Her Majesty The Queen *Appellant*

v.

Joann Kimberley White *Respondent*

1999 CanLII 689 (S.C.C.)

Indexed as: R. *v*. White

File No.: 26473.

1998: November 13; 1999: June 10.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Fundamental justice -- Self-incrimination -- Accused charged under Criminal Code with leaving scene of accident -- Provincial legislation requiring persons involved in traffic accident to complete accident report -- Whether accused's statements made under compulsion in traffic report admissible in criminal proceedings -- Canadian Charter of Rights and Freedoms, ss. 7, 24(1), (2) -- Criminal Code, R.S.C., 1985, c. C-46, s. 252(1)(a) -- Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 61(1), (1.1), (7).

The respondent was involved in an accident and reported it to the police by telephone the next day. A police officer attended at her home and she told him her version of the accident. The officer then read her *Charter* rights to her. The respondent then spoke to her lawyer and subsequently advised the officer that she, on her lawyer's advice, would not provide a statement with respect to the accident. In response to a question by the officer, the respondent confirmed some elements of her previous statements. The officer then advised her, however, that even though she was not required to provide a written statement, she would be required to provide a statement, if requested by the police, under the *Motor Vehicle Act* and that that statement could not be used against her in court. The respondent was later charged with failing to stop at the scene of an accident under s. 252(1)(*a*) of the *Criminal Code*. At trial, the Crown sought to adduce evidence of the three conversations that the respondent had had with the police; elements of the conversations linked the respondent to the accident. On a *voir dire*, the respondent stated that she knew immediately on being involved in an accident that she was under a duty to report it. She stated that she felt the officer had attended at her premises to take an accident report and that she was under a duty to speak to him about the accident and that she felt so obligated even after speaking with her lawyer.

The trial judge, even though he found the respondent's statements to be voluntary, allowed a defence motion as to an infringement of s. 7 (self-incrimination as part of fundamental justice) and excluded the statements under s. 24(1) (appropriate and just remedy) of the *Canadian Charter of Rights and Freedoms*. A motion to dismiss the charge on the basis that the Crown had adduced no evidence as to the identity of the person driving the vehicle involved in the accident was granted. The Court of Appeal dismissed a Crown appeal on the s. 7 issue. The primary issue here is whether the admission into evidence in a criminal trial of statements made by the accused under

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compulsion of the *Motor Vehicle Act* offends the principle against self-incrimination embodied in s. 7 of the *Charter*.

Held (L'Heureux-Dubé J. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ.: Statements made under compulsion of s. 61 of the *Motor Vehicle Act* are inadmissible in criminal proceedings against the declarant. Their admission in a criminal trial would violate the principle against self-incrimination, which is one of the fundamental principles of justice protected by s. 7 of the *Charter*. The respondent's statements to the police in this case were made under compulsion.

Several self-incrimination concerns were present here. Firstly, 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 to be entirely absent in this context. Secondly, the vesting of responsibility for taking accident reports in the police transforms what might otherwise be a partnership relationship into one that is adversarial, for the police officer can simultaneously be investigating a possible crime where the driver is a suspect. The driver is generally in the officer's immediate physical presence at the time of giving the accident report, resulting in a context of psychological and emotional pressure. Thirdly, the prospect of unreliable confessions is very real because accident reports are frequently given directly to a police officer who might be seen as a person in authority and whose physical presence might cause a person to produce a statement in circumstances where that person is not willing to speak and where there may be a strong incentive to provide a false statement. Fourthly, the possibility is real and serious that permitting the use of compelled accident reports within criminal

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proceedings might increase the likelihood of abusive conduct by the state. The police can question a person suspected of a motor vehicle offence but if they wish to use this information in a criminal proceeding the information must not be provided pursuant to the *Motor Vehicle Act*. Finally, an accident report is a personal narrative and its use to incriminate clearly affects the declarant's dignity. The reduced expectation of privacy in a vehicle generally is irrelevant.

The protection afforded by the principle against self-incrimination does not vary according to the relative importance of the self-incriminatory information sought to be used. If s. 7 is engaged by the circumstances surrounding the admission of a compelled statement, the concern with self-incrimination applies in relation to all of the information transmitted in the compelled statement. Immunity against the use of an accident report in subsequent criminal proceedings is itself a balancing between society's goal of discerning the truth, and the fundamental importance for the individual of not being compelled to self-incriminate. The balance which must be struck in the context of the reporting provision of the *Motor Vehicle Act* is between a driver's right not to be compelled to self-incriminate in criminal proceedings and the province's interest in highway safety.

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 statement may properly be considered compelled. The test for compulsion under s. 61(1) 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. The basis of a subjective belief exists because compulsion implies an absence of consent. The requirement that the belief be reasonably held also relates to the meaning of compulsion.

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The Crown does not bear the onus of establishing that an accident report was not made pursuant to the statutory duty to report. Rather, since the onus lies on the person raising the *Charter* challenge to establish an infringement of his or her rights, it is the accused who must establish on the balance of probabilities that the statement was compelled. The trial judge did not misapply the onus. His reasons reflected the uncontroversial view that once a *prima facie* case has been made with respect to an element of a *Charter* claim, it is left to the Crown to adduce evidence to rebut that *prima facie* case.

It may not be necessary to use s. 24(1) of the *Charter* in order to exclude evidence whose admission would render the trial unfair. Section 24(1), however, may appropriately be employed as a discrete source of a court's power to exclude such evidence. Here, exclusion was required. There was evidence on which the trial judge could reasonably have found the accused's statements to be compelled by s. 61 of the *Motor Vehicle Act*.

Per L'Heureux-Dubé J. (dissenting): In addition to their duty to receive a mandatory accident report, police officers also have the duty to investigate criminal conduct, such as the failure to stop at the scene of an accident. These different functions are not incompatible. However, when performing these various functions implies the risk of self-incrimination, the police must make efforts to clarify the purpose of their presence.

The principle against self-incrimination must be applied on a case-by-case basis and must begin with a concrete and contextual analysis in the circumstances. As stated by Iacobucci J., the proper test for determining whether the statements should be considered to have been made under the compulsion of s. 61 is whether, at the time the

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accident report was given, 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. The trial judge applied the wrong test and his findings, which were based on several errors of law, cannot stand.

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There is evidence to conclude that the first two statements are inadmissible because they were made under statutory compulsion. The third, which was made after the police officer had informed the respondent of her s. 10(*b*) *Charter* rights and her right to silence is admissible, since it was voluntary and freely made. In giving the warnings, the officer clearly indicated that the matter was serious and that he was starting a criminal investigation. Any ambiguity as to whether the officer was there to take a report under the Act was no longer present after the warning. The evidence must not only disclose that the respondent subjectively believed that she was under a statutory duty to report, but must also establish an objectively reasonable basis for that belief. No such objective basis was established here because the accused (1) was cautioned about her right to a lawyer, (2) contacted her lawyer who advised her not to make any comments and (3) told the officer that she would not make a statement about the accident. There is no rule prohibiting the use, for questioning purposes, of information gathered under a statutory duty to report or any information gathered otherwise.

Cases Cited

By Iacobucci J.

Distinguished: *R. v. Fitzpatrick,* [1995] 4 S.C.R. 154; **considered:** *R. v. Jones,* [1994] 2 S.C.R. 229; *R. v. Therens,* [1985] 1 S.C.R. 613; *R. v. Collins,* [1987] 1 S.C.R. 265; *R. v. Harrer,* [1995] 3 S.C.R. 562; *Schreiber v. Canada (Attorney General),*

[1998] 1 S.C.R. 841; *R. v. Terry*, [1996] 2 S.C.R. 207; **referred to:** *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Spyker* (1990), 63 C.C.C. (3d) 125; *R. v. Stillman*, [1994] B.C.J. No. 646 (QL); *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Finlay*, [1993] 3 S.C.R. 103; *Walker v. The King*, [1939] S.C.R. 214; *R. v. Hodgson*, [1998] 2 S.C.R. 449; *Starr v. Houlden*, [1990] 1 S.C.R. 1366; *R. v. Strachan*, [1988] 2 S.C.R. 980.

By L'Heureux-Dubé J. (dissenting)

R. v. Fitzpatrick, [1995] 4 S.C.R. 154; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Schmautz*, [1990] 1 S.C.R. 398; *Ibrahim v. The King*, [1914] A.C. 599; *Boudreau v. The King*, [1949] S.C.R. 262.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 10(*b*), 11(*c*), 13, 24(1), (2).

Constitution Act, 1867, s. 91(27).

Criminal Code, R.S.C., 1985, c. C-46, s. 252(1)(*a*).

Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 61(1) [am. 1986, c. 19, s. 2; 1990, c. 71, s. 7], (1.1) [ad. 1990, c. 71, s. 7], (4) [am. 1986, c. 19, s. 2], (7) [*idem*], 69.

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), 122 C.C.C. (3d) 167, 13 C.R. (5th) 187, 32 M.V.R. (3d) 161, [1998] B.C.J. No. 82 (QL), dismissing an appeal from acquittal by Carlgren Prov. Ct. J. Appeal dismissed, L'Heureux-Dubé J. dissenting.

William F. Ehrcke, Q.C., for the appellant.

Peter Burns, for the respondent.

The judgment of Lamer C.J. and Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ. was delivered by

//*Iacobucci J.*//

1 IACOBUCCI J. -- The primary question in this appeal is whether the admission into evidence in a criminal trial of statements made by the accused under compulsion of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, offends the principle against self-incrimination as embodied in s. 7 of the *Canadian Charter of Rights and Freedoms*.

2 The case involves a Crown appeal both with leave and as of right from a judgment of the Court of Appeal for British Columbia, which dismissed the Crown's appeal from the respondent's acquittal on a charge of failure to stop at the scene of an accident under s. 252(1)(*a*) of the *Criminal Code*, R.S.C., 1985, c. C-46. At issue are three separate statements made to police by the respondent, purportedly pursuant to the duty set out in s. 61 of the *Motor Vehicle Act* to report a motor vehicle accident. The trial judge excluded the three statements under s. 24(1) of the *Charter*, on the basis that

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their admission into evidence would violate s. 7. The Crown argues that the admission of these statements would not have violated s. 7 of the *Charter*. The Crown also contests whether, in law, the three statements can all be considered to have been made pursuant to the statutory duty to report an accident.

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I. Factual Background

A. *The Respondent's Three Conversations with Police*

3 Around midnight on October 6, 1994, Lawrence O'Brien was changing a tire on the side of a local highway near Fernie, British Columbia, when he was struck by a passing vehicle. O'Brien was thrown several feet and died in hospital from his injuries a number of hours later. During their investigation into the accident, police observed that the driver's door of O'Brien's vehicle was dented and had fresh scrape marks on it. Plastic fragments from a broken yellow vehicle turn signal were strewn on the ground nearby.

4 During the morning of October 7, 1994, a telephone call came in to the R.C.M.P. detachment in Fernie from a woman who identified herself as Joann Wright or White. Corporal Dehmke testified that the woman advised him that she wanted to report an incident that had happened the night before, in which she had swerved to miss a deer on the road and had hit a jack and a man changing a tire. The woman stated that she had panicked and left the scene, and she asked Cpl. Dehmke how the man was. Cpl. Dehmke asked the caller for her birth date and address, which she provided. He advised the woman that an officer would soon attend at her address to speak with her. This was the first of three conversations which the respondent would have with police that morning.

5 About half an hour later, Sergeant Tait of the R.C.M.P. attended at the respondent's trailer. Sgt. Tait observed a blue Ford pickup truck outside the trailer, with noticeable damage to its right front corner. Sgt. Tait met the respondent outside and identified himself. The respondent asked him how the fellow from the accident was. Sgt. Tait informed her that the man had died. The respondent became very upset, and took about 10 minutes to regain her composure. The respondent told Sgt. Tait that she had swerved to miss hitting deer in the road and that she had hit a jack, panicked, and driven on. Sgt. Tait asked the respondent for her driver's licence, which she provided to him. Sgt. Tait then read the respondent her rights under s. 10(*b*) of the *Charter*, and warned her that she was not obliged to say anything but that anything she did say might be given in evidence. Sgt. Tait did not place the respondent under arrest, but indicated that he would like to talk to her outside once she had spoken to a lawyer, if she chose to do so. Sgt. Tait then went outside. This exchange was the second conversation between the respondent and police.

6 The respondent called a lawyer from a neighbour's trailer. About 45 minutes later she returned and got into the front seat of Sgt. Tait's police car. She said that she had spoken with a lawyer and that, on the lawyer's advice, she would not provide a statement with respect to the accident. Sgt. Tait told her she did not have to provide a written statement. He asked her if she had swerved to miss a deer, as she had said earlier. She replied: "Actually there were two. It was on the blind corner across from the mill at Galloway. I just swerved and I thought I hit the jack and I panicked. I'm sorry." Sgt. Tait informed the respondent of some of the charges she might face as a result of the accident. Sgt. Tait then told the respondent that even though she was not required to provide a written statement, she would be required to provide a statement, if requested to do so by police, under the British Columbia *Motor Vehicle Act*. He told

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the respondent that any statement she gave under the *Motor Vehicle Act* could not be used against her in court, but Sgt. Tait did not expressly request a statement under the *Motor Vehicle Act* from the respondent. This was the respondent's third and final conversation with police on the morning of October 7, 1994.

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7 Sgt. Tait seized the pickup truck that was in the respondent's driveway. The truck was later determined to be owned by the respondent's husband. The plastic fragments from the accident scene were matched to the damage to the truck's right front corner.

8 The respondent was charged under s. 252(1)(*a*) of the *Code* with the offence of failure to stop at the scene of an accident. The Crown proceeded by indictment. The respondent elected to have the trial heard by a provincial court judge. At trial, the Crown sought to adduce evidence of the three conversations between the respondent and police on October 7, 1994. Defence counsel argued that the respondent's various statements to police were involuntary, that they were obtained in violation of her s. 10(*b*) *Charter* rights, and that their admission into evidence would violate her right under s. 7 of the *Charter* not to be compelled to incriminate herself. A joint *voir dire* was held on all of these issues.

9 The respondent testified on the *voir dire*. She stated that she knew immediately upon being involved in the accident that she was under a duty to report it. With respect to her first conversation with Sgt. Tait, prior to the giving of the s. 10(*b*) warning, the respondent testified that she felt that he had attended at her premises to take an accident report, and that she was under a duty to speak to him about the accident. She stated that she continued to feel obligated to speak to him after she had spoken to a lawyer.

10 The trial judge, Carlgren Prov. Ct. J., accepted the respondent's evidence that she believed she was required by law to report the accident to police. Although he found that the respondent's statements to police were voluntary, and dismissed the motion under s. 10(*b*), he allowed the s. 7 motion and excluded the respondent's statements to police pursuant to s. 24(1) of the *Charter*. At the close of the Crown's case, defence counsel brought a motion to have the charge against the respondent dismissed on the basis that the Crown had adduced no evidence as to the identity of the person driving the truck which had struck Mr. O'Brien. The motion was granted and the respondent was acquitted. A Crown appeal on the s. 7 issue was dismissed by a majority of the Court of Appeal for British Columbia.

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B. *Accident Reports Under the Motor Vehicle Act*

11 Section 61 of the British Columbia *Motor Vehicle Act* establishes a statutory regime requiring and regulating the reporting of motor vehicle accidents in the province. Sections 61(1) and (1.1) require a driver involved in a motor vehicle accident to report the accident where the accident has caused death or personal injury, or has caused property damage beyond a certain monetary value. The driver is expressly required to provide information to the person who receives the accident report (usually the police) as required. The provisions read as follows:

> **61.** (1) Where a vehicle driven or operated on a highway, either directly or indirectly, causes death or injury to a person or damage to property causing aggregate damage apparently exceeding the amount set out in subsection (1.1), the person driving or in charge of the vehicle shall report the accident to a police officer or to a person designated by the superintendent to receive those reports, and shall furnish the information respecting the accident required by the police officer or designated person.
>
> (1.1) The amount referred to in subsection (1) is

> (a) $1 000, in the case of a vehicle other than a motor cycle, and
>
> (b) $600, in the case of a motor cycle.

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12 Section 61(4) imposes a corresponding duty upon the person who receives an accident report to secure information from the driver and from other sources and to prepare a written report. The recipient of the information is required by law to secure the particulars of the accident, the persons involved, the extent of the personal injury or property damage, and other necessary information:

> (4) The person receiving a report under this section shall secure from the person making it, or by other inquiries where necessary, the particulars of the accident, the persons involved, the extent of the personal injury or property damage and other information necessary to complete a written report of the accident, and shall forward the written report to the superintendent within 10 days after being advised of the accident.

13 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:

> (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.

As is discussed below, the parties have agreed that this use immunity applies only in provincial proceedings and not in proceedings under the *Code*.

II. Judicial History

A. *Provincial Court of British Columbia*

14 Carlgren Prov. Ct. J. held that the respondent's three statements to police on October 7, 1994, were all made under the statutory compulsion of s. 61 of the *Motor Vehicle Act*. Carlgren Prov. Ct. J. first considered whether the conditions precedent to the obligation to report an accident existed in the respondent's case. He asked whether, as a general matter, the obligation to report an accident exists as soon as a driver has a subjective and possibly mistaken belief in the duty to report the accident, or whether the belief must be objectively reasonable in light of the requirements of the statute. He found that, where a party wishes to claim the benefit of the use immunity accorded by s. 61(7), as distinct from where a person is being prosecuted for a failure to report an accident, objective reasonableness is not required in order for a report to be deemed to have been made pursuant to the duty in s. 61(1). An accident report, he concluded, "is a statement concerning an accident made to a police officer by a person who believes it is a statement required to be made".

15 Carlgren Prov. Ct. J. went on to state that, if he were wrong in his determination of what constitutes a compelled accident report under ss. 61(1) and (7), the obvious damage to the respondent's husband's truck in this case, as apparent from photographs filed as exhibits, was sufficient for the respondent to have held a reasonable belief that she was required to report the accident. He held that the respondent subjectively believed that she was required to report the accident, and that when she called the R.C.M.P. on the morning of October 7, 1994, and engaged in subsequent conversations with the police, she did so pursuant to her perceived obligation to report.

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16 Carlgren Prov. Ct. J. held that the admission of the respondent's three statements to police as evidence against her in her criminal trial would violate s. 7 of the *Charter*, and that the statements should therefore be excluded pursuant to s. 24(1). He reviewed the decisions of this Court in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, as well as the decisions of the British Columbia Supreme Court in *R. v. Spyker* (1990), 63 C.C.C. (3d) 125, and *R. v. Stillman*, [1994] B.C.J. No. 646 (QL). Both of these latter trial judgments had excluded statements made under the compulsion of provincial statutes from criminal trials on the basis that their use in the trial would itself be a breach of the accused's s. 7 rights. Carlgren Prov. Ct. J. held that he was bound to accept these two decisions as determinative, provided the respondent could establish that she fell within the scope of the principles enunciated therein.

17 Carlgren Prov. Ct. J. found that the respondent had established that admission of the statements would violate s. 7. He concluded that, although the principles of fundamental justice must reflect a balance between the interests of society and the interests of the individual seeking the protection of s. 7, use immunity is itself a reflection of that balance. Carlgren Prov. Ct. J. held that *Spyker* and *Stillman* applied in the respondent's case to require the exclusion of all three statements, and he excluded them pursuant to s. 24(1).

18 At the end of his reasons, Carlgren Prov. Ct. J. commented that s. 61 of the *Motor Vehicle Act* is vague as to what information is required to be reported by a driver. He stated that this vagueness should enure to the benefit of the accused, unless the

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Crown is able to establish that a particular statement was not made pursuant to the statutory obligation to report an accident.

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B. *Court of Appeal for British Columbia* (1998), 122 C.C.C. (3d) 167

(1) Esson J.A., Lambert J.A. concurring

19 Esson J.A. reviewed the decision of this Court in *Thomson Newspapers*, *supra*. He stated that all five members of the Court in that case agreed that, where testimony is compelled in the context of proceedings investigating wrongdoing and potentially resulting in criminal charges, s. 7 affords protection co-extensive with the individual's testimonial participation, through use immunity in those subsequent criminal proceedings.

20 Esson J.A. reviewed this Court's decision in *Fitzpatrick*, *supra*, and concluded that it was not applicable to the facts of the respondent's case. Esson J.A. noted that one of the reasons why the admission of the compelled records in that case was found not to violate s. 7 was that the maintenance of the records was an integral part of a regulatory scheme in which both the accused and the Crown were participants. Exclusion of the records would have "remove[d] the teeth" from the regulatory scheme itself (p. 177). The difference between *Fitzpatrick* and this case, he stated, was that the respondent was being prosecuted for a criminal offence. None of the reasoning in *Fitzpatrick* could be applied in this different context. Esson J.A. stated that, if compulsory accident reports could be used against an accused in criminal proceedings, this would compromise the integrity of the statutory reporting scheme, since motorists would prefer to refrain from reporting accidents rather than risk self-incrimination.

21 With respect to the issue of whether all of the respondent's statements to police were made pursuant to her statutory obligation under s. 61(1), Esson J.A. stated that there was evidence upon which the trial judge could have reached the conclusion he did that they were, and that he saw no basis for interfering with that conclusion.

22 Esson J.A. then discussed the trial judge's comments regarding the vagueness of the reporting requirement created by s. 61. Esson J.A. found that, contrary to the Crown's submission, the trial judge had not imposed a reverse onus on the Crown to prove that a statement by the accused was not made pursuant to a statutory obligation under s. 61(1). Esson J.A. interpreted the trial judge as first having determined that the respondent had met the onus of establishing a *prima facie* case that her statements were made pursuant to the reporting requirement, and then having ruled that it was up to the state to adduce evidence of its own to rebut this *prima facie* case, in accordance with the ordinary onus of proof in *Charter* matters. Esson J.A. found no error in principle in the manner in which the trial judge dealt with what Esson J.A. described, at p. 179, as a "rather tricky question". Esson J.A. therefore dismissed the Crown's appeal.

(2) Southin J.A. dissenting

23 Southin J.A. began her analysis by noting that the *Charter* does not contain a blanket protection against self-incrimination. She referred to the judgment of this Court in *Fitzpatrick*, *supra*, which emphasized the importance of engaging in a contextual analysis in order to determine whether the principle against self-incrimination has been engaged. Southin J.A. stated that the principles of fundamental justice under s. 7 require a balance to be struck between the interest of the individual claiming the protection of s. 7, and the interest of society in providing a fair and workable system of justice. She emphasized Canadian society's pressing interest in curbing motor vehicle

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offences, referring on this point to the reasons of Cory J. in *R. v. Hundal*, [1993] 1 S.C.R. 867, and to recent statistics regarding death and injury rates from motor vehicle accidents in British Columbia.

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24 Southin J.A. did not accept the Crown's submission that the analysis applied by the Court in *Fitzpatrick, supra*, was similarly applicable to the respondent's case. She noted that, although driving is a regulated activity, driving is one of life's necessities, such that it cannot be said that compulsory accident reporting constitutes voluntary compliance with a chosen regulatory regime. As she stated, at p. 194, "these sections are coercive and were intended by the Legislature to be so."

25 Nonetheless, Southin J.A. held that the principles of fundamental justice are not violated where at least some elements of a compulsory accident report are adduced as evidence in a criminal trial for a driving offence. She stated that, if Parliament enacted a statute providing that statements compelled by the *Motor Vehicle Act* were admissible in criminal proceedings, that statute would be sustained either under s. 7 or under s. 1 of the *Charter*, at least to the extent of rendering admissible the name and address of the driver and the fact that he or she was driving at a certain place and time. Admitting any more of the statements, though, would go beyond the needs of society. As a result, she found that the trial judge's imposition of a rule of automatic exclusion of all statutorily compelled statements was over broad.

26 With respect to the facts of the case, Southin J.A. accepted the trial judge's finding that the respondent's initial telephone call to police was founded in an honest belief that she was under an obligation to speak to police. She also agreed with the trial judge's conclusion that such an honest belief is all that is required to bring a statement within the scope of s. 61(1) of the *Motor Vehicle Act* as a compelled statement. Southin

J.A. found that the second conversation with police, when Sgt. Tait first arrived at the respondent's trailer, was simply an extension of the initial phone call. However, she held that the third conversation, taking place as it did after a s. 10(*b*) warning and after the respondent had spoken to counsel, could not be considered compelled and was thus admissible in its entirety as an uncompelled statement, regardless of the analysis under s. 7 of the *Charter*.

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27 Finally, Southin J.A. stated that the trial judge's remarks as to the need for the Crown to demonstrate a lack of statutory compulsion under s. 61 were *obiter*, and she did not consider it necessary to comment further on them.

III. Issues

28 The formal order of the Court of Appeal states that Southin J.A.'s dissent is founded upon three issues of law, namely:

> 1. Whether there is a rule of automatic and complete exclusion in a criminal trial of all statements made by an accused under compulsion of statute, namely, section 61 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288.
>
> 2. Whether the voluntary statement of an accused made under the statutory compulsion of s. 61 of the *Motor Vehicle Act* that he or she was driving at a particular time and place must automatically be excluded as evidence in a criminal trial.
>
> 3. Whether the trial judge erred in law in concluding that the voluntary statement of the accused to Sgt. Tait after she had been informed of her section 10 *Charter* rights and after she had consulted with counsel must be excluded from evidence on the basis that it was a statement made under compulsion of the provisions of the *Motor Vehicle Act*. [Emphasis added.]

29 The Crown was subsequently granted leave to appeal to this Court on two closely related grounds:

> 1. That the British Columbia Court of Appeal erred in law in failing to find that statements compelled by the operation of s. 61 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, are properly admissible in evidence on a criminal trial for reasons analogous to those in *Regina v. Fitzpatrick*, [1995] 4 S.C.R. 154.
>
> 2. That the British Columbia Court of Appeal erred in law in failing to find the trial judge erred in law both in placing the onus on the Crown, and also in his determination of what constitutes a statement made under the compulsion of s. 61 of the *Motor Vehicle Act*.

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IV. Analysis

A. *Introduction*

30 To begin with, I am in general agreement with the lucid reasons of and conclusions reached by Esson J.A. in the Court of Appeal in this case. Statements made under compulsion of s. 61 of the *Motor Vehicle Act* are inadmissible in criminal proceedings against the declarant because their admission would violate the principle against self-incrimination. I agree with Esson J.A. that the respondent's three statements to police in this case were properly found by the trial judge to have been made under compulsion of s. 61, and that the trial judge did not impose a reverse onus on the Crown to disprove such compulsion.

31 In these reasons, I wish to elaborate upon Esson J.A.'s conclusions, and to deal with the other issues raised by the appellant and by the dissent of Southin J.A. In this respect, a brief outline of the structure of the reasons may be useful.

32 I begin with a discussion of the primary issue of why statements made to police under compulsion of s. 61 of the British Columbia *Motor Vehicle Act* are inadmissible in criminal proceedings against the declarant. This discussion relating to s. 7 of the *Charter* constitutes the bulk of the analysis. In light of the dissenting reasons of Southin J.A. in the Court of Appeal, I also consider the more specific question of whether the statements are admissible for the limited purpose of revealing the declarant's name and address and the fact that he or she was driving at a particular place and time.

33 Next, I examine the issue of when, in law, a statement may properly be characterized as having been made pursuant to s. 61 of the *Motor Vehicle Act*. In particular, is a subjective belief that one is making a statement pursuant to s. 61 sufficient, or must the belief also be reasonably held? Also, who bears the onus of establishing that a statement was made pursuant to s. 61 of the *Motor Vehicle Act*?

34 Finally, I consider the court's power to exclude evidence whose admission at a criminal trial would violate s. 7 of the *Charter*, and conclude with a discussion of the admissibility of the respondent's three conversations with police on October 7, 1994.

35 It should be noted that, in their submissions before this Court, the parties have not disputed two legal issues. First, the parties agree that the use immunity created by s. 61(7) of the *Motor Vehicle Act* does not extend to proceedings under the *Code*, because it would be *ultra vires* the province of British Columbia to restrict the admissibility of evidence in criminal matters. It is for this reason that the respondent has sought the protection of the *Charter* in order to exclude her three statements to police.

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36 Second, the respondent has not contested the trial judge's finding that the respondent's statements to police were voluntary. The issue of voluntariness is thus not squarely raised in this appeal, and I do not intend to discuss it.

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B. *The Section 7 Issue*

37 The principal s. 7 issue in this appeal is whether the admission into evidence in a criminal trial of statements made under compulsion of s. 61 of the *Motor Vehicle Act* would violate the principle against self-incrimination. The respondent did not challenge the constitutional validity of s. 61 at trial, but rather sought a remedy under s. 24(1) of the *Charter*. The respondent's position and the finding in the courts below is that, while compelling a driver to report a motor vehicle accident accords with s. 7 of the *Charter*, the principle against self-incrimination as embodied in s. 7 requires at least that the driver be protected against the subsequent use of such a report in criminal proceedings.

38 Section 7 of the *Charter* reads as follows:

> **7.** 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.

Where a court is called upon to determine whether s. 7 has been infringed, the analysis consists of three main stages, in accordance with the structure of the provision. 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.

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39 In the present case, it is clear that the respondent's liberty interest is engaged by the potential admission into evidence of her three statements to police on October 7, 1994, because she faces the possibility of up to five years' imprisonment if convicted on indictment under s. 252(1)(*a*) of the *Code*. The pivotal question is whether the admission of the three statements would accord with the principles of fundamental justice.

C. *The Principle Against Self-Incrimination*

(1) General Principles

40 It is now well-established that there exists, in Canadian law, a principle against self-incrimination that is a principle of fundamental justice under s. 7 of the *Charter*. The meaning of the principle, its underlying rationale, and its current status within Canadian law have been discussed in a series of decisions of this Court, notably *Thomson Newspapers, supra*; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, *per* Lamer C.J.; *R. v. Jones*, [1994] 2 S.C.R. 229, *per* Lamer C.J.; *S. (R.J.), supra*; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; and *Fitzpatrick, supra*.

41 The principle against self-incrimination was described by Lamer C.J. in *Jones, supra*, at p. 249, as "a general organizing principle of criminal law". The principle is that an accused is not required to respond to an allegation of wrongdoing made by the

state until the state has succeeded in making out a *prima facie* case against him or her. It is a basic tenet of our system of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused should respond: *P. (M.B.)*, *supra*, at pp. 577-79, *per* Lamer C.J., *S. (R.J.)*, *supra*, at paras. 81 to 83, *per* Iacobucci J.

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42 In *Jones*, *supra*, the principle against self-incrimination was defined as an assertion of the fundamental importance of individual freedom. As the Chief Justice stated, at pp. 248-49:

> The principle against self-incrimination, in its broadest form, can be expressed in the following manner:
>
> > . . . the individual is sovereign and . . . proper rules of battle between government and individual require that the individual . . . not be conscripted by his opponent to defeat himself. . . .
>
> (*Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), § 2251, at p. 318.)
>
> . . .
>
> Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

Similarly, in *S. (R.J.)*, *supra*, at para. 81, is the reference to "the principle of sovereignty embodied in the idea that individuals should be left alone in the absence of justification, and not conscripted by the state to promote a self-defeating purpose".

43 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*, *supra*, at pp. 250-51, 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: see, e.g., *Thomson Newspapers*, *supra*, at p. 480, *per* Wilson J.; *Jones*, *supra*, at pp. 250-51, *per* Lamer C.J.; and *Fitzpatrick*, *supra*, at paras. 51-52, *per* La Forest J. A state which arbitrarily intrudes upon its citizens' personal sphere will inevitably cause more injustice than it cures.

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44 The jurisprudence of this Court is clear that the principle against self-incrimination is an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances. Within the *Charter*, the principle against self-incrimination is embodied in several of the more specific procedural protections such as, for example, the right to counsel in s. 10(*b*), the right to non-compellability in s. 11(*c*), and the right to use immunity set out in s. 13. The *Charter* also provides residual protection to the principle through s. 7.

(2) The Importance of Context

45 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. This point was made in *Jones*, *supra*, at p. 257, *per* Lamer C.J., and in *S. (R.J.)*, *supra*, at paras. 96-100, *per* Iacobucci J., where it was explained that 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. See also *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, *per* La Forest J.

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46 In *Fitzpatrick, supra*, at paras. 21-25, La Forest J., speaking on behalf of the full Court, confirmed that 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. He stressed, at para. 25, that 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.

47 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. This analytical approach was applied, for example, in *S. (R.J.), supra*, at paras. 107-8, *per* Iacobucci J., where it was stated:

> . . . the principle against self-incrimination may mean different things at different times and in different contexts. The principle admits of many rules. What should the rule be in respect of testimonial compulsion?
>
> . . .
>
> I begin this inquiry by asserting that any rule demanded by the principle against self-incrimination which places a limit on compellability is in dynamic tension with an opposing principle of fundamental justice. That is the principle which suggests that, in a search for truth, relevant evidence should be available to the trier of fact. . . . Obviously, the *Charter* sanctions deviations from this positive general rule. Sections 11(c) and 13 stand as

> obvious examples. The question is whether we need another exemption, and if so, why? [Emphasis added.]

See similarly, e.g., *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603, *per* McLachlin J., and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 590-91, *per* Sopinka J.

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48 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, as was the case, for example, in *Thomson Newspapers*, *supra*, *S. (R.J.)*, *supra*, and *Branch*, *supra*. 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.

(3) The Present Case

49 In the present appeal, the Crown has argued that it would not violate the principle against self-incrimination to permit the respondent's three statements to police under the *Motor Vehicle Act* to be used against her in a criminal trial. In its view, a proper understanding of the context in which the statements were taken and of the interplay between the relevant principles of fundamental justice results in a finding that

s. 7 is not violated. The Crown relies, in particular, upon the decision of this Court in *Fitzpatrick*, *supra*.

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50 *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. The accused had made oral hail reports of his daily catch by radio, and had recorded daily fishing logs of his estimated catch, as required by the applicable fishery regulations. He was charged with the provincial offence of overfishing, and the hail reports and fishing logs were sought to be introduced as evidence at trial.

51 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.

52 In my view, the Crown's argument that the factual and legislative context of this case parallels that which was at issue in *Fitzpatrick* is incorrect. Several of the

self-incrimination concerns which were absent in *Fitzpatrick* are acutely present here. It will be helpful to address these concerns individually.

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D. *Inadmissibility of a Statement Made Under Section 61 of the Motor Vehicle Act*

(1) Existence of Coercion

53 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.

54 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*, *supra*, and *R. v. Finlay*, [1993] 3 S.C.R. 103.

55 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*.

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(2) Adversarial Relationship

56 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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57 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.

58 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.

59 The facts of this appeal provide a clear illustration of the problem. The police arrived at the respondent's home immediately after she phoned them, suggesting a sense of urgency. Upon hearing the news of the victim's death, the respondent was

extremely upset and accordingly vulnerable. Although the police did not interrogate her in a rigorous fashion, the respondent knew that Sgt. Tait was attending at her home in anticipation of receiving information about the accident. She also felt that she was required to speak to him, a feeling that was reinforced by Sgt. Tait's having waited outside her home while she spoke to a lawyer, and by his statement to her after she spoke to a lawyer that she remained under an obligation to provide an accident report, notwithstanding her right to remain silent and the advice of her lawyer.

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60 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.

(3) Unreliable Confessions

61 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.

62 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,

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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).

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(4) Abuse of Power

63 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 alternative 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.

64 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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65 The inability of police to rely upon statements made under the compulsion of s. 61 of the *Motor Vehicle Act* highlights the importance of questioning a driver separately for the purpose of engaging in a criminal investigation. Clearly, police are entitled to question a person who is suspected of a motor vehicle offence, and who is properly advised of and given the opportunity to exercise his or her *Charter* rights. The effect of s. 61 of the *Motor Vehicle Act* is thus to create a logistical difficulty for police. If police wish to use in criminal proceedings information acquired from the driver through questioning, the information must not be provided pursuant to the duty in s. 61. There are several ways in which police might organize their investigation in order to prevent any information acquired independently of s. 61 from becoming "tainted", as it were, by the accident report that is subject to use immunity. One possibility, which appears to be contemplated by s. 61(4) of the Act, is for police to inform the driver that they intend to secure the details of the accident report, not from the driver himself or herself, but "by other inquiries", thus terminating the driver's statutory duty to report the accident and permitting police to begin their investigation immediately.

66 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.

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(5) Conclusion on Contextual Factors

67 In sum, then, the analogy which the Crown has endeavoured to draw between the context of this case and that in *Fitzpatrick* is inapt. The principle against self-incrimination is strongly brought into play by numerous aspects of the context surrounding the compulsion to make an accident report under s. 61 of the *Motor Vehicle Act*. A driver who makes a statement pursuant to the statutory duty set out in s. 61 is entitled, at least, to use immunity in criminal proceedings in relation to the contents of that statement.

68 It now remains to consider what it means to make a statement pursuant to s. 61. Before doing so, however, I will address briefly the finding made by Southin J.A., dissenting in the Court of Appeal below, that the principle against self-incrimination will not be violated if only certain parts of an accident report are used against him or her in criminal proceedings.

E. *The Question of Limited Admissibility*

69 Southin J.A. found that, although s. 7 is engaged by the requirement to report an accident under s. 61 of the *Motor Vehicle Act*, it is not engaged to the extent that s. 61 requires a driver to provide his or her name and address and to acknowledge that he or she was driving at a particular place and time. Southin J.A. stated that a proper balance between the rights of the individual driver and the interest of society in curbing motor vehicle offences could not be achieved unless this information could be used in order to prosecute. She acknowledged that the use of such information in the respondent's case might be sufficient to permit her conviction under s. 252(1)(*a*) of the *Code*. The majority of the Court of Appeal did not draw a distinction between types of information acquired under s. 61 that might be admissible in criminal proceedings.

70 In my view, and with respect, the distinction drawn by Southin J.A. is inappropriate. 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*.

71 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

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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.

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72 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 mentioned, 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.

F. *Establishing the Existence of Compulsion Under Section 61*

73 I have stated that a statement made under compulsion of s. 61 of the *Motor Vehicle Act* cannot be used to incriminate the declarant in subsequent criminal proceedings. There remains the question of how it is to be determined that a statement was, in fact, made under compulsion of the statute.

(1) The Need for an Honest and Reasonably Held Belief

74 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*?

75 The Court of Appeal below did not discuss this issue in detail. I would like to elaborate briefly on the legal definition of a compelled statement under s. 61. In my view, 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.

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76 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*.

77 The requirement that the declarant's honest belief be reasonably held also relates to the meaning of compulsion. The principle against self-incrimination is concerned with preventing the abuse of state power. It is not concerned with preventing unreasonable perceptions that state power exists. There is no risk of true oppression of the individual where the state acts fairly and in accordance with the law, but the individual unreasonably perceives otherwise. It is true that the individual who unreasonably believes that he or she is compelled to speak may produce an unreliable confession, but this result will have flowed from concerns that are outside the scope of the principle against self-incrimination: see *Hodgson*, *supra*, at para. 34, *per* Cory J. The requirement that an honest belief be reasonably held is an essential component of the balancing that occurs under s. 7. The application of the principle against self-incrimination begins, and the societal interest in the effective investigation and prosecution of crime is subordinated, at the moment when a driver speaks on the basis of a reasonable and honest belief that he or she is required by law to do so.

78 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. This point was made by the trial judge, who found that it may be reasonable for a driver to believe that he or she is required to report an accident even where the damage caused by the accident is not sufficient to trigger the

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duty to report under s. 61 of the *Motor Vehicle Act*, or where the driver is unaware of the extent of damage caused. 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. However, I would not go so far as to say that a driver's belief in the duty to report will be unreasonable simply because, for example, the property damage caused by the accident appeared to total only $500 in value, while the trigger value for the duty to report under the *Motor Vehicle Act* is $1000 in the case of a motor vehicle other than a motorcycle. The nature and extent of the damage caused by the accident, and the driver's awareness of such damage, will simply be factors for the trial judge to consider in evaluating the reasonableness of the driver's belief.

79 Having emphasized the importance of a driver's honest belief in compulsion being reasonably held, I should also emphasize that I agree with the trial judge that the scope of the compulsion created by s. 61(1) of the *Motor Vehicle Act* is fairly broad.

80 Section 61(1) requires a driver involved in an accident to report the accident and, in very general terms, to "furnish the information respecting the accident required by the police officer or designated person". Section 61(4) requires the person receiving an accident report from a driver to "secure from the person making [the report] . . . the particulars of the accident, the persons involved, the extent of the personal injury or property damage and other information necessary to complete a written report of the accident" (emphasis added). 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

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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 officer 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.

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(2) Onus of Proof

81 Does the Crown bear the onus of establishing that an accident report was not made pursuant to the statutory duty created by s. 61 of the *Motor Vehicle Act*? The answer to this question must be no. The accused who raises a *Charter* challenge to the admissibility of evidence bears the onus of establishing an infringement of his or her *Charter* rights. Thus, where an accused seeks to argue that the admission of a statement into evidence will violate the principle against self-incrimination under s. 7 because he or she was compelled to make the statement by the terms of a provincial statute, it is the accused who must establish on the balance of probabilities that the statement was compelled. There cannot be any controversy about this point. The real question is whether the trial judge erred by placing an onus on the Crown to disprove compulsion.

82 In my view, the trial judge's reasons should not be construed as having misapplied the onus under s. 7 of the *Charter*. I agree again with Esson J.A. for the majority in the Court of Appeal that the trial judge's reasons do not actually state that the Crown bears the onus of disproving compulsion. The trial judge should be assumed to

know the law, particularly a basic principle such as the onus of proof in *Charter* matters. His reasons can be read in a manner which does not suggest the imposition of a reverse onus, and therefore they should be read in this way. As stated by Esson J.A., the trial judge's comments on the Crown's onus to demonstrate a lack of compulsion should be seen as reflecting only the uncontroversial view that once a *prima facie* case has been made with respect to an element of a *Charter* claim, it is left to the Crown to adduce evidence to rebut that *prima facie* case if it wishes to do so.

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G. *Exclusion of the Evidence*

83 The trial judge below found that the appropriate mechanism for the exclusion of evidence whose very admission would violate s. 7 of the *Charter* was s. 24(1) of the *Charter*. Section 24(1) reads as follows:

> **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.

The trial judge based his finding with respect to s. 24(1) on two previous decisions of the Supreme Court of British Columbia, *Spyker*, *supra,* and *Stillman*, *supra*.

84 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, 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.

85 The Court in *Therens* was dealing with evidence that had been <u>obtained</u> 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 <u>admission</u> 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

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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*.

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86 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.

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87 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-Dubé 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-Dubé J. did not specifically advert to the possible role of s. 24(1).

88 Thus it may be seen that this Court has never affirmatively decided that s. 24(1) of the *Charter* may serve as the mechanism for the exclusion of evidence whose admission at trial would violate the *Charter*. In the present appeal, the parties and the courts below appear to have proceeded on the basis that s. 24(1) is the appropriate mechanism for exclusion of evidence whose admission would contravene the principle against self-incrimination under s. 7. None of the argument before this Court was directed to this specific issue.

89 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.

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H. *Application to the Facts*

90 In the Court of Appeal below, all judges agreed that the respondent's first and second conversations with police were properly found by the trial judge to have been compelled by s. 61 of the *Motor Vehicle Act*. There was evidence on the basis of which the trial judge could reasonably have found that, at both of these times when the respondent spoke to police, she believed that she was required to report the accident to them. There was also evidence to support the finding that her honest belief in the requirement to report was reasonable in the circumstances. Such a finding was supported by the conduct of the police in actively seeking a description of the accident from the respondent, from the visible property damage to the respondent's vehicle, as well as from the respondent's knowledge of the victim's injuries (whether that knowledge was acquired at the time of the accident or, as the respondent testified at trial, the following morning through radio reports).

91 The point of division between the majority and the dissenting judge in the Court of Appeal concerned the respondent's third conversation with police, which occurred after the respondent had been advised of her *Charter* rights and after she had spoken to counsel. Southin J.A., dissenting, found that the timing of this third

conversation meant that it should not be considered compelled. If I understand Southin J.A.'s reasons correctly, she considered that any harm caused to the respondent by the admission of this third statement into evidence was the result of the respondent's own free will in choosing to speak to police after having been advised of her right to silence and after having spoken to a lawyer about her obligation to speak.

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92 With respect, I do not agree with Southin J.A.'s finding in relation to the respondent's third conversation with police. The logic of use immunity is precisely that the individual who is granted use immunity remains subject to the statutory compulsion to make the original compelled statement. In the context of s. 61 of the *Motor Vehicle Act*, the existence of the principle against self-incrimination in s. 7 of the *Charter* does not eliminate the statutory compulsion to report an accident. The accused who has consulted counsel does not become immune from the reporting requirement set out in the statute. Rather, as I have discussed in these reasons, s. 7 provides protection to the person who is required to report an accident. Thus, when the respondent returned from speaking to counsel, she was still required by law to answer Sgt. Tait's questions regarding the accident, provided those questions were made pursuant to s. 61 of the *Motor Vehicle Act*. Indeed, if the respondent's lawyer acted appropriately in advising her, as the Court should assume he did, he would have told the respondent that she was required by law to answer the officer's questions pursuant to the *Motor Vehicle Act*, notwithstanding her general right to silence.

93 In the circumstances of this case, there was evidence on the basis of which the trial judge could reasonably have found that the respondent's third statement to police was compelled by s. 61 of the Act. First, prior to speaking to counsel, the respondent honestly and reasonably believed she was required to report the accident. This fact supports the view that, all other things being equal, she likely continued to

believe in the subsistence of the duty. Second, after speaking to counsel, who could not lawfully have advised the respondent not to make an accident report, the respondent continued to reply to Sgt. Tait's questions about the accident. Although she stated that she did not wish to speak to Sgt. Tait any further, she did answer his question once it was asked. Third, the respondent was, in fact, under a statutory duty to answer any of Sgt. Tait's questions made pursuant to s. 61. Fourth, Sgt. Tait informed the respondent after the respondent had spoken to counsel that she remained under a statutory compulsion to report the accident. Although Sgt. Tait's reminder in this regard occurred after the respondent had completed her third statement regarding the accident, the fact that Sgt. Tait issued such a reminder shows that he still believed he was taking a s. 61 accident report, and thus that the general atmosphere between Sgt. Tait and the respondent likely reflected this belief. Fifth, the respondent's third statement to police regarding the accident was made in response to a leading question posed by Sgt. Tait, which referred back to the substance of her second statement. Again, the fact that Sgt. Tait was asking the respondent to confirm her previous statement would likely have caused her to believe that she was required to answer, since she had been required to make the second statement.

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V. Conclusion and Disposition

94 In sum, I am of the view that the trial judge did not err in finding that all three of the respondent's conversations with police on October 7, 1994 were made on the basis of the respondent's honest and reasonably held belief that she was required to report the accident to police. The appeal is therefore dismissed.

The following are the reasons delivered by

//*L'Heureux-Dubé J.*//

95 L'HEUREUX-DUBÉ J. (dissenting) – This case involves three statements made by the respondent to the police in the context of a mandatory reporting requirement under s. 61 of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 (hereinafter the Act). Following the making of these statements, the respondent was charged with the offence of failure to stop at the scene of an accident under s. 252(1)(*a*) of the *Criminal Code*, R.S.C., 1985, c. C-46. The respondent claims that the use of all three statements at her criminal trial violates the principle against self-incrimination embodied in s. 7 of the *Canadian Charter of Rights and Freedoms* and that they should, therefore, be excluded, as held by the trial judge and the majority of the Court of Appeal.

96 My colleague Justice Iacobucci is of the view that the three statements are not admissible at the respondent's trial. Although I agree with my colleague that the first two of these statements are inadmissible since they were made under statutory compulsion, I find that, in the circumstances of this case, the third statement is admissible.

Facts

97 Although my colleague has described the facts, I will consider the chain of events that led to the making of the three statements and emphasize some of the important details.

98 Late at night on October 6, 1994, Lawrence O'Brien was struck by a motor vehicle while changing a tire on the side of the road. He later died in the hospital from his injuries. The vehicle that struck him did not stop to help. The next morning, the

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respondent Joann White called the R.C.M.P. detachment to report an accident that happened the night before. She explained to Corporal Dehmke that she swerved to miss a deer and hit a jack and a man changing a tire, then panicked and left the scene. She also asked how the man was. Cpl. Dehmke asked for her birth date and address and told her that Sergeant Tait, who was in the area, would see her. That brief exchange constitutes the first of the three statements made to the police.

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99 Sgt. Tait went to the respondent's home shortly thereafter. He met the respondent and introduced himself. He did not have time to say more before the respondent asked him how the man was. Sgt. Tait indicated that it would be better to go inside her home. Once inside, the respondent again inquired about the condition of the man, and the Sergeant answered that he had died. The respondent reacted strongly to that news, falling on her knees, saying she was sorry and crying. Sgt. Tait asked for her driver's licence. The respondent produced her licence and explained that she had swerved to miss a deer on the road and that she had hit the jack and panicked. That was her second statement.

100 At that point, Sgt. Tait asked the respondent to sit down. He then read to the respondent her right to counsel as required by s. 10(*b*) of the *Charter* and added that she was not obliged to say anything, but that anything that she said could be given in evidence against her. Sgt. Tait did not arrest the respondent. He went outside in order to let the respondent and her husband decide on their course of action. He told her: "Whenever it's appropriate, you can come out and see me and tell me what you want to do, I'll just be outside."

101 Shortly afterwards, the respondent and her husband went to a neighbour's house to call a lawyer, since they did not have a telephone. After having contacted her

lawyer, the respondent returned to her home. Sgt. Tait was waiting in the police car. She went to him, sat in the front seat and indicated that she had spoken to a lawyer and that she had decided not to provide a statement regarding the accident. After a brief discussion, Sgt. Tait told her that she did not have to provide a written statement and then asked her if she had swerved to miss a deer, as she had previously said. The respondent explained that there were actually two deer on the curve, that she had swerved, and that when she thought she had hit the jack, she panicked. She said that she was sorry for what had happened. This was the third statement made to the police.

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102 Sgt. Tait then informed the respondent of some of the charges she might face depending on the result of the investigation. After this exchange, Sgt. Tait told the respondent that even if she did not have to provide a written statement, she would be required under the *Motor Vehicle Act*, if requested, to provide a statement about the accident but that such a statement could not be used in a court of law.

Analysis

103 Counsel for the respondent argued before us that the respondent felt compelled by the provincial statute to make the statements to the police officer. She believed that she had to report the accident and thought that the ensuing discussions with Sgt. Tait were part of her obligation to report. The respondent does not challenge the mandatory reporting requirement under the Act or the constitutionality of its provisions. Rather, she challenges the use that is sought to be made at trial of the purportedly compelled information legitimately obtained under s. 61 of the Act.

104 The Act requires anyone involved in a motor vehicle accident to provide a motor vehicle accident report. Sections 61(1) and (1.1) of the Act make it mandatory for

the person driving a vehicle involved in an accident causing death or injury to a person or damage exceeding $1000 to report the accident to a police officer. A person failing to report such an accident is guilty of an offence under s. 69 of the Act.

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105 Under ss. 61(1) and (4) of the Act, police officers are to receive the mandatory accident report and secure from the person making it "the particulars of the accident, the persons involved, the extent of the personal injury or property damage and other information necessary to complete a written report of the accident. . . ." In addition, police officers also have a duty to investigate criminal conduct, such as the failure to stop at the scene of an accident (s. 252 of the *Criminal Code*). Sometimes, and probably most of the time, these distinct functions are fulfilled by one police officer, which may lead to some confusion as to whether an accident report is being taken or a crime investigated. This also leads to the importance of a case-by-case analysis and the proper assessment of the particular circumstances in which the statement is made.

106 The police must be able to fulfill their different functions in the best possible way, and there is nothing wrong in principle with a police officer's investigating a crime after obtaining information required by statute either on the same day or later. The requirement of s. 61 of the Act should not make it harder for the police to investigate a hit and run offence under the *Code* than it is to investigate any other crime. When police work involves performing various functions, which imply the risk of self-incrimination, as here, efforts must be made by the police to clarify the purpose of their presence. Therefore, to the extent that the reasons of my colleague suggest that the requirement to take an accident report under provincial law is incompatible with a criminal investigation, I must respectfully disagree.

A. *Protection Against Self-Incrimination*

107 First, it is not at issue that, in this case, the liberty interest of the respondent, protected by s. 7 of the *Charter*, is engaged by the Crown's use of her statements at trial. If found guilty, she faces a maximum sentence of five years' imprisonment.

108 There is no blanket protection against self-incrimination by statutorily compelled statements under the *Charter*. This position is in accord with the unanimous decision in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, where this Court specifically rejected the proposition that the principle against self-incrimination guaranteed by s. 7 of the *Charter* always precludes the use of statutorily compelled information. La Forest J., for the Court, wrote at para. 21:

> The appellant effectively asks this Court to endorse a broad, abstract principle against self-incrimination as a principle of fundamental justice under s. 7, which would prevent the use of information in all contexts in which it is statutorily compelled. He suggests that this principle is supported by this Court's decision in both *Thomson Newspapers*, . . . and *S. (R.J.)*. . . . Nowhere in the case law, however, is there support for such a broad, abstract approach to the issue of self-incrimination.

As stated by Iacobucci J. at para. 46 of his reasons in this case, the Court in *Fitzpatrick, supra*, confirmed the case-by-case approach to the application of the principle against self-incrimination and specified that, in order to determine whether that principle is actually engaged in a given case, the Court "must begin 'on the ground', with a concrete and contextual analysis of the circumstances". My colleague adds at para. 47 that the contextual analysis mandated under s. 7 of the *Charter* requires the balancing of various individual and societal interests. This approach was applied in *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at paras. 107-8, where Iacobucci J. stated:

> . . . the principle against self-incrimination may mean different things at different times and in different contexts. The principle admits of many rules. What should the rule be in respect of testimonial compulsion?
>
> . . .

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> I begin this inquiry by asserting that any rule demanded by the principle against self-incrimination which places a limit on compellability is in dynamic tension with an opposing principle of fundamental justice. That is the principle which suggests that, in a search for truth, relevant evidence should be available to the trier of fact.

Hence, the contextual analysis mandates that the purportedly compelled statements be examined in the context of the surrounding circumstances and, here, the circumstances in which the three statements were made.

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B. *Errors of the Trial Judge*

109 I agree with my colleague that the proper test to determine whether the statements should be considered to have been made under the compulsion of s. 61 of the Act, is whether, at the time of giving the accident report, "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" (para. 75). 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. In this case, however, given that the third statement was made after the respondent had been warned of her s. 10(*b*) *Charter* rights and her right to silence, she could not have had "an honest and reasonably held belief" that what she said to the police officer after being given the proper warnings, was related to the statutory duty to report the accident.

110 In my view, the trial judge applied the wrong test and his findings were based on several errors of law and, consequently, cannot stand. The trial judge began his analysis by determining that the respondent's statements to the police were voluntary. He stated:

> . . . I'm satisfied that despite the fact accident reports are compulsory in order to comply with statute, the accused's statements are freely and voluntarily made. I reached that determination considering the statutory compulsion as a factor only and not determinative of the issue.

Obviously, if the statements were freely and voluntarily made, there would be no reason to exclude them. At the very least, it demonstrates some inconsistency in the trial judge's reasoning since he concluded that they were compelled by the statute.

111 The trial judge also applied the wrong test in his determination of whether the respondent's statements were made pursuant to the statutory duty to report the accident when he stated that "an accident report is a statement concerning an accident made to a police officer by a person who believes it is a statement required to be made". He used an entirely subjective test that would allow anyone making a statement to the police with an unreasonable or erroneous belief that he or she was under a duty to report an accident to be protected against the potential use of that information. However, given the test set out by my colleague, mere subjective belief is not enough. There must be a reasonable basis for such a belief in the circumstances surrounding the making of the statement. The subjective element of the reasonableness test recognizes that s. 7 of the *Charter* is only engaged if the individual actually feels compelled to give the statement while the objective element ensures that there is a rational basis for the claim.

112 The entirety of the evidence must also be considered. The trial judge accepted the evidence of the respondent that she believed that she was required to report the accident to the police. However, he based his conclusion essentially on the evidence given by Cpl. Dehmke that the first words he heard on the telephone were from a woman who wanted to report an accident that happened the night before. The trial judge did not make any distinction between the different statements. Based on the evidence of this

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initial call to the police, he concluded that all three statements were made under s. 61 of the Act. That, in my view, was an error of law since, in so doing, he did not consider the evidence in its entirety and, in particular the evidence relating to the third statement. The Court of Appeal (1988), 122 C.C.C. (3d) 167, at p. 178, was also in error in deciding not to interfere with the trial judge's finding on the basis that "there was evidence upon which the trial judge could reach the conclusion he did. . . ."

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113 The basic principle is that the onus of establishing a *Charter* right violation is on the person alleging the violation. The trial judge placed that onus on the Crown when he said:

> It seems to me that having created such a vaguely defined compulsory report, any lack of precision on what statements were made pursuant to the reporting requirement and which were not, should be for the state to answer in the clearest terms. If the state fails to demonstrate that a statement by an accused driver was not a part of the report, then it should be considered to be a part of the report.

This was clearly an error of law. 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. This error was compounded by the fact that the trial judge did not distinguish between the three statements, basing his finding only on the initial call to the police. Since the onus is on the respondent to establish that all three statements were made under statutory compulsion, the analysis of the trial judge cannot stand. In my opinion, absent those errors of law, the trial judge should have come to the conclusion that the respondent's third statement was not made pursuant to the statutory duty to report.

C. *Surrounding Circumstances of the Three Statements*

114 In this case, the respondent originally contacted the police in order to report the accident. She identified herself and gave her name and address, but there was no mention of a report under the Act. When Sgt. Tait attended at the respondent's premises, there was still no mention of the duty to report the accident before she started asking about the victim and explaining what had happened. I can appreciate that it was not clear at that point whether Sgt. Tait was there to take the mandatory accident report or investigate the hit and run. Hence, regardless of the fact that the reporting requirement of the Act was not mentioned at that stage of the inquiry, the trial judge was entitled to conclude that the respondent knew that there was a general duty to report when she made the first call and that, in the circumstances, she could have believed that when she made her second statement to Sgt. Tait, he was there to take her report. Accordingly, as stated earlier, I agree with my colleague that the trial judge had evidence upon which he could reach the conclusion that the first two statements were made under statutory compulsion and declare them inadmissible.

115 However, in relation to the third statement, I agree with Southin J.A., dissenting in the Court of Appeal, that the statement is of a different genus and that it is admissible. That statement was made after the police officer had given the respondent her s. 10(*b*) *Charter* rights, had invited her to call a lawyer and had warned her about her right to silence. This, of course, was not done as regards the first and second statements and, in my view, it is a clear indication that the police officer was now conducting a criminal investigation. In *R. v. Schmautz,* [1990] 1 S.C.R. 398, Gonthier J. for the majority explained the meaning of a s. 10(*b*) warning. He wrote at p. 416:

> In this case, by serving both the police and the *Charter* warnings on the appellant at the outset of the short interview, the police officers alerted him that he was suspected and was being investigated in relation to a serious offence. These warnings made him aware that all he would say could incriminate him and that he had the right to remain silent and to instruct counsel on every aspect of the interview that followed.

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These comments are most apposite in this case. After listening to the explanation of the respondent, Sgt. Tait carefully cautioned the respondent and testified that she said she understood the meaning of those rights. In fact, she acted upon those rights by contacting her lawyer. In so doing, the police officer clearly indicated that the matter was serious and that he was starting a criminal investigation. Therefore, any ambiguity as to whether the police officer was there to take a report under the Act was no longer present after the warning. Surely, the respondent and her lawyer could not have missed not only the meaning of that warning, but also that the investigation took a different turn from that point on since, on the advice of her lawyer, she told Sgt. Tait of her intention not to make any statements in relation to the accident. The assertion of a right to silence does not indicate that the respondent felt obliged to speak.

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116 Despite the foregoing, the respondent still maintains that she believed she was compelled under the Act to talk to Sgt. Tait after she had been given the appropriate warnings. As I mentioned above, there must be sufficient objective grounds for such a belief to be reasonably held. In other words, the evidence must not only disclose that the respondent subjectively believed that she was under a statutory duty to report, but must also establish an objectively reasonable basis for that belief. I find that no such objective basis was established in this case. First, the respondent was cautioned about her right to counsel under s. 10(*b*) of the *Charter* and her right to silence. This was a clear indication that the police officer was no longer acting under the Act and, hence, that the respondent was no longer under a statutory duty to answer Sgt. Tait's question. His subsequent comment that the respondent would have to file a report under the *Motor Vehicle Act* at a later time also shows that he was not taking the accident report at that moment. Second, the respondent contacted her lawyer who, once informed of the circumstances, advised her not to make any statements. If the respondent had informed her lawyer that she believed that she had to make a report under the Act, which her

lawyer would have confirmed, that advice might have been different. Third, the respondent told Sgt. Tait that she would not make a statement about the accident. How can the respondent now argue that she felt compelled by s. 61 of the Act to make a statement to Sgt. Tait if this was not an investigation under the Act? I am satisfied that any reasonable person in those circumstances would not have believed that Sgt. Tait was pursuing his investigation under the Act. The respondent's belief, therefore, was not reasonably held as to the third statement here at issue.

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117 I would like to point out that even if the police officer asked the respondent a leading question that related to the information she gave under her duty to report, she was certainly not under any compulsion to reply. Sgt. Tait confirmed this during the *voir dire* when asked by the trial judge what he would have done had the respondent decided not to answer his question. He explained that he would have asked her if there was anything else he could do for her and that she could phone the office in respect to the seized vehicle and then leave. The police are not forbidden to ask questions to a suspect who has been properly advised of his or her rights in the conduct of a criminal investigation. There is no rule prohibiting the use, for questioning purposes, of information gathered under a statutory duty to report or any information gathered otherwise.

118 Since I find that the third statement was not made any under any statutory compulsion, I do not see any reason why that statement should not be admissible. The respondent was warned of her right to counsel and her right to silence. She voluntarily walked to the police car and sat beside Sgt. Tait, who asked her what she wanted to do next. He did not force her to sit in the police car and did not detain her. The respondent was free to leave at will. She had no obligation to talk or answer to Sgt. Tait at that point and she was advised of her right to consult her lawyer. Nonetheless and against her

lawyer's advice, she decided to answer Sgt. Tait's question. That statement was not obtained by either threats or inducements (*Ibrahim v. The King*, [1914] A.C. 599, *Boudreau v. The King*, [1949] S.C.R. 262). Therefore, I conclude that the answer given by the respondent to Sgt. Tait's question was voluntarily and freely made (a finding that the trial judge himself made and which is not contested) and is, accordingly, admissible at her trial.

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Conclusion

119 For these reasons, I find that the trial judge made an error of law in excluding the third statement to Sgt. Tait after she had been informed of her s. 10(*b*) *Charter* rights and after she had consulted with counsel. In the circumstances of this case, that statement was not made under compulsion of the provisions of the *Motor Vehicle Act* and was clearly admissible as it was found to have been voluntary.

Disposition

120 Therefore, I would allow the appeal, reverse the judgment of the Court of Appeal and order a new trial on the basis that the respondent's third statement is admissible in evidence.

Appeal dismissed, L'HEUREUX-DUBÉ J. *dissenting*.

Solicitor for the appellant: The Attorney General of British Columbia, Vancouver.

Solicitor for the respondent: Peter Burns, La Ronge, Saskatchewan.