September 21, 2015

R v Porter: Self-incrimination – Judicial Restraint of State Coercion

By: Brett Code, Q.C.

Case Commented On: *R v Porter*, 2015 ABCA 279

It should not have been necessary, because the applicable law on the matter has been settled since 1999, but for those police officers and prosecutors who might have forgotten, the Court of Appeal in *R v Porter* has once again forcefully stated that statutorily compelled statements are inadmissible in criminal trials because they violate the principle against self-incrimination and section 7 of the *Canadian Charter of Rights and Freedoms*. Insistent upon guarding against the admissibility of potentially unreliable confessions, against potential abuse of state power, and against the improper use by the Crown of otherwise properly-collected, statutorily required information, the Court confirmed the principle of fundamental justice that the state may not conscript the accused against himself or herself but must build any case to meet without compelled evidence from the suspect.

At issue was the use, if any, that could be made of information contained in compulsory accident reports made to police under section 71 of the *Traffic Safety Act*, RSA 2000, c T-6 (*TSA*) and in compulsory statements made to insurers for insurance purposes following an accident. The Court's decisive conclusions were that:

1) such statements or the information contained in them are inadmissible in criminal proceedings arising out of a car accident; and

2) the information obtained through those statements cannot be used as part of the reasonable and probable grounds of an informant in an Information to Obtain a Search Warrant or Production Order.

Facts

The facts are set out in full here, not only because they provide a lesson in good legal advice and apt, as well as effective waiver of solicitor-client privilege in the client's interest, but also because they set out starkly how gravely statutory reporting obligations can trench on fundamental rights and freedoms protected by the *Charter*.

On June 13, 2012, Andrew Green pulled over on Anthony Henday Drive in Edmonton to assist another motorist with a tire. While they were discussing the situation, a passing vehicle struck and killed Mr. Green. The driver of the vehicle did not stop.

The next morning, Mr. Porter contacted a lawyer about his involvement in an accident. His lawyer advised him that he had a right to remain silent but that he had an obligation to make a collision statement to the police under the *TSA*. He further advised Mr. Porter that the *TSA* statement could not be used against him in a prosecution under the *Criminal Code* or the *TSA*.

The lawyer also advised Mr. Porter that he was obligated to provide a statement regarding the collision to his insurance company, and referred Mr. Porter to an expert in insurance law.

The lawyer contacted the police and advised them that he had a client who needed to make an accident report under the *TSA*. The lawyer spoke with Cst. Jones and said his client was the driver of the vehicle involved in the accident. He also gave Cst. Jones Mr. Porter's name, but noted that he was only doing so as a part of the *TSA* report. They agreed to meet at police headquarters for the purpose of Mr. Porter providing a *TSA* statement.

Mr. Porter attended with his lawyer at the police station and provided the *TSA* report. Both Cst. Jones and his supervisor, Sgt. Bates, met with Mr. Porter and his lawyer. Cst. Jones informed the lawyer that the police wanted to seize Mr. Porter's vehicle; the lawyer replied that they were entitled to inspect it under section 66 of the *TSA* but would have to obtain a warrant if they wanted to seize it. The typed *TSA* statement was provided to Sgt. Bates, who placed it in a sealed envelope.

Cst. Jones placed Mr. Porter under arrest. He asked Mr. Porter where his vehicle was, but Mr. Porter declined to answer any questions on the advice of his lawyer. He did not make any statements during the interview.

After being interviewed by Det. Yarmuch, Mr. Porter was released. Sgt. Bates, Det. Yarmuch and Cst. Jones then reviewed the *TSA* statement. Cst. Chandra swore an Information to Obtain ("ITO") for a warrant to seize Mr. Porter's car. He had been told that Mr. Porter was driving a 2008 Porsche Cayenne that was located at his residence, and he was provided with the licence plate number. The ITO included information obtained from the *TSA* statement, including the statement from Mr. Porter's lawyer that his client had been involved in the fatal collision, Mr. Porter's name, and the make and location of Mr. Porter's vehicle. The ITO did not mention that any of that information was obtained as part of a compelled statement pursuant to the *TSA*. The warrant was granted, the police seized Mr. Porter's vehicle, and they found incriminating evidence on the vehicle [emphasis added].

Mr. Porter subsequently contacted his insurance broker, TD. In early August 2012, TD opened a fatality file after it learned the collision had caused Mr. Green's death. The file was assigned to a TD claims adjuster, who assigned an independent adjuster, Ms. Fitzpatrick, to collect evidence in relation to the claim. Ms. Fitzpatrick was told that Mr. Porter could make his statement with counsel present, but that a statement was required if he wanted coverage.

At a meeting with Mr. Porter, Ms. Fitzpatrick explained to Mr. Porter that it was a condition of his policy that he provide a statement, and that failure to do so could result in a denial of coverage. On August 15, 2012, Ms. Fitzpatrick received a written statement from Mr. Porter. The statement indicates that he was involved in the collision, but does not mention the fatality. Mr. Porter asked who would get a copy of the insurance statement, and Ms. Fitzpatrick gave him several assurances that she would give it only to TD. She said she would not give it to the police without a court order, and testified that she had never seen that happen in her time as an adjuster. Mr. Porter asked to have his lawyer review the statement before it was released to TD, which was done.

The police eventually learned of the insurance statements and obtained production orders to get them. Cst. McKenna swore an ITO for a production order on February 14, 2013. In it, he referred to information obtained from the *TSA* report, the evidence seized from the vehicle, as well as

information from other sources that the police had investigated. The Court of Appeal states here that the second ITO mentioned that Mr. Porter had provided a *TSA* report, but the Court does not state whether the second ITO advised that the information relied upon had been compelled by the *TSA*.

Eventually, Mr. Porter was charged, and acquitted, of one count of careless driving under the *TSA* and of one count of failure to stop at an accident under the *Criminal Code*, RSC 1985, c C-46. The Crown appealed the acquittals. The Court of Appeal unanimously dismissed the appeal.

Commentary Arising from the Facts

Beyond their demonstration of sheer competence by Mr. Porter's lawyer, the facts relating to the legal advice demonstrate two important things, and the emphasized sentence above gives rise to inferences that are not complimentary.

First, it is obvious that from the moment he was instructed, Mr. Porter's lawyer knew exactly what to do. He knew that Mr. Porter must complete a police report on the accident, even though it violated his right to silence, but the latter caused him no concern. He also knew, presumably because the law was settled by the Supreme Court of Canada in *R v White*, [1999] 2 SCR 417 1999 CanLII 689 (SCC), that whatever Mr. Porter said in the *TSA* statement could not be used against him in a prosecution under either the *Criminal Code* or the *TSA*, and that such compelled information was inadmissible as evidence against Mr. Porter. Every move he made and everything he said was guided by that knowledge.

The value of clear, decisive guidance on the rules as they relate to the admissibility of evidence is that it can be used and applied not only by every lawyer in Canada as they advise their clients, but by every judge in every courtroom in every province or territory in Canada. Clear rules provide for certainty in legal advice and certainty of application by Courts, thus ensuring equal justice across the general run of cases, as opposed to the approximate justice arrived at by discretionary application of such rules depending upon vague notions of fairness, prejudice or the like. The rule, well known and expertly applied here by the lawyer, permitted proper legal advice. Being correct advice, his client ought to have been able to rely on it. He trusted his lawyer, provided the compelled information with legal advice, and completed the required insurance as his lawyer had advised.

Imagine the surprise on Mr. Porter's face when he was placed under arrest and then later when he learned he was to be prosecuted, both for the very thing that his lawyer told him unequivocally could not be done. Imagine the ire of the lawyer, made to look foolish by the police and later by the Crown, in the face not only of settled principles of fundamental justice but also of settled rules of admissibility flowing directly from those principles.

The second thing of note is the recitation by the Court here of the legal advice given to Mr. Porter by his lawyer, an unqualified recitation of information that was obviously protected by solicitor-client privilege. Nothing is said by the Court of the waiver of solicitor-client privilege, but that privileged information was not released and so casually reported by the Court as the result of some unwitting mistake. Mr. Porter's counsel, again demonstrating a striking level of competence, had to have made the strategic decision to have his client waive privilege so that he could strengthen the arguments in favour of having the evidence being used against his client by the Crown excluded. Knowing that any admission of such evidence would demonstrate direct and extensive harm to Mr. Porter's Charter-protected rights, his counsel was well aware that

early waiver could, if it arose, permit him to strengthen any arguments for exclusion under the first and second branches of the *Grant* analysis (*R v Grant,* 2009 SCC 32). (In *Porter*, as in *White*, the evidence tendered in violation of section 7 of the *Charter* is excluded either under section 24(1) of the *Charter* or pursuant to a trial judge's "common law duty to exclude evidence whose admission would render the trial unfair" (*White* at para 89)). Such waiver comes with many risks, but, when the law is as settled as it was here, the risk is mitigated, and the advantage of having his right to counsel essentially vitiated by the state's violation of his right against self-incrimination, would strongly swing the balance in favour of the exclusion of the evidence by the trial judge in exercising her *Grant* discretion, if called upon depending on the circumstances.

Knowing the rules of evidence, and knowing that they will be enforced by the Court, permits a lawyer to plan the client's case in a way that anticipates the places in a trial where the trial judge will exercise an evidentiary discretion, and to prepare arguments that will cause, as here, the judge to go the way of the accused against the Crown.

One further point deserves comment. It relates to the sentence emphasized by me above. The Court did not focus on it but easily could have. In swearing the ITO in support of their application for a warrant to seize Mr. Porter's car, the police failed to mention that all of the information they were relying on was statutorily compelled. There is a slight possibility that these experienced police officers did not know that they could not use compelled information in their investigation and prosecution of Mr. Porter. But much more likely, in my opinion, is that they were fully aware that they could not use the information but knew that they would not obtain the warrant if they advised that they were using compelled information to build their case to meet, that is, that they were using Mr. Porter to incriminate himself. They appear to me to have proceeded despite their knowledge of the law, but no finding is made on that question, so I could well be mistaken. The Court does not castigate the Crown for using the evidence so obtained; nor does it criticize the police for this failure. That may be because such criticism is unnecessary, and that the remedy of exclusion is criticism enough. But it may also be that no *Grant* analysis was performed here. Had it been, such criticism would have been unavoidable.

The Principle Against Self-Incrimination

In very recent years, the Supreme Court of Canada has waffled in its embrace of what Chief Justice Lamer developed with his Court regarding the principle, as compared to the right, against self-incrimination and more particularly its embrace of his concept of the case-to-meet. Those concepts were enunciated strongly by the Supreme Court of Canada in the 1990s in several cases and were most succinctly enunciated by him, for the majority in *R v P. (M.B.),* [1994] 1 SCR 555 (*M.B.P.*) at paras 36 and 37:

> Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution: M. Hor, "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] *Singapore J. Legal Stud.* 35, at p. 35; P. K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1988), at para 1:10100. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.

> The broad protection afforded to accused persons is perhaps best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. As a majority of this Court suggested in *Dubois v The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and the procedural and evidentiary protections to which it gives rise.

That principle protects a suspect from compulsion, from being compelled to provide information, in any circumstance where the state attempts to extract incriminating evidence from him or her. The state is permitted to compel its citizens to provide it with information. The Province of Alberta is permitted to compel its citizens to report themselves when they have been involved in accidents. That is what the *Traffic Safety Act* does. It is valid, constitutional legislation. But the Province and its agents are not then permitted to use that information to assist the police in their investigations or to assist the Crown in its prosecutions. All that was decided in *White*, a case that followed and adopted *M.B.P.* and confirmed that the principle against self-incrimination forbids the state from using such statutorily compelled information in building the case-to-meet against those who comply with the statute.

Worth remembering briefly are the justifications and purposes of justice underlying the principle against self-incrimination, including the idea that coerced statements designed to be used against a suspect are likely to be unreliable. Excluding potentially unreliable statements whose potential non-reliability is the direct consequence of state decision-making or state law-making promotes accurate fact-finding and adjudication. As was said by the Supreme Court of Canada in *White* (at para 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 [emphasis added].

By 1999 when *White* was decided, the principle established by Chief Justice Lamer's Court, and only being developed in *M.B.P.,* was well established. As Justice Iacobucci, writing for the majority (6-1) said in *White*, at paragraphs 40 and 41:

> 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*.

> 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.

The Court of Appeal's Decision in *Porter*

Because the facts in *White* were very similar to those in *Porter*, the Court of Appeal made short work of the main point on appeal. In *White*, the Supreme Court had already considered the application of those principles to provincial legislation that compelled drivers involved in accidents to make a report of the accident to the police. As here, the accused in *White* was involved in a fatal hit and run at the side of a highway, but in British Columbia. The next morning, she called the police to report the accident and, in the course of that morning, she had three conversations with the police about the accident. She testified that she knew she had a duty to report the accident, and felt obliged to speak to the officers who attended at her house. The Crown sought to admit the statements into evidence at her criminal trial. At issue was section 61 (as it was then) of the British Columbia *Motor Vehicle Act* RSBC 1996, c 318 which established a statutory scheme requiring and regulating the reporting of motor vehicle accidents in the province. The issue was whether the admission into evidence in a criminal trial of statements made by the accused under compulsion of the *Motor Vehicle Act*, offends the principle against self-incrimination as embodied in section 7 of the *Charter*. The majority answered that question in the affirmative, stating simply, at para 30:

> "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".

Moreover, the Supreme Court of Canada rejected the possibility that the information contained in a compulsory accident report could be admissible in a limited way, by requiring 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, at para 70:

> 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.

In *Porter*, the Crown made a further argument, essentially purporting to be able to do indirectly what it could not, applying *White*, do directly. The Court also made short work of that argument, but it may be that the Crown could at least argue that there is not as yet a finally settled rule governing the indirect use of statutorily compelled information. All that existed specifically on point were unanimous judgments of the British Columbia and the Ontario Courts of Appeal, with regard to both of which the Supreme Court of Canada had denied leave to appeal.

The Crown argued that the court in *White* considered only the admissibility of the compelled statements themselves. It did not expressly consider whether information from the compelled

statements could be used to gather additional evidence. Here, the Crown argued that the principles in *White* should not be applied to the broader question of whether information from a *TSA* statement can form part of the grounds to obtain a search warrant.

The Court of Appeal agreed with the trial judge, who rejected that argument, preferring the reasoning of the British Columbia and Ontario Courts of Appeal in *R v Powers*, 2006 BCCA 454 (CanLII), leave denied [2006] SCCA No. 452, and *R v Soules*, 2011 ONCA 429 (CanLII), leave denied [2011] SCCA No. 375, respectively.

In *Powers*, the British Columbia Court of Appeal determined that statutorily compelled statements of an accused are not admissible in a criminal proceeding for any purpose, including to establish reasonable grounds for a roadside demand or a breath sample demand. Although the court recognized that the use of the statement was less direct than in *White*, the evidence was a necessary link in the chain of evidence to convict the accused (at para 13). The Ontario Court of Appeal applied the same reasoning and reached the same conclusion in *Soules*. The accused, having been involved in an accident, was statutorily compelled to make a statement to the police. The statutorily compelled statement was not admissible for the purpose of establishing grounds to make an approved screening device demand. The Court of Appeal in *Porter*, then concluded, in paras 26 and 27:

> 26. 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 statutes like the *Motor Vehicle Act*: *White* at para 65; *Soules* at para 52. The courts in both *White* and *Soules* recognized that this requirement might cause logistical issues in police investigations, but as the trial judge here pointed out, this case law is not new and the police were aware the information from the *TSA* statement was not admissible.
>
> 27. The same reasoning is applicable here. The conclusion of the Supreme Court in *White,* as applied by the appellate courts in *Powers* and *Soules*, is determinative of the issue. The statutorily compelled statements from the respondent are not admissible for the purpose of establishing reasonable and probable grounds to obtain a search warrant or production order.

Compelled Statements to Insurers – Also Inadmissible

To supplement the evidence that they had to know was going to be ruled inadmissible, the police and the Crown obtained and then tried to tender statements compelled by Mr. Porter's insurance company. The Crown argued that statements to insurance companies are not compelled but voluntary since they arise not from statute but from contract. They also argued that, even if insurance statements are essentially compelled by a statutory regime that requires them, not all compelled statements are inadmissible and that somehow these ought to be admitted rather than excluded.

Relying on the same principles, on *White* and on *R v Fitzpatrick,* [1995] 4 SCR 154, 1995 CanLII 44 (SCC), the Court of Appeal also dismissed these arguments. The relationship between insurer and insured is contractual, but it is mandatory, and its mandatory nature is the consequence of statute. Mandatory reporting under contracts of insurance is not consented to freely or willingly: insurability, which is statutorily required, compels it.

Not every statutorily compelled statement engages the section 7 protection against self-incrimination. The early cases emphasized contextual and circumstantial analysis. In *Fitzpatrick*, the Supreme Court introduced factors that might indicate whether the principle against self-incrimination applied. In *White*, the Court referred to four: the existence of coercion by the state; the existence of an adversarial relationship between the accused and the state at the time the statements were made; the risk of unreliable confessions; and the risk of abuse of power by the state as a result of the statutory compulsion.

The Court of Appeal in *Porter* agreed with the trial judge that each was engaged here. Coercion exists by the mandatory nature of vehicle insurance and the mandatory reporting requirements in the statutory conditions for insurance.

Despite the Crown's arguments that an adversarial relationship between the state and Mr. Porter was not relevant to the insurance statements, the Court found that the relationship was adversarial for purposes of this contextual analysis, because Mr. Porter was the subject of a criminal investigation when he admitted facts relevant to that investigation to his insurer, and because he was concerned, and said so, that the statements might be released to the police.

The risk and fear of unreliable confessions was likely determinative of this analysis by the Court. As in *White*, drivers who find themselves reporting a serious accident to their insurer may feel a strong incentive to provide a false statement, particularly if they know the information reported might be passed on to the police. In this respect, the Court said, "there is little to distinguish the insurance statements from the *TSA* statement considered in *White*" (at para 36).

Finally, the Court held that there is a risk of abuse of power by the state from the statutory compulsion. The insured is required to provide notice, with all available particulars, of any accident, among several other things. As the Court provides in paragraph 37:

> To permit the information so obtained to be used in criminal proceedings would permit the state to avoid the protection of s 7 and accomplish, through the insurance statements, what *White* prohibits the state from doing with *TSA* statements. Moreover, as was noted in *White*, statements by a driver, occurring shortly after an accident, are the type of communication that the principle of self-incrimination is designed to protect: *White* at para 66.

This is an excellent, decisive judgment by the Court of Appeal. By relying as it does on case law from the pinnacle of the *Charter*-based development of the principle against self-incrimination by the Supreme Court of Canada and of the idea that individuals cannot be compelled to assist the state in developing the case-to-meet without undermining the fairness of any trial that results from the conscription of such evidence, the Court provides hope that the broad principle of fundamental justice continues to protect those suspected and accused of crimes from the governing spirit of the day, the spirit that appears to believe that too many guilty people go free, whether by way of technical rules of evidence or by way of discretion in sentencing among other things. In *Porter*, the Court of Appeal shines a bright light over these dark days.