reporting of accidents, as a condition of receiving the privilege to drive. The only personal information pertaining to the defendant being submitted as evidence from that report is that he was the driver of the vehicle and his excuse for not reporting promptly. The defendant's right to privacy, autonomy and dignity in this case will only face minimal intrusion, if the statutorily compelled statement were admitted.

166 The Supreme Court in R. v. Fitzpatrick and R. v. White have held that criminal precedents involving self-incrimination should not be applied rigidly to regulatory prosecutions. They also have held that not all statutorily compelled statements or information is protected by the principle against self-incrimination under s. 7 of the Charter, nor is it contrary to the principles of fundamental justice to convict someone of a regulatory offence on the basis of a compulsory statutory report given by that person.

167 Now, to the central factor that I used to determine whether the admission of the defendant's statutorily compelled statement in a regulatory proceeding, that marginally infringes the defendant's security interest, would accord with the principles of fundamental justice. The key to this case is found in the relationship of the "use immunity shield" provided in the regulatory legislation considered in R. v. White with the admissibility of compulsory accident reports. In that case, the Supreme Court held that the information statutorily compelled to be given in an accident report could not be used against the accused in a criminal prosecution since its admissibility would violate the right against self-incrimination. The British Columbia Motor Vehicle Act, R.S.B.C. 1979, c. 288, the statute under consideration in R. v. White, provided in its s. 61(7) an "immunity or prohibition against future use" of any statements made under an accident report for any prosecutions under that Motor Vehicle Act. That is, any information contained in the report or the report itself could not be used as evidence in any subsequent proceedings or charges prosecuted under that Act. However, the legislation did provide two exceptions to this "use immunity shield" contained in s. 61(7): the reports could be admitted as evidence for proving compliance of reporting an accident or for prosecuting someone making a false statement in that report. Clearly then, these compulsory reports could be used as evidence in only extraordinary circumstances, such as proving compliance with reporting accidents.

168 Although the Ontario Highway Traffic Act does not have a similar "use immunity shield" like s. 61(7) of the Motor Vehicle Act, I am persuaded by the action of the legislators in British Columbia, who on one hand found it necessary in fulfilling some regulatory objective, to provide immunity to people making accident reports in British Columbia from having these reports used against them, yet decided that the public interest was paramount in compelling people to report accidents, when it did not bar these same reports from being used in proceedings to prove compliance with reporting accidents. From that inference, I am also convinced that there should be no bar or "use immunity shield" to prevent the use of a statutorily compelled accident report in prosecuting someone for making false statements in an accident report or for using it to prove someone failed to report an accident under the Highway Traffic Act.

169 In conclusion, I find that although the defendant's right to security of the person has been infringed marginally by the admission of his statutorily compelled statement in this regulatory proceeding, it does not violate the rule against self-incrimination as a principle of fundamental justice contained in s. 7.

Would the admission of the statutorily compelled statement render the trial unfair under the common law?

170 Even if there had been an infringement of s. 7, I was statutorily barred from granting a remedy under the Charter as the defendant had failed to comply with the Notice of Constitutional Question requirements under s. 109 of the Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12. Therefore, if an exclusion of the inculpatory statement is warranted based on the principle against self-incrimination, it has to be found within the availability of a remedy under the common law relating to trial unfairness.

171 The Supreme Court in R. v. Wray, [1971] S.C.R. 272, held that the principle is not whether the admission of self-incriminating evidence would be unjust or unfair to the accused, but whether its admission would operate unfairly. Operating unfairly meant the probative value of the evidence was trifling to the main issue, yet prejudicial to the accused. It did not operate unfairly when the admissible evidence was relevant to the main issue and had substantial probative value, although it might operate unfortunately against the accused.

172 In order for the court to exclude the defendant's statutorily compelled statement under the common law, the admission of this statement must have little probative value, but be of serious prejudicial effect where it would operate unfairly to the defendant. The defendant's statement that he was the driver does not operate unfairly against the defendant under the Wray test, as the statement is relevant to the main issue and is of significant probative value, although it operates unfortunately against the defendant's interest. Thus, the exclusion of the inculpatory statement is not warranted under the common law.

173 In sum, if the statutorily compelled statement were admitted as evidence in this regulatory proceeding there would be no breach of the principle against self-incrimination under s. 7, nor would its admission make the trial operate unfairly under the common law. Therefore, the defendant's voluntary statement that he had been driving the vehicle is not excluded from this proceeding.

6. DISPOSITION

174 In the result, it is the finding of this Court that the prosecution, based on the totality of the evidence before the court, has proven beyond a reasonable doubt that the defendant, Blain C. Colquhoun, is guilty of failing to report an accident contrary to section 199(1) of the Highway Traffic Act, R.S.O. 1990, c. H-8. A conviction will be entered against the defendant.

* * * * *

APPENDIX A

[para175]

Cases Considered or referred to:

1. R. v. Bakker, [1986] O.J. No. 2705, 41 M.V.R. 190 (Ont. Prov. Ct.) per Geiger J.
2. R. v. Corbett, [1988] S.C.J. No. 40 (S.C.C.).
3. R. v. DaCosta, [2001] O.J. No. 2392 (Ont. Sup. C.J.) per Wein J.
4. R. v. Fitzpatrick, [1995] 4 S.C.R. 154, 102 C.C.C. (3d) 144 (S.C.C.).
5. R. v. Harripersad, [2001] O.J. No. 3639 (Ont. Sup. C.J.) per Seppi J. at Brampton.
6. R. v. Hicks (1988), 42 C.C.C. (3d) 394, 64 C.R. (3d) 68, 37 C.R.R. 151 (O.C.A.).
7. R. v. Jones (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229.
8. R. v. Marshall, [1961] S.C.R. 123 (S.C.C.).
9. R. v. Mitchell, [2000] O.J. No. 735 (Ont. C.J.) per Reinhardt J. at Toronto.
10. R. v. Naces, [2001] O.J. No. 3854 (Ont. C.J.) per Horkins J. at Toronto.
11. R. v. Sarkonak (1990), 23 M.V.R. (2d) 45, 53 C.C.C. (3d) 542, 63 Man. R. (2d) 174 (Q.B.).
12. R. v. Slopek (1974), 21 C.C.C. (2d) 362 (Ont. C.A.) per Gale C.J.O., Brooke and Martin JJ.A.
13. R. v. Stillman, [1997] S.C.J. No. 34 (S.C.C.).
14. R. v. White, [1999] S.C.J. No. 28 (S.C.C.).
15. R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.).
16. R. v. Wray, [1971] S.C.R. 272 (S.C.C.).
17. R. v. Zalai, [2000] O.J. No. 3294 (Ont. C.J.), per Oates J.P. at Toronto.
18. Reference re Motor Vehicle Act (British Columbia) S. 94(2), [1985] 2 S.C.R. 486, S.C.J. No. 73 (S.C.C.).

Statutes, Regulations and Rules cited:

1. Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, ss. 7, 11(d), 24(1), 24(2).
2. Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12, ss. 95(3), s. 109.
3. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 91(27).
4. Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 31, 199(1), 199(2), 214(1).
5. Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 61(7).
6. Provincial Offences Act, R.S.O. 1990, c. P.33, s. 8(1), 12.
7. General regulation of Highway Traffic Act (R.R.O. 1990, Reg. 596): am. O. Reg. 537/97, s. 11.

Authorities referred to:

1. Sharpe and Swinton, The Charter of Rights and Freedoms (1998) (Irwin Law, Toronto: 1998), chap. 13(A)).

cp/e/nc/qlhcc/qlkjg

1 R.R.O. 1990, Reg. 200, rule 6 provides the authority for the Chief Justice of the Ontario Court of Justice to determine the amount of the set fine for an offence commenced under Part 1 of the Provincial Offences Act.