

CITATION: R. v. Soules, 2011 ONCA 429
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COURT OF APPEAL FOR ONTARIO

Sharpe, MacFarland and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Stephen Soules

Respondent

Greg Skerkowski, for the appellant

Alan D. Gold and Vanessa Arsenault, for the respondent

Heard: March 15, 2011

On appeal from the judgment of Summary Conviction Appeal Judge W. U. Tausendfreund of the Superior Court of Justice dated February 11, 2010, with reasons reported at [2010] O.J. No. 602, dismissing the appeal from the acquittal entered by Justice G. Griffin of the Ontario Court of Justice dated July 17, 2009, with reasons reported at [2009] O.J. No. 6022.

H.S. LaForme J.A.:

INTRODUCTION

[1] This is a Crown appeal from an unsuccessful Crown summary conviction appeal.

The key issue is whether statements compelled under the *Highway Traffic Act*, R.S.O.

1990, c. H.8 are admissible in a criminal trial. Specifically, are the statements admissible for the purpose of establishing that an officer had grounds to make an approved screening device demand, or does such use violate the right against self-incrimination under s. 7 of the *Canadian Charter of Rights and Freedoms*?

BACKGROUND

[2] In September 2009 there was an accident involving four motor vehicles. The roads were wet. A driver of an automobile was in the process of turning right into a driveway when his vehicle was struck from behind by the vehicle operated by the respondent Stephen Soules. Mr. Soules' vehicle was struck from behind by yet another vehicle.

[3] Constable Bucci investigated and spoke to each driver individually inquiring as to what had happened. In response to this questioning, Mr. Soules identified himself as the driver of his vehicle. Because of his observations Constable Bucci suspected that Mr. Soules had alcohol in his system.

[4] Constable Bucci made an approved screening device demand, which Mr. Soules failed. He was arrested for operating a motor vehicle with more than 80 milligrams of alcohol in 100 millilitres of blood and advised of his right to counsel.

[5] Mr. Soules indicated that he understood his right to counsel, that he was from Calgary and did not know whom to call but that he did wish to speak to a lawyer. He was

transported to the police station and provided two samples of his breath into an approved instrument, with the results of 143 and 136 milligrams of alcohol respectively in 100 millilitres of blood.

[6] Mr. Soules was charged with operating a motor vehicle having a concentration of alcohol in his blood over 80 milligrams in 100 millilitres of blood, contrary to s. 253(b) of the *Criminal Code*. The trial judge acquitted him, finding that his s. 7 and 10(b) *Charter* rights had been violated.

[7] Sections 199 and 200 of the Ontario *Highway Traffic Act* contain the statutory obligations to report accidents on the highway, which are the subject of this appeal. For our purposes the relevant portions are:

Duty to report accident

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

Officer may direct person to report accident at another location

(1.1) If, on reporting the accident to the nearest police officer under subsection (1), the person is directed by the officer to report the accident at a specified location, the person shall not furnish the officer described in subsection (1)

with the information concerning the accident but shall forthwith attend at the specified location and report the accident there to a police officer and furnish him or her with the information concerning the accident as may be required by the officer under subsection (3).

...

Duty of police officer

(3) A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report, or by other inquiries where necessary, the particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and the other information that may be necessary to complete a written report concerning the accident and shall forward the report to the Registrar within ten days of the accident.

...

Duty of person in charge of vehicle in case of accident

200.(1) Where an accident occurs on a highway, every person in charge of a vehicle or street car that is directly or indirectly involved in the accident shall,

(a) remain at or immediately return to the scene of the accident;

(b) render all possible assistance; and

(c) upon request, give in writing to anyone sustaining loss or injury or to any police officer or to any witness his or her name, address, driver's licence number and jurisdiction of issuance, motor vehicle liability insurance policy insurer and policy number, name and address of the registered owner of the vehicle and the vehicle permit number.

Penalty

(2) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not less than \$400 and not more than \$2,000 or to imprisonment for a term of not more than six months, or to both, and in addition the person's licence or permit may be suspended for a period of not more than two years.

[8] It will, I think, be helpful to briefly summarize the decisions in the trial court and on the summary conviction appeal.

The trial decision

[9] The trial judge accepted Mr. Soules' evidence that he remained at the scene of the collision and answered the questions of Constable Bucci because he understood that he was required by law to do so. He held that the statements were statutorily compelled and inadmissible pursuant to *R. v. White*, [1999] 2 S.C.R. 417. Based on *R. v. Powers* (2006), 213 C.C.C. (3d) 351 (B.C.C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 452, the breath results were excluded under s. 24(1) of the *Charter* because in the absence of those statements there was no reasonable suspicion for the approved screening device demand. Mr. Soules was acquitted.

[10] The trial judge further held that the breath results would also be excluded under s. 24(2) of the *Charter* because of the violation of Mr. Soules' right to counsel under

s. 10(b) by the failure to give a *Prosper*¹ warning. The trial judge held that it was unnecessary to consider Mr. Soules' additional argument that ss. 258(1)(c), (d.01), and (d.1) of the *Criminal Code* create an impermissible mandatory presumption.²

Summary Conviction Appeal decision

[11] The Crown appealed from the acquittal on the basis that there was no breach of s. 7 or s. 10(b), and if there was a breach then the evidence should not have been excluded. In brief written reasons, the summary conviction appeal judge upheld the s. 7 violation and the exclusion of the breath results under s. 24(1). As a result, he found it unnecessary to consider s. 10(b).

ISSUES

[12] The Crown advances three arguments on this appeal and submits that:

1. This is a proper case for leave to a second appeal in summary conviction proceedings pursuant to s. 839 of the *Criminal Code*.
2. Both the summary conviction appeal judge and the trial judge erred in their application of *Powers* and its ruling on s. 7 of the *Charter*. Further, even if the statements made by

¹ *R. v. Prosper*, [1994] 3 S.C.R. 236. What is known as a "Prosper warning" arises where a detainee who has asserted the right to counsel, changes his or her mind and no longer wants to exercise the right. *Prosper* requires that at this point, the police provide additional information to the detainee, namely, to tell them of their right to a reasonable opportunity to contact a lawyer, and of the obligation of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity.

² The argument was that the mandatory presumption allows for a finding of guilt on over 80 despite a reasonable doubt regarding blood alcohol concentration, constituting an unjustifiable infringement of s. 7 and the s. 11(d) presumption of innocence.

Mr. Soules infringed s. 7, it is a reasonable limit on that right pursuant to s. 1 of the *Charter*.

3. Although not considered by the summary conviction appeal court, this court should consider whether Mr. Soules' s. 10(b) *Charter* rights were breached and whether the evidence should have been excluded pursuant to s. 24(2) of the *Charter*.

[13] For the following reasons, while I would grant the Crown leave to appeal, I would dismiss the appeal entirely. I am satisfied that this case, because of the *Charter* implications for drivers and police, clearly raises an issue of significance to the general administration of justice. Nevertheless, I am also satisfied that this appeal is completely answered by the Supreme Court of Canada's decision in *White*.

DISCUSSION

Issue 1: Leave to appeal

[14] This court established in *R. v. R.R.* (2008), 90 O.R. (3d) 641 (C.A.), and has repeated numerous times since then, that leave to appeal pursuant to s. 839 should only be granted in two distinct categories of cases:

Where the merits of the proposed question of law are arguable, even if not strong, and the proposed question of law has significance to the administration of justice that goes beyond the particular case.

Where there appears to be a "clear" error even if it cannot be said that the error has significance to the administration of justice beyond the particular case.

[15] Moreover, at para. 27 of *R.R.*, Doherty J.A emphasized that access to this court for a second appeal “should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal.”

[16] The Crown argues that the questions of law raised by this appeal are of significance to the general administration of justice in this province for two reasons. The questions of law are: (i) whether or not a person's *Charter* rights have been violated; and (ii) the granting or denial of *Charter* relief as a result. First, the Crown submits that the decisions below wrongly render inadmissible any statements made by an accused under compulsion at the scene of a collision, even for the limited purpose of establishing grounds for a breath demand and not as evidence of guilt.

[17] Second, the Crown submits that the s. 10(b) ruling in this case creates an absolute rule that in every case where a detainee changes his or her mind about speaking to counsel, additional information must be provided by the police. This court, it says, has rejected such an interpretation, therefore this ground of appeal is also deserving of leave on the basis of strong merit.

[18] Mr. Soules disagrees and argues that the present case cannot be brought under either of the two permissible categories to warrant granting of leave to this court. That is, its issues of law are not sufficiently meritorious, nor does it raise a significant question for the administration of the justice system.

[19] His position is that the two arguments advanced in the leave application are virtually the same as those raised on the summary conviction appeal. Apart from the leave issues, the appellant raises two questions of law – the rule against self incrimination and the right to counsel – which, Mr. Soules argues, are based on well-settled and consistently applied principles of law. The appellant is merely challenging the application of these firmly settled *Charter* principles.

[20] I would, as I said, grant leave to appeal. This is a case of first impression for this court. The trial courts in Ontario currently rely on the Supreme Court’s decision in *White* as interpreted by the British Columbia Court of Appeal in *Powers*. That, together with the *Charter* implications for drivers and police, raises issues of significance to the general administration of justice so as to warrant leave to appeal.

Grounds of appeal

[21] As a policy argument, the Crown submits that the holding below “has the potential to cripple the investigation of drinking and driving offences where a collision has occurred”. More specifically, the Crown argues that admission of the statement to establish reasonable suspicion for an ASD demand does not infringe s. 7 of the *Charter*, or that such infringement is justifiable under s. 1.

[22] The Crown essentially argues that the courts below erred in relying on *Powers*. *White* is distinguishable in that the statements in that case went to an essential element of

the offence charged, whereas the statements in *Powers* and in this case were not tendered as evidence of guilt. *White*, the Crown argues, does not address the admissibility of compelled statements for establishing reasonable grounds for a breath demand, and it did recognize that the protection against self-incrimination was contextual.

[23] The Crown also submits that this court should address the s. 10(b) issue, although it was not considered by the summary conviction appeal court. As I noted above, the Crown suggests that the s. 10(b) ruling creates an absolute rule that in every case where a detainee changes their mind about speaking to counsel, additional information must be provided by the police. This, it says, is contrary to earlier decisions of this court.

[24] As with the relevant statutory provisions, I believe a brief summary of *White* and *Powers* will assist in tracking my analysis.

Summary of *White* and *Powers*

[25] *R. v. White* involved a charge of failure to stop at the scene of an accident (*Criminal Code*, s. 252(1)(a)) in British Columbia. The victim was struck by a passing vehicle at about midnight. The next morning, the driver of that vehicle called the police to report the incident. She provided her name, date of birth, and address. An officer then attended at her home. The driver described the incident and provided her driver's licence. She was then given a s. 10(b) caution. After contacting her lawyer, she told the officer she would not provide a statement. She then answered additional questions.

[26] The relevant provision then in force – s. 61 of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 – was analogous to s. 199 of the Ontario *Highway Traffic Act*, except for s. 61(7) which was a use-immunity provision. The trial judge accepted that the accused subjectively believed she was required by law to report the accident. He excluded her statements to the police on the basis that they violated the s. 7 *Charter* right against self-incrimination, and then dismissed the charge because no evidence remained as to the identity of the driver.

[27] The majority of the court of appeal dismissed the Crown’s appeal. In dissent Southin J.A. held that the automatic exclusion of all statutorily-compelled statements was overbroad – the name and address of the driver, and the fact that they were driving at a certain place and time, would not necessarily offend the *Charter*.

[28] At the Supreme Court, Iacobucci J. for the majority held at para. 30 that “[s]tatements 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.” In particular he held that: the relationship between a driver and an officer receiving an accident report is potentially adversarial, because of the officer’s dual role in receiving reports and investigating crime; the prospect of unreliable confessions is quite real because of the strong incentive to provide a false statement; and there is a danger of abusive conduct by the state.

[29] In order to claim the protection of s. 7 of the *Charter*, Iacobucci J. held at para. 75 that a driver must establish on a balance of probabilities 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”.

[30] *Powers* was an over 80 case that involved facts similar to those in our case. The accused in *Powers* was involved in a collision. When the attending officer asked who had been driving the vehicle, the accused identified himself as the driver. His eyes were red and his breath had the odour of alcohol. The officer made an approved screening device demand and the accused failed. He then gave a breath sample that read over 80.

[31] The trial judge accepted the evidence of the accused that he identified himself as the driver because he thought he was required to do so. She found that to admit his admission that he was the driver of the vehicle in the ditch into evidence at trial would contravene s. 7 of the *Charter*. She excluded the admission, leaving no evidence that the officer had reasonable grounds to make the ASD demand.

[32] The summary conviction appeal court upheld the decision.

[33] The Court of Appeal held at para. 13 that the statement contravened s. 7 of the *Charter* following *White*:

The question on this case is whether, as the Crown contends, *White* allows for a different result in the circumstances of this

case. For the reasons that follow I have concluded that it does not. Although the use of the statement in this case is less direct than it was in *White*, the evidence was a necessary link in the chain of evidence necessary to convict Mr. Powers. As I read *White*, the Supreme Court of Canada has given a conclusive answer to the question which we are bound to apply.

[34] Based on *White*, the court also rejected the Crown's alternate arguments that: (1) the use of the statement for the limited purpose of establishing a proper foundation for making the device demands is a reasonable limitation under s. 1 of the *Charter*; or (2) the statement should not be inadmissible under s. 24(1). (See paras. 32 and 38.)

[35] With that background I now turn to the two remaining issues, which relate specifically to the grounds of appeal.

Issue 2: Sections 7 and 1 of the *Charter*; the application of *Powers* in Ontario.

[36] The Crown's submission here is that *Powers* should not be followed in Ontario and that both the trial judge and the summary conviction appeal court judge erred by relying on that case. In the Crown's view the limited admissibility of Mr. Soules' roadside statements either did not infringe his right against self-incrimination guaranteed by s. 7 of the *Charter*, or represented a reasonable limit on that right pursuant to s. 1.

[37] Indeed, the Crown seems to argue that *Powers* itself is wrong in not holding that compelled statements at the scene of a collision were admissible for the limited purpose of forming part of a police officer's "reasonable suspicion" to make an ASD demand.

Powers, and the decisions in this appeal, it is noted, do not apply the *Orbanski/Elias*³ line of cases, in which impugned evidence is admissible for this limited purpose. That is, the evidence is admissible for the limited purpose of establishing reasonable grounds for Constable Bucci to make an ASD demand.

[38] The Crown argues that while cases such as *Orbanski/Elias* are not collision cases, the infringement in issue is no greater than that of admitting statements in a collision case. Roadside statements such as those in our case, therefore, should be admissible as grounds for a breath demand as a reasonable limit on drivers' rights under s. 1. That is, even if there is a s. 7 infringement, the Crown submits that it ought to be justifiable under s. 1. Protecting against "the carnage caused by impaired drivers" is a pressing and substantial objective. The Crown put its position this way:

A complete bar on admissibility of road-side statements in collision cases constitutes a windfall for impaired drivers who have become involved in a collision. The decisions below cripple police investigation of impaired driving at the scene of a collision, where the need for these preventative powers is most pressing.

[39] As I explain, I would reject each of the Crown's arguments. In the end I trust it will be clear that *Powers* correctly interpreted and applied the *White* decision, which in turn were correctly followed by the courts below in our case.

³ *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3.

[40] In *Powers*, the majority referred to *Orbanski/Elias* and held that *White* was determinative of the issue. That is, statutorily compelled statements were not admissible for any purpose including for the purpose of establishing reasonable grounds: *Powers* at para. 38. It is this portion of *Powers* that the Crown contends cannot be correct.

[41] To illustrate its view, the Crown notes that a motorist's compelled participation in an ASD test is admissible to support an officer's grounds to make a breath demand: *R. v. Thomsen*, [1988] 1 S.C.R. 640. Therefore, the Crown argues, it must also be the case that compelled statements made at the scene of a collision are admissible when they are being used for the same limited purpose. The Crown points out that in both cases:

- the evidence emanates from the accused;
- they invoke the same level of concern regarding the potential for self-incrimination;
- it is an offence to fail to participate or cooperate with police; and,
- the evidence cannot be used at trial to prove an element of the offence.

[42] I disagree. The Crown's reliance on *Thomsen* and other like cases is misplaced, and for a very noteworthy reason: the questioning by police in those cases does not involve compelled answers. In each of them the motorist can refuse to answer if he or she chooses; they are not forcefully enlisted in aid of their own prosecution. For example, in the case of a breath demand made by a police officer pursuant to s. 254(5) of

the *Criminal Code*, the motorist is legally obligated to comply with the demand; nevertheless, s. 7 continues to furnish him or her with the right to choose whether or not to speak with the police – a choice statutory compulsion clearly eradicates. There is absolutely no legal compulsion to speak or provide information in any of the cases cited.

[43] In the result, *Powers* was correct to hold that *White* was determinative of the issue. The statutorily compelled admission from Mr. Soules in our case is not admissible for the purpose of establishing grounds for making either the ASD or the breath demand. Indeed, as Iacobucci J. made clear in *White* 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. Section 7 is violated and that is the end of the analysis, subject to issues relating to s. 24(1) of the *Charter*.

[44] The Crown's arguments on this issue rely almost exclusively on jurisprudence such as *Orbanski/Elias* directed at the s. 10(b) *Charter* right to counsel exemption in drinking and driving cases. However, despite the strong connection between ss. 7 and 10(b) of the *Charter*, the two are not mutually exclusive. As I believe the above quote from *White* illustrates, although it is a well established principle that s.10(b) rights are limited until arresting officers have developed reasonable and probable grounds to effect

an arrest, the choice of whether or not to remain silent – and thus prevent self-incrimination – nevertheless remains.

[45] The Crown makes the further argument that the distinctions between the British Columbia legislation and the Ontario legislation are important. While the British Columbia legislation expressly prohibits the use of statements compelled by the requirement to report a collision “in a trial or proceeding arising out of the accident”, the Ontario legislation contains no such limitation on the admissibility of this evidence.

[46] In my view, both the trial judge and the summary conviction appeal judge in our case came to the correct result on this point. I would begin with the apt comments of Wein J. in *R. v. DaCosta* (2001), 156 C.C.C. (3d) 520 (Ont. S.C.) at para. 33:

[It cannot] be realistically said, that anything turns on the distinctions between the British Columbia legislation and the Ontario legislation... notwithstanding that the Ontario legislation is far less specific than the B.C. legislation concerning use immunity.

[47] Use immunity created by a provincial statute cannot extend to proceedings under the *Criminal Code*, because it would be *ultra vires* the province to restrict the admissibility of evidence in criminal matters: *White* at para. 35. As Iacobucci J. explains further in para. 72, the purpose of this type of provincial legislation is not to assist the police in the investigation of specific crimes; rather,

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. [Citation omitted.]

[48] Use immunity therefore is limited to the jurisdiction of the provincial legislature and relates to whether or not there has been compliance with the legislated reporting requirement. Thus, although the Ontario *Highway Traffic Act* does not have similar use immunity provisions, this simply means that in Ontario the statutorily compelled accident report can be used to prove non-compliance as required by the *Highway Traffic Act*; nothing more.

[49] Iacobucci J. in *White* at para. 60 explained that the inclusion of use immunity provisions, like those in British Columbia, in relation to an accident report in subsequent proceedings means an intention to use them to gather information for non-litigious purposes only:

[T]he 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.

[50] As a result, this argument respecting the difference between the British Columbia and Ontario language does not assist the Crown.

[51] Before moving to the last argument in this ground of appeal, I will make some brief comments on the Crown's submission that this interpretation of the law "has the potential to cripple the investigation of drinking and driving offences where a collision has occurred". The Supreme Court in *White* essentially disagreed with this concern, Iacobucci J's observations at para. 64 are instructive:

[T]he 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.

[52] It was accepted in *White* that the effect of statutory provisions such as those under consideration in this case is to create a logistical difficulty for police. That is, if the desire is to use information acquired from a motorist in criminal proceedings, the information cannot derive from the duty of the motorist mandated by the statutory provisions: para. 65. Iacobucci J. then at para. 80 stressed the importance of the police taking an accident report while simultaneously investigating a crime to describe clearly to the motorist the start and end points of the accident report.

[53] At various places in his reasons Iacobucci J. describes several ways in which police might investigate so as to acquire information independently of the accident report that is subject to use immunity. One, he says, is to inform 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. Second, they might tell the driver that they will postpone the taking of an accident report until after they have questioned him or her. (See paras. 65 and 80.)

[54] Given the above, I think it is an unfounded argument that use immunity arising from the information mandated by provincial legislation such as that in this case has the “potential to cripple the investigation of drinking and driving offences where a collision has occurred”. I turn then to the last argument advanced by the Crown on this ground of appeal: that even if there is a s. 7 infringement, it is justifiable under s. 1 of the *Charter*.

[55] The Crown does not develop this argument at all in its factum but simply submits that just as in the case of the ASD test, the infringement of s. 7 in the circumstances of this case represents a reasonable limit on that right. It says that “measures aimed at protecting the public from the carnage caused by impaired drivers serve a pressing and substantial objective”. In addition, this argument does not appear to have been raised nor was it addressed in either the trial court or the summary conviction appeal court.

[56] Given that the issue of justification under s. 1 was not raised below and has only superficially been raised on this appeal, I would give no consideration to this argument. I would, however, note that *White* holds that the admission of Mr. Soules' statement would render the trial unfair; it is therefore unlikely to be seen as a s.1 reasonable limit of a *Charter* right.

[57] For these reasons I would not give effect to this ground of appeal.

Issue 3: Consideration of s. 10(b) of the *Charter*

[58] The Crown appealed the trial judge's findings on both s. 7 and s. 10(b) of the *Charter*. The summary conviction appeal court judge ruled that since he upheld the finding that Mr. Soules' right against self-incrimination was violated, it was unnecessary for him to consider the s. 10(b) issue. The Crown argues that this court should do so. It relies on this court's decision in *R. v. Flis* (2006), 205 C.C.C. (3d) 384. *Flis* is not helpful to the Crown on this point.

[59] First, the issues before the summary conviction appeal judge in our case are entirely different from those that were of concern and addressed in *Flis*. *Flis* was a case in which this court allowed the respondent in a Crown appeal to raise additional alleged errors by the trial judge in an effort to sustain the order of the summary conviction appeal court: *Flis* at para. 55.

[60] In the end our case was fully decided on the s. 7 *Charter* issue. The core issue engaged the principle against self-incrimination. As Iacobucci J. makes clear at para. 70 in *White* – which is set out in more detail above – if s. 7 is violated, the analysis is ended, subject to issues relating to s. 24(1) of the *Charter*.

[61] Where s. 7 applies to provide use immunity in relation to compelled statements in subsequent criminal proceedings – as it does in this case – exclusion of the evidence is compulsory. And, although the evidence can be excluded under the common law duty because admission would render the trial unfair, it can also be excluded pursuant to s. 24(1) of the *Charter*: see *White* at para. 89. This is precisely what occurred in this case.

[62] It was within the discretion of the summary conviction appeal judge to make a ruling on s. 10(b) in this case. However, because the self-incrimination issue alone is determinative of this appeal, the summary conviction appeal judge did not have to go beyond what he did. It was unnecessary for the appeal judge, and it is unnecessary for this court, to consider the s. 10(b) issue.

DISPOSITION

[63] As I have previously concluded, I think this is a proper case for leave to appeal to this court pursuant to s. 839 of the *Criminal Code*. However, for the reasons given above, I would dismiss the appeal. In my view, neither the summary conviction appeal court judge nor the trial judge erred in their application of *Powers* and its ruling on s. 7 of

the *Charter*. Further, I would give no consideration to the argument of justification under s. 1 because it was not raised below and was only raised in a cursory fashion on this appeal.

[64] Finally, because the self-incrimination issue alone is sufficient to decide this appeal, I conclude that it was unnecessary for either the appeal judge or for this court to consider the s. 10(b) *Charter* issue.

[65] Accordingly, I would dismiss the appeal.

RELEASED:

“JUNE -6 2011”

“H.S. LaForme J.A.”

“JMacF”

“I agree Robert Sharpe J.A.”

“I agree J. MacFarland J.A.”