PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Clark*, 2024 NSPC 52

Date: 20241112
Docket: 8680167,8680168
Registry: Dartmouth

Between:

His Majesty the King

v.

Justin Thomas Owens Clark

DECISION ON *VOIR DIRE* APPLICATION TO EXCLUDE COMPELLED STATEMENTS *CHARTER* SECTIONS 7 AND 24(1)

Judge: The Honourable Judge Bronwyn Duffy

Heard: February 22, July 2, August 26 and September 15, 2024, in Dartmouth, Nova Scotia

Decision: November 12, 2024

Charge: Sections 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code*

Counsel: Janine Kidd, for the Public Prosecution Service of Nova Scotia
Matthew Kennedy, for the Defence

By the Court:

Introduction

[1] In the early morning hours of March 16, 2023, Mr. Clark called 911 to report a single-car accident. The police arrived shortly thereafter and observed a car upside down in the ditch. The police spoke with both Mr. Clark and his wife, who were standing nearby. The police later charged Mr. Clark with impaired driving and having a blood alcohol concentration that exceeds that statutory limit within two hours after he is alleged to have stopped driving.

[2] The Crown elected to proceed by summary process.

[3] Mr. Clark entered pleas of "not guilty" and the matter was scheduled for trial.

[4] The Applicant (Defence) seeks to exclude from the evidentiary record Mr. Clark's statements that he made to the 911 operator and to the police roadside prior to his arrest.

[5] The Defence filed a *Charter* application, alleging a breach of his section 7 rights. Mr. Clark asserts that his conversation with the 911 operator, and his subsequent comments to the police at the roadside prior to his arrest, were made under compulsion by statute. He claims that the admission of these statements at his trial would contravene his right to be free from self-incrimination. The Defence asserts use immunity protection for these statements.

[6] The Defence argues the evidence should be excluded from consideration at his trial, and that the Court can rely upon its common law power to protect trial fairness to do so. Alternatively, the Defence argues the Court can resort to s. 24(1) of the *Charter* to exclude the evidence.

[7] The *Charter* application proceeded by way of a standalone *voir dire*. The Defence called Cst. Timothy Mugford and the accused. At the conclusion of the evidence, counsel agreed to adjourn argument on the *Charter* application to permit the filing of written submissions as to the admissibility of the accused's statements.

[8] The matter then proceeded immediately into the trial proper with its distinct evidentiary landscape.

[9] The prosecution called three witnesses at the trial proper: Constable Timothy Mugford; Corporal Andrew McBride; and Constable Christopher Brennan. The Crown tendered the following exhibits: Mr. Clark's subject test report from the approved instrument; the certificates of analyst; five photos (the scene and Mr. Clark's vehicle); and the approved instrument printout from Mr. Clark's mouth alcohol reading.

[10] The Defence had previously exhibited the 911 call on the *voir dire*. For the purposes of the trial proper, Defence counsel admitted the voluntariness of Mr. Clark's statement to the 911 operator that he was the driver, subject to the Court's pending ruling on its admissibility on the *Charter* application.

[11] The Defence elected not to call evidence on the trial proper. The matter was adjourned to August 26, 2024, for oral argument on both the application and trial proper, and counsel filed briefs to assist the Court. The parties appeared on September 15, 2024, to schedule the decision date of November 12, 2024.

[12] At the conclusion of oral argument, the Court asked the prosecution whether it would be able to establish the essential elements of the offences based on the evidence on the trial proper if the accused's statements to the 911 operator and to the police at the roadside were ruled inadmissible. The Crown conceded, fairly, that there is insufficient evidence of driver identification to ground a conviction in the absence of the accused's statements.

[13] For the reasons set out below, the Defence has met its burden with respect to the *Charter* application. I find that the accused's statements are inadmissible on the trial proper. Given the Crown's concession, my ruling on the *Charter* application is also determinative of the trial proper.

Evidentiary Record – *Charter* Application - *Voir Dire*

[14] On March 16, 2023, Justin Clark called 911 shortly after 1 a.m. and reported that he was in an accident on Caldwell Road in Dartmouth, Nova Scotia. He told the operator that he had "hit some black ice and slid". He advised that he was not injured but that his car was upside down in the ditch.

[15] Cst. Mugford received the call from dispatch about the single-vehicle collision. Constable Mugford was aware that the caller had self-identified as Justin Clark.

[16] Constable Mugford arrived on scene at 1:17 a.m. He saw two people standing about 15 feet from the edge of the road. Constable Mugford saw a vehicle in the

ditch and observed where it had left the road. There was heavy snow and the road conditions were slippery. Cst. Mugford greeted, and identified, Mr. Clark and his wife, Faith Bowyer. Mr. Clark declined emergency services. Cst. Mugford asked Mr. Clark questions to try to "figure out what had transpired." As they were speaking, Cst. Mugford detected an odour of alcohol from Mr. Clark. Mr. Clark advised that he had consumed a couple of beers at Dooly's with his friends – more specifically, that he had three or four drinks before leaving them.

[17] Cst. Mugford confirmed that he went to the scene to investigate a motor vehicle collision. He completed an accident report (Exhibit VD-1) at about the same time as his officer report.

[18] Cst. Mugford testified that he was generally aware of his obligations with respect to reporting accidents under the *Motor Vehicle Act* (MVA). The reporting obligation which Cst. Mugford was referring to is contained in s. 98(4) of the MVA, which requires a peace officer who investigates a collision to forward a report to the Registrar of Motor Vehicles. Cst. Mugford noted the damage as "severe" in his report. The collision was "reportable", exceeding $2,000 in apparent property damage.

[19] The Crown asked Cst. Mugford in cross-examination whether calling 911 amounts to reporting something to the police. Cst. Mugford responded that a call to 911 connects with the Integrated Emergency Services for police, fire (department), and Emergency Health Services. He said he did not know whether Mr. Clark had called 911 or the non-emergency number for the police.

[20] At the scene of the accident, Cst. Mugford asked Mr. Clark questions as to how he came to be in the ditch. It was shortly after this conversation commenced that Cst. Mugford noted the odour of alcohol. Cst. Mugford testified that this "sent [him] down the beginnings of an impaired driving investigation". This investigative change happened after Mr. Clark had already identified himself as the driver.

[21] Mr. Clark testified and authenticated the recording of his 911 call (Exhibit VD-2). He also identified two photos of his vehicle, a 2019 Honda CRV upside down in a ditch (Exhibit VD-3).

[22] Mr. Clark testified about what occurred in the time immediately following the collision. He said that he unbuckled his seat. He heard his phone ringing and found it between the passenger's seat and the air bag. He had missed a call from his wife. He called her back and was speaking with her when he exited the vehicle through

the rear passenger door. He then climbed up a slight hill by the ditch. A snowplough driver stopped and asked if he was okay or needed any help.

[23] Mr. Clark called 911 after the exchange with the snowplough driver. He did so because his car was upside down in the ditch and had sustained significant damage. Mr. Clark testified that his wife's urging also contributed to his decision to call 911. Counsel agreed that any alleged comments by his wife are not properly considered by this Court for the truth of their contents.

[24] Mr. Clark testified that he understood the police officer was there because he had called 911 to report an accident. The officer asked if everyone was okay and inquired as to how the accident had happened. The officer said that he smelled alcohol. Mr. Clark testified that the officer asked him and his wife if they had had anything to drink. Mr. Clark was of the impression that the officer was there to ask questions about the accident and to do an accident report which would "go to insurance". Mr. Clark testified that in these circumstances, "any questions he was asking, I was answering".

[25] Mr. Clark testified in detail as to the extensive damage to the vehicle: the airbags in the vehicle deployed; the passenger side mirror was smashed; the passenger side window was broken. Mr. Clark said that the insurance company deemed the vehicle a write-off and the damage was valued, and paid out, at approximately $31,000.

[26] The Crown cross-examined Mr. Clark on his interaction with the snowplough driver. Mr. Clark agreed that the driver asked him if he was okay. The snowplough driver also asked Mr. Clark if he – the snowplough driver - should call 911. Mr. Clark responded that he would call 911 himself.

[27] The prosecution suggested on cross-examination that had Mr. Clark not called 911, the snowplough driver would have done so. Mr. Clark agreed with the suggestion but went on to say, "it was my car, my accident, and I called 911".

Issues

[28] The issues are as follows:

1. Whether Mr. Clark made the 911 call and the roadside statements under compulsion;

2. Whether admission of the statements would constitute a breach of Mr. Clark's right to be free from self-incrimination as a principle of fundamental justice guaranteed by section 7 *Charter*; and

3. Whether the statements should be excluded under s. 24(1) or the common law power of the Court to ensure trial fairness, and instead used only for the limited purpose of justifying a breath demand legislated in section 320.31(9) *Criminal Code (CC).*

Issue 1 – Whether Mr. Clark made the statements to the 911 operator and police at the roadside under compulsion

[29] The *Charter*-enshrined right to life, liberty and security of the person is guaranteed by section 7, and persons in Canada cannot be deprived of this right except in accordance with the principles of fundamental justice. Section 7 of the *Charter* states:

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

[30] Section 320.31(9) CC restricts the use of an accused's statements to a peace officer during the prosecution of impaired driving offences:

> A statement made by a person to a peace officer, including a statement compelled under a provincial Act, is admissible in evidence for the purpose of justifying a demand made under section 320.27 or 320.28.

[31] The allegations before the Court, prosecuted summarily, each carry a maximum penalty of 24 months' imprisonment and/or a $5000 fine, pursuant to the general penalty provisions (s. 787 CC).

[32] The charges also have minimum penalties, including fines, driving prohibitions, and in the case of second or subsequent offences, a period of incarceration. Accordingly, Mr. Clark's liberty interest is engaged.

[33] In *R. v. White*, [1999] 2 SCR 417, the Supreme Court characterized the right to be free from self-incrimination protected by section 7 as an "overarching principle" in our justice system (para. 44). The Court emphasized at para. 41 that "[i]t 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…" (citations omitted). The right to protection against self-incrimination is dual-

purpose – it protects against abuses of power by the state, and against unreliable confessions.

[34] When the state levels a charge against an individual, the *Charter* guarantees the individual the right to silence in subsequent interactions with the police. That is part and parcel of the protection from self-incrimination. This right is violated in circumstances where the state coerces a person to give evidence against themselves, and coercion extends to questioning without free and informed consent (*R. v. Jones*, [1994] 2 SCR 229 at para. 29).

[35] In *White*, the Supreme Court held that statements made by an accused person under compulsion of section 61 of the British Columbia Motor Vehicle Act are "inadmissible in criminal proceedings against the declarant because their admission would violate the principle against self-incrimination" (para. 30). However, declarants are protected by use immunity under section 7 only to the extent their statements are properly considered to be compelled.

[36] In evaluating whether a statement is compelled, *White* directed trial courts to consider the following test for compulsion at para. 75:

> … 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.

[37] There is a subjective element to the test for compulsion. The Court stated at para. 76:

> …If a declarant gives an the 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*.

[38] Our provincial legislation also includes a statutory regime for reporting motor vehicle collisions. Section 98(1) of the MVA mandates reporting where the driver of a vehicle is involved in an accident that results in injury or death or property damage to an apparent extent of two thousand dollars or more:

> Accident report
>
> 98 (1) The driver of a vehicle involved in an accident resulting in injury or death to any person, or property damage to an apparent extent of two thousand dollars or more, shall, within twenty-four hours,

> (a) if the accident takes place within a city or incorporated town, forward a written report of the accident, or report the accident in person to the Registrar, or to the nearest detachment of the Royal Canadian Mounted Police, or to the chief of police or any regular member of the police force of the city or incorporated town;
>
> (b) if the accident takes place other than within a city or incorporated town, forward a written report of the accident or report the accident in person to the Registrar or to the nearest detachment of the Royal Canadian Mounted Police.

[39] Further, peace officers in Nova Scotia have a duty to investigate highway collisions pursuant to the same legislation:

> 98 (4) Any peace officer who is a witness to or who investigates any accident in which a vehicle upon a highway is involved, whether or not required to be reported under this Section, shall forward to the Registrar, in addition to any other report that may be required under this Section, a report setting forth full particulars of the accident, the names and addresses of the persons involved, the extent of the personal injuries or property damage, if any, and such other information as may enable the Registrar to determine whether any driver involved in or contributing to the accident should be prosecuted, and where the peace officer or any other person has laid an information against a driver of a vehicle in connection with such accident, such fact shall be stated in the report.

[40] The Defence offers the case of *R. v. Spin* from our Court of Appeal (2014 NSCA 1). Mr. Spin was involved in a highway collision and left the scene after being assessed by paramedics. Shortly thereafter, a peace officer attended at Mr. Spin's residence and sought a statement from him pursuant to the MVA. The Court noted the finding by the trial judge that the statement was statute-compelled and inadmissible to be tendered by the Crown at the trial per the use immunity declaration in *R. v. White* (para. 13). That aspect of the ruling was not the subject of the appeal.

[41] The prosecution argues that the *Spin* decision was a Crown appeal of the trial judge's ruling that the certificate of analysis should be excluded pursuant to section 24(2) of the *Charter* because of conceded breaches of sections 8 and 10(b). The Crown highlights that this decision was not about the driver's statement to the police or section 7 of the Charter. The prosecution moreover argues that the appeal from the original trial, *R. v. Spin*, 2011 NSCA 80, was also not about the driver's statement to the police or section 7 of the *Charter*. Rather, it concerned the trial judge's failure to find a breach of Mr. Spin's section 10(b) *Charter* rights and the admission of the breath sample results.

[42] The prosecution submits that the issue of when a driver's statement is compelled by our provincial MVA does not appear to have been litigated in Nova Scotia in any reported decisions.

[43] The Defence argues that this case is analogous to the circumstances in *White* and *Spin*.

[44] The Defence bears the burden of establishing on the balance of probabilities that the statements were compelled. More specifically, the Defence must establish that the driver gave the report to the police under an honest and reasonably held belief that they were required to do so.

[45] In *White*, the driver had been on the road late at night when she struck a man who was changing a tire at the roadside. The following morning, she called the police and said that "she wanted to report an incident that had happened the night before" where she had swerved to avoid hitting a deer and hit a jack and a man changing his tire (para. 4).

[46] An officer arrived at her residence 30 minutes later, and before he read her any rights or caution, she repeated her account, adding that she had panicked and driven on afterward. After the officer read her s. 10(b) rights and caution, she made further comments to police elaborating on the incident.

[47] Ms. White testified in a *voir dire* and stated that she knew "immediately upon being involved in the accident that she was under a duty to report it" (para. 9). The trial judge's finding that the statement was compelled was affirmed by the Supreme Court.

[48] The Defence asks the Court to consider the following notable evidence in this case:

- Mr. Clark called 911 minutes after the collision, explaining that he did so because his car was upside down in the ditch and had sustained significant damage;

- Cst. Mugford arrived at the scene with the purpose of investigating a motor vehicle collision. He approached Mr. Clark and his wife and asked them several questions for the purpose of finding out what had happened;

- Upon detecting the odour of alcohol, the nature of the officer's investigation changed to that of impaired driving. This was after Mr. Clark had already identified himself as the driver;

- Mr. Clark believed that the officer had responded to help with the accident and to create an accident report, which would then "go to insurance". Mr. Clark testified that in these circumstances, "any questions he was asking, I was answering";

- When tested on cross-examination about his interaction with the snowplough driver, Mr. Clark agreed that the driver asked if he was okay. The driver further asked Mr. Clark if he – the driver - should call 911 and Mr. Clark said that he would call 911 himself; and

- Mr. Clark agreed when the Crown suggested that had he not called 911, the snowplough driver would have done so. Mr. Clark went on to say: "it was my car, my accident, and I called 911".

[49] The Defence argues there is no basis to doubt that Mr. Clark honestly believed in his obligation, having been a regular driver in this country for eight or nine years.

[50] The Defence refers to the case of *R. v. Korduner*, 2022 ABKB 790. The Court of King's Bench upheld the trial judge's ruling that the accused's statements were compelled under the Alberta *Traffic Safety Act* (leave to appeal was granted on a separate issue - the Alberta Court of Appeal considered the constitutionality of s. 320.31(9) in *R. v. Korduner*, 2023 ABCA 82). The Court found the accused's assertion that she believed she had a duty to report the accident was substantiated by the objective circumstances of the collision. The accused was "probed for information" and "gave the verbal responses she did in relation to those questions based on her perceived understanding of her statutory obligations under the TSA to answer any questions the officer asked of her as a driver involved in a motor vehicle accident" (para. 70). The Court determined that it was reasonable for the trial judge to conclude that the exchange between the accused and the peace officer constituted the making of an accident report.

[51] The Defence argues likewise here – that Mr. Clark honestly and reasonably believed that he was obligated to report the accident. As such, his statements to the 911 operator and to Cst. Mugford were statutorily-compelled statements reporting the occurrence of a motor vehicle accident.

[52] The Crown provides several cases from Ontario involving the subsequent use of a driver's compelled statements under provincial motor vehicle legislation.

[53] The Crown draws from *R. v. Parol*, 2011 ONCJ 292 at para. 7, for the proposition that a three-fold test applies to engage the use immunity protection under *White*:

> 1) That [the driver] was in fact compelled by statute to provide a report.
>
> 2) That the statements [the driver] made were 'a report' within the meaning of the compelling statute.
>
> 3) That [the driver] gave [their] report in the honest and reasonable belief that [they] were compelled by the statute to do so.

[54] The Crown also refers to *R. v. Pita*, 2013 ONCJ 716. *Pita* elaborates on the requirements for an accused to rely on the protection in *White*. The Court states that:

- there is a tactical burden for the accused to testify as to their belief and have it tested by cross-examination (para. 52);
- there is no "magical incantation or detailed appreciation of the legislation" required to substantiate their belief and invoke the s. 7 *Charter* protection (para. 53); and
- the accused is "effectively obliged to assert that she felt compelled to speak to the police" because she understood her legal requirement to report and/or the potential consequences flowing from the failure to do so (para. 53).

[55] The Crown argues that a police officer who speaks with an accused in the context of a motor vehicle accident must understand whether they can rely on a driver's statement if criminal charges are ultimately laid and what use they may make of it when they are embarking on a criminal investigation (*R. v. Hussainyar*, 2015 ONSC 2109, at para. 8).

[56] The Crown submits that the determination of whether the statement was statutorily compelled is a question of fact (*R. v. Moussavi*, 2016 ONCA 924, at para. 29).

Conclusion on Issue 1: The statements to the 911 operator and the officer at the roadside were statutorily compelled

[57] One of the items on which counsel are at odds is whether the 911 operator properly falls under the classification of a person to whom an accident report must be given.

[58] When asked during direct examination if calling 911 constitutes a report to the police, Constable Mugford said that calling 911 is calling the Integrated Emergency Services – police, fire (department), and Emergency Health Services.

[59] The Crown argues that 911 operators are not the persons to whom s. 98(1) MVA requires a report to be tendered. The Defence argues that this distinction is void of any practical difference and the Court agrees with their assessment. Mr. Clark exited his vehicle, shaken but unhurt, and then called his wife. He then called 911 because his car was upside down in a ditch and had sustained significant damage. As a result, the police arrived on the scene. Mr. Clark said that he understood the officer was there because he called 911 to report an accident. Whether Mr. Clark called 911 or called the non-emergency line is immaterial; it leads to the same end, the notification and subsequent arrival of the police.

[60] I find that Mr. Clark was compelled by statute to provide a report. Evidence of the objective circumstances of the collision support this finding, including Mr. Clark's detailed description of the extensive damage to the vehicle. He testified that the airbags in the vehicle deployed, the passenger side mirror was smashed, and the passenger side window was broken. Mr. Clark said that the vehicle was deemed a write-off and the damage was valued and paid out at approximately $31,000.

[61] With respect to whether his statements to the 911 operator and to the police at the roadside constitute 'a report' to police, Mr. Clark testified on cross-examination on the *voir dire* that he understood the officer was there because he called 911 to report the accident as his car was upside down in a ditch. He was of the impression that the officer was there to ask questions about the accident and do an accident report which would "go to insurance". Mr. Clark testified that in these circumstances, "any questions he was asking, I was answering".

[62] When asked on cross-examination about his interaction with the snowplough driver, Mr. Clark agreed that the driver asked if he was okay and if the driver should call 911. Mr. Clark said that he would call 911.

[63] Mr. Clark did agree when the Crown suggested that if he had not called 911, the snowplough driver would have done so. Notably, however, he went on to say, "it was my car, my accident, and I called 911".

[64] The Crown argues that Mr. Clark's driving history does not support the finding that he held an honest and reasonable belief that he was compelled by statute to report the accident. The Crown highlights that more than half of his driving experience has been in British Columbia where there has not been a requirement for persons involved in accidents to report them to police since 2008. Furthermore, Mr. Clark has only been a regular driver since 2015 or 2016.

[65] In my view, the evidentiary record supports the contrary. The honesty and reasonableness of his belief is encapsulated by his evidence that he had the impression that the officer was there to ask questions about the accident and do an accident report which would "go to insurance". Mr. Clark testified that he would answer any questions the officer was asking of him.

[66] I will address the argument raised by the Crown that the police must also have some certainty when they are in the process of collecting evidence in a criminal investigation as to whether they may rely on a statement made by an individual should the investigation result in criminal charges (*Hussainyar*, at para. 8). This is not a requisite of the *White* test for use immunity. Cst. Mugford confirmed he went to the scene to investigate a motor vehicle collision. His evidence was that he completed an accident report (Exhibit VD-1) at about the same time as his officer report. He testified that he was generally aware of his accident reporting obligations under the *Motor Vehicle Act*. He noted the odour of alcohol after Mr. Clark had already identified himself as the driver, and consequently embarked on an impaired operation investigation. This evidence suffices as to his understanding of his duty in the course of his investigation. Whether the statement of Mr. Clark can be relied upon is a question of law not within the purview of Cst. Mugford's investigative responsibility.

[67] Mr. Clark's statements to the 911 operator and to the police at the roadside were statutorily compelled reports of the occurrence of a motor vehicle accident as contemplated by the use immunity ruling in *White*.

Issue 2 - Whether admission of the statements would constitute a breach of Mr. Clark's right to be free from self-incrimination as a principle of fundamental justice guaranteed by section 7 of the *Charter*

[68] Having determined that Mr. Clark's statements to the 911 operator and the police at the roadside were statutorily compelled, and that his liberty interest is engaged in answer to the charges against him, I turn to the following direction from the Supreme Court of Canada in *White* at para. 70:

> …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*.

[69] As the Supreme Court reviewed in *White*, the use immunity created by provincial legislation does not extend to proceedings under the *Criminal Code* because it would be *ultra vires* of the province to restrict the admissibility of evidence in criminal matters. Accordingly, individuals must avail themselves of the *Charter* to access this protection.

[70] In the time since *White*, Parliament has legislated on the issue of statutorily compelled statements in the context of impaired investigations.

[71] Section 320.31(9), which came into force on December 18, 2018, reads:

> Admissibility of statement
>
> (9) A statement made by a person to a peace officer, including a statement compelled under a provincial Act, is admissible in evidence for the purpose of justifying a demand made under section 320.27 or 320.28.

[72] Section 320.31(9) reflects the intent of Parliament to restrict the use of statements that are compelled by legislation on the trial proper. There may be reliance on such statements to support officer grounds for a breath demand.

[73] Admission of these statements made under a statutory duty to report an accident for a purpose beyond supporting officer grounds offends the principle against self-incrimination protected by section 7 of the *Charter*.

Issue 3 - Whether the statements should be excluded under subsection 24(1) or under the common law power of the Court to ensure trial fairness

[74] The Defence does not claim the evidence was obtained in a manner that violated his *Charter*-protected rights, thereby engaging section 24(2), but rather that the evidence itself is violative.

[75] The Supreme Court of Canada addressed the avenues to a remedy in *White*. The Court reviewed their previous jurisprudence relating to exclusion under s.

24(1), beginning with *R. v. Therens*, [1985] 1 SCR 613. *Therens* addressed evidence that had been obtained in a manner that infringed the accused's *Charter* rights. The majority found that section 24(2) was the only appropriate mechanism for exclusion - this is now settled law.

[76] In *White* at para. 85, the Court confirmed that while the writers of *Therens* had not specifically adverted to the section 24(1) route to exclusion:

> …*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*.

[77] The Court in *White* went on to discuss at paras. 87 and 88 how the possibility of exclusion via section 24(1) was addressed in *R. v. Harrer* [1995] 3 S.C.R. 562 and in *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841.

[78] To settle the question of whether s. 24(1) of the *Charter* may serve as the mechanism for the exclusion of evidence whose admission at trial would violate the *Charter*, the Court says at para. 89 of *White*:

> Although I agree with the majority position in Harrer, supra, that it may not be necessary to use s. 24(1) … 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. [Emphasis added.]

[79] The Defence also refers to the cases of *R. v. Powers*, 2006 BCCA 454 and *R. v. Soules*, 2011 ONCA 429.

[80] In *Powers*, the accused had identified himself as the driver of a vehicle involved in a highway accident in response to a police investigator asking, "Who is the driver of the car in the ditch?", to the two individuals present at the scene (para. 4). The judge found that the identification was based on an honest and reasonably held belief that he was required by law to report the collision to police. The British Columbia Court of Appeal held that *White* was determinative and that the evidence should be excluded. The Court stated although the trial judge could have arrived at that remedy by common law or by resort to s. 24(1), she chose the latter and the Court of Appeal confirmed that she was entitled to do so.

[81] Likewise in *Soules*, in response to questioning by police, the driver identified himself "…because he understood that he was required by law to do so" (para. 9). On appeal, the Court affirmed exclusion of the evidence was compulsory as section 7 is engaged in relation to the compelled statements. The Court went on to confirm that the evidence can be excluded under the common law duty of trial courts to ensure trial fairness, or via section 24(1), the latter which occurred in that case.

[82] Earlier this year, the Supreme Court of Canada reviewed the nature of the protection afforded by section 7 in *R. v. Brunelle*, 2024 SCC 3. The Court states at para. 68:

> [W]here none of the specific procedural guarantees [in the *Charter*] addresses the alleged misconduct, this Court has established that section 7 … acts as a safeguard and provides accused persons with additional protection from state conduct that affects trial fairness in other ways and from 'residual' conduct that otherwise undermines the integrity of the justice system (*Nixon*, at para. 36). …

[83] The Court confirmed the recognition in *White*, and others[1], of the residual protection afforded by section 7 against abuse of process.

[84] I am of the view that invoking section 24(1) is appropriate in this case to arrive at a remedy. The Supreme Court instructed in *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62, that "[s]ection 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms" (para 87). The proper remedy lies under subs. 24(1).

[85] While superior courts may craft any remedy that they consider "appropriate and just" in the circumstances, this is a statutory court. Accordingly, I turn to the binding authority from our Court of Appeal and the Supreme Court of Canada as to the nature of the remedy. Our Court of Appeal in *R. v. Zwicker*, 2003 NSCA 140, approved exclusion of the compelled statement per s. 24(1), which was the same approach recognized in *White* as a suitable remedy[2]. A consistent approach is in order here and I exclude the evidence pursuant to s. 24(1) of the *Charter*.

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[1] See also: *J.J.*, 2022 SCC 28, at para. 113; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 24; *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 72 and 76; *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688.

[2] Our Court of Appeal also discussed the remedial function of s. 24(1) in *Constitution Act* (*Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*, 2023 NSCA 82). While that case involved a different issue, addressing the jurisdiction of section 96 courts to grant a section 24(1) remedy in cases where there has already been a declaration of constitutional invalidity under s. 52(1), it confirmed the discretionary nature of the remedial jurisdiction of subs. 24(1) to right unconstitutional government acts (citing *R. v. Ferguson*, 2008 SCC 6, and *Vancouver (City) v. Ward*, 2010 SCC 27).

[86] The prosecution has fairly acknowledged, and the Court agrees, there is insufficient evidence of identification without admission in the trial proper of the accused's statements to the 911 operator or police at the roadside.

[87] Acquittals are registered on both counts.

[88] The Court acknowledges Ms. Kidd and Mr. Kennedy for proficient and insightful written and oral argument, which focused the Court's attention on the issues requiring consideration in this case.

Bronwyn Duffy, JPC