

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N:

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(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

- and -

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CONTENTS

PART I — OVERVIEW..... 1

PART II — QUESTION IN ISSUE..... 2

PART III — STATEMENT OF ARGUMENT..... 2

PARTS IV AND V — SUBMISSIONS ON COSTS AND ORDER SOUGHT 10

PART VI — TABLE OF AUTHORITIES 11

PART I — OVERVIEW

1. Section 320.31(9) of the *Code* permits the admission of statements compelled from the accused by provincial law at the accused’s criminal trial. This section makes such statements admissible at the instance of the Crown – not to prove guilt, but to justify a police demand for breath samples or other methods of alcohol and drug testing. This appeal raises the question of whether this limitation on the permissible use of compelled statements is consistent with the protection against compelled self-incrimination enshrined in s. 7 of the *Charter*.

2. The Canadian Civil Liberties Association (CCLA) submits it is not.

3. In enacting s. 320.31(9), Parliament has attempted to reverse more than a quarter century of *Charter* jurisprudence holding that the use of compelled statements as evidence in criminal proceedings violates the s. 7 self-incrimination guarantee, full stop. Carving out an “establishing grounds” exception would render nugatory the sensible use immunity standard developed by this Court in *R. v. White*, [\[1999\] 2 S.C.R. 417](#). After all, in alcohol-driving prosecutions, the Crown benefits from a host of favourable presumptions and evidentiary shortcuts which typically combine to make the successful admission of breath samples dispositive of guilt. As a matter of fundamental justice, it is unfair to allow police to leverage the existence of provincial regulatory requirements – enacted for wholly non-criminal purposes – in order to collect dispositive evidence of criminal guilt through compelled self-incrimination. Parliament could never validly enact a requirement to speak to police as an exercise of its criminal law power. Permitting police to co-opt a provincial regulatory regime to pursue a criminal law objective would be an end-run around this constitutional limitation. It likewise runs afoul of s. 7 of the *Charter*.

4. In addition, to ensure protection of the principle against self-incrimination, the CCLA submits that the s. 7 use immunity analysis should be streamlined to focus on whether the accused individual is statutorily required to give a statement in circumstances where potential criminal

liability has crystallized.

PART II — QUESTION IN ISSUE

5. The CCLA intervenes in this appeal to advance its view of the proper understanding of s. 7 use immunity, and to ensure that this analysis is consistently applied by courts. The Court’s conclusions regarding the constitutionality of s. 320.31(9) will have wide-ranging ramifications on the liberty of individuals who are, or reasonably believe themselves to be, legally compelled to speak to police. This Court should confirm the use immunity of compelled statements in *all* criminal proceedings to ensure that the principle against self-incrimination is not rendered moot.

PART III — STATEMENT OF ARGUMENT

A. The core protection against self-incrimination cannot be vitiated by an “establishing grounds” exception

a. Use immunity in all aspects of criminal proceedings

6. Few if any principles of fundamental justice are more firmly entrenched in the s. 7 jurisprudence, and in the criminal law more generally, than the principle against self-incrimination. It is “[p]erhaps the single most important organizing principle in criminal law.”¹ In practice, it means that an individual cannot be “conscripted by the state to promote a self-defeating purpose.”² In other words, “until the Crown establishes that there is a ‘case to meet’, an accused is not compellable in a general sense ... and need not answer the allegations against him or her.”³

7. The principle against self-incrimination is engaged by both the subsequent use of compelled statements (resulting in “use immunity” under s. 13 of the *Charter*) and the use of compelled statements to obtain derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for statement (resulting in “derivative use

¹ *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 577.

² *R. v. White*, [1999] 2 S.C.R. 417, at para. 42.

³ *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 577.

immunity”).⁴ This “derivative use immunity” is connected to the s. 7 protection afforded to individuals who make compelled statements.⁵

8. In *White*, this Court held that the principle against self-incrimination is engaged by statutorily compelled statements made in the context of police taking a motor vehicle accident report pursuant to provincial traffic legislation. *White*’s core holding is that an accused who makes a statutorily compelled statement to authorities is “entitled, at least, to use immunity in criminal proceedings in relation to the contents of that statement.”⁶

9. The *ratio* from *White* is sensible. It gives effect to the *quid pro quo* at the heart of the use immunity doctrine: namely, that the state can validly compel a potentially self-incriminatory statement to further the purposes of provincial traffic legislation, but is disentitled from using such a statement to establish liability under the federal *Criminal Code*.

10. The *ratio* from *White* is also workable. It has been applied by different appellate courts to address the very scenario present in the Appellant’s case. For example, the Court of Appeal for Ontario released its decision in *Soules* eleven years after *White*. In *Soules*, the Court of Appeal held that statutorily compelled statements are also not admissible for the purpose of establishing grounds to make a breathalyzer demand. According to LaForme J.A., “the statutorily compelled accident report can be used to prove non-compliance as required by the *Highway Traffic Act*; nothing more.”⁷ In other words, these statements cannot be used to establish an accused’s guilt.

11. It would be both illogical and an affront to the protection against self-incrimination to hold that whether a statement attracts use immunity depends on what the Crown proposes to do with it. To be a meaningful right under s. 7, it must apply to *all* aspects of criminal proceedings, including

⁴ *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at p. 561.

⁵ *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at p. 561.

⁶ *R. v. White*, [1999] 2 S.C.R. 417, at para. 67.

⁷ *R. v. Soules*, 2011 ONCA 429, at para. 48 (emphasis added).

a *voir dire* at which crucial evidence against the accused (typically a breath sample) is admitted or excluded.

12. In arguing that statements at the scene of an accident should be admissible for the “limited purpose” of establishing grounds for a demand, the Respondent points to this Court’s decisions in *R. v. Orbanski*; *R. v. Elias*, [2005 SCC 37](#), and *R. v. Paterson*, [2017 SCC 15](#).

b. The limitation on use immunity in *Orbanski* is not applicable when faced with statutory compulsion

13. In *Orbanski*, this Court permitted a limitation on the s. 10(b) right to counsel (justifiable under s. 1) in the context of impaired investigations. *Orbanski* holds that evidence obtained through a motorist’s participation at the scene without the right to counsel can be used as an investigative tool to confirm or reject suspicion of impairment. It cannot be used as direct, incriminatory evidence against the motorist.⁸ According to the Respondent, *Orbanski*’s limitation on use immunity is applicable to compelled roadside statements, as self-incrimination lies at the root of *Orbanski*, and “there is no compelling reason to distinguish the admissibility of statements according to whether they are *statutorily* compelled or merely *psychologically* compelled.”⁹

14. Respectfully, the narrow limitation on use immunity that *Orbanski* establishes in the s. 10(b) context cannot be grafted onto the principle against self-incrimination – especially in the context of statutorily compelled statements – for the following three reasons.

15. First, *Orbanski* did not fully consider the limits of the s. 7 protection against self-incrimination,¹⁰ and it did not need to because the limitation on use immunity established in that case “relates to responses to questions posed by police officers that drivers are not compelled to

⁸ *R. v. Orbanski*; *R. v. Elias*, [2005 SCC 37](#), at [para. 58](#).

⁹ Factum of the Respondent, at para. 63 (emphasis in original).

¹⁰ See *R. v. Orbanski*; *R. v. Elias*, [2005 SCC 37](#), at [para. 48](#).

answer”.¹¹ As the Court of Appeal for Ontario held in *Roberts*, “[t]he self-incrimination implications may be quite different for statements the subject is legally obliged to make by statute.”¹² At all times in the *Orbanski* scenario, motorists can preserve their right to silence. The same would not be true if the motorist were statutorily compelled to make potentially incriminating statements. In that case, the only option for the motorist would be to quickly decide between: (1) keeping silent and facing the consequences of ignoring the statute; or (2) incriminating oneself in the criminal investigation. This forced choice is inherently distinct from the psychological pressure a given person *could* be under when speaking with police.

16. Second, legislative changes have eroded the foundation of *Orbanski*. Successive legislative amendments have essentially resulted in breath samples becoming unassailable, conclusive proof of guilt in the event they are admissible.¹³ The comfort *Orbanski* once took in distinguishing “incriminating evidence” (i.e., breathalyzer results) from statements adduced “solely to confirm ... grounds for making the breathalyser demand” now runs cold.¹⁴ Insofar as those statements now pave the way for admission of “conclusive proof” of guilt, they are straightforwardly incriminating.

17. Third, statutory compulsion presents unique fairness consequences. Should *Orbanski*’s limitation on use immunity be transplanted to compelled statements, the police could leverage the regulatory regime – validly enacted by a provincial legislature only because it had a non-criminal purpose – to collect dispositive evidence of criminal guilt through compelled self-incrimination. Section 320.31(9) represents Parliament’s attempt to legislate a requirement to speak to police through the backdoor, permitting the state to reap the benefits of statutory compulsion to secure a

¹¹ *R. v. Roberts*, [2018 ONCA 411](#), at [para. 46](#) (emphasis added).

¹² *R. v. Roberts*, [2018 ONCA 411](#), at [para. 46](#).

¹³ See *R. v. Goldson*, [2021 ABCA 193](#), at [paras. 31-53](#); *R. v. Rousselle*, [2025 SCC 35](#), at [paras. 37-47](#).

¹⁴ *R. v. Orbanski*; *R. v. Elias*, [2005 SCC 37](#), at [para. 59](#).

finding of guilt. This intimate connection between compulsion and guilt simply does not exist in the *Orbanski* scenario. Both fairness and justice require that compelled statements benefit from use immunity that is not circumscribed by the exception identified in *Orbanski*.

18. The bottom line is that statutory compulsion is different than psychological pressure to speak to police without the right to counsel. This Court cannot import the limitation on use immunity in *Orbanski* to situations of statutory compulsion. To ensure the s. 7 principle against self-incrimination is not rendered moot, statutorily obtained statements cannot be used in any aspect of a criminal proceeding.

c. Use immunity for statutorily compelled statements is different than the common law confessions rule in *Paterson*

19. In *Paterson*, this Court held that the Crown is not required to prove voluntariness of an accused's statement prior to tendering it at a *Charter voir dire*. While *Paterson* did not address statutory compulsion, the Respondent says that the principles articulated in *Paterson* regarding the common law confessions rule apply with equal force to the use of compelled roadside statements.

20. It is true that the s. 7 principle against self-incrimination finds expression in the common law confessions rule. However, that rule is about *reliability*.¹⁵ The use immunity for compelled statements protected by s. 7 is different: it is, in essence, a *privilege* held by the accused that protects them from being co-opted to incriminate themselves. Like any privilege, this privilege bars the use of protected information for any purpose. It is rooted in the longstanding recognition that “the citizen involved in the criminal process must be given procedural protections against the overweening power of the state.”¹⁶

21. Those protections do not bend, much less break, because the state believes it has helpful or

¹⁵ See *R. v. Tessier*, [2022 SCC 35](#), at [para. 70](#).

¹⁶ *R. v. Hebert*, [\[1990\] 2 S.C.R. 151](#), at p. 174.

reliable evidence to present. Nor should it matter if the state only intends to violate those protections for a “limited purpose” like establishing grounds – especially not now that those grounds open the door to conclusive proof of guilt, as explained above.

d. Conclusion: *White*'s use immunity prevents the admission of statutorily compelled statements in all aspects of criminal proceedings

22. The law in *White*, confirmed by *Soules*, is clear: statements made by motorists in compliance with their statutory duties under provincial highway traffic legislation are protected from admission in criminal proceedings by virtue of use immunity. The core protection against self-incrimination cannot be vitiated by the “establishing grounds” exception contained in s. 320.31(9). To be meaningful, the use immunity provided by s. 7 must protect against *all* uses of statutorily compelled statements during criminal proceedings, not just direct incrimination. After all, the “main event” in an “over 80” or impaired driving trial is usually the evidentiary breath readings obtained from the accused and the admissibility thereof. Allowing the accused’s compelled statements to be admitted for grounds is, in most cases, tantamount to vitiating the immunity.

23. Permitting police to compel statements to obtain grounds for a breath demand will undoubtedly incentivize overreach. As Iacobucci J. stated in *White*, “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.”¹⁷ The fundamental criminal law right to silence will be eclipsed by the regulatory obligation to speak – notwithstanding the severe implications for the accused’s criminal jeopardy.

24. In intervention submissions, the Attorney General of Ontario addresses the following reality: the police are not mind readers, and they cannot know in the moment whether a motorist’s

¹⁷ *R. v. White*, [1999] 2 S.C.R. 417, at [para. 64](#).

utterances were made on their own volition, or via statutory compulsion. Respectfully, this ignores the main issue before this Court: whether the compelled statement is available, as a matter of law, for establishing grounds at a subsequent *voir dire*. Nothing practically changes in the work of a police officer on the scene. In any event, use immunity for compelled statements would not stifle impaired investigations. Reasonable suspicion is a low standard, and the police can rely on “[s]ights, sounds, movement, body language, patterns of behaviour, and the like” to form this suspicion.¹⁸ They can also advise a motorist of their right to counsel and provide them a choice about whether to speak.

25. Accordingly, the CCLA submits this Court should confirm that the core protection against self-incrimination cannot be vitiated by an “establishing grounds” exception as contained in s. 320.31(9), as this would render nugatory the sensible use immunity developed by this Court in *White*.

B. The s. 7 use immunity analysis ought to be streamlined

26. The CCLA further argues that this Court should take this opportunity to clarify and streamline the *White* s. 7 immunity analysis. Creating a shorter, “to the point” test, which honours the spirit of the contextual factors in *White*, would avoid future attempts at legislating unconstitutional provisions that violate the privilege against self-incrimination.

27. *White* outlined four factors to determine whether the principle against self-incrimination is engaged: (1) whether there was state coercion in obtaining the statement; (2) whether there was an adversarial relationship between the accused and the state at the time police obtained the statement; (3) whether the statutory compulsion would increase the risk of unreliable confessions; and (4) whether the statutory compulsion increased the risk of the state abusing its power.¹⁹

¹⁸ *R. v. MacKenzie*, [2013 SCC 50](#), at [para. 62](#).

¹⁹ *R. v. White*, [\[1999\] 2 S.C.R. 417](#), at [para. 51](#).

28. Through s. 320.31(9), Parliament has done away with the sensible *White* factors to create a new power: the utilization of compelled statements to justify a police demand for breath samples. This is a law of general application that produces an obviously unconstitutional result, as it results in the violation of the principle against self-incrimination.

29. Given the constitutional considerations at stake, this Court should streamline the *White* use immunity analysis to send a clear message to Parliament that it cannot co-opt a provincial regulatory regime to pursue a criminal law objective. To avoid further unconstitutional attempts to limit the principle against self-incrimination, the use immunity analysis should focus on one core question surrounding compulsion during police interactions: was the accused required by statute to give a statement in circumstances where their potential criminal liability had crystallized? If so, the use immunity should apply because the accused is on the horns of an impossible dilemma: break the provincial law requiring a statement; or incriminate oneself in the criminal investigation. This is so, *regardless* of whether there was a risk of wrongful confessions or an abuse of state power. The dilemma just described is what requires the immunity as a matter of fundamental justice to uphold the privilege.

30. In its submissions before this Court, the Respondent argues that a recalibration of the *White* framework to focus on potential criminal liability is unworkable in practice and could undermine effective regulation. As an example, the Respondent points to the duty of employers to report injuries or accidents, pursuant to occupational safety legislation. Requiring the use immunity analysis to focus on the crystallization of potential criminal liability could effectively insulate employers from prosecution for criminal negligence.

31. Respectfully, the Respondent's argument exaggerates the effects of the streamlined approach to the use immunity analysis. Should an employer provide a statement pursuant to occupational safety legislation at a moment where potential liability for criminal negligence has

crystallized, it is correct that use immunity would prevent using the employer’s statement at trial. However, it is incorrect to assert that such use immunity could insulate the employer from prosecution. Police have numerous investigative powers in relation to investigations for criminal negligence, from the analysis of documents to interviews with employees. The Crown can therefore mount a successful prosecution for criminal negligence without relying on the employer’s statutorily compelled statement. As aptly stated by Fagnan J.A., “[t]he assertion that investigations and prosecutions are rendered ineffective or less effective by the inability to rely on statutorily compelled statements is doubtful.”²⁰

32. A streamlined approach would give clear guidance to Parliament about the importance of the principle against self-incrimination. Here, Parliament acted beyond its authority in purporting to allow criminal law enforcement to piggy-back on the exercise of a provincial regulatory power, unjustifiably infringing a core self-incrimination privilege in the process. The streamlined *White* framework would affirm the importance of the privilege against self-incrimination, and it would avoid future attempts from Parliament to codify rules of evidence that violate this core principle.

PARTS IV AND V — SUBMISSIONS ON COSTS AND ORDER SOUGHT

33. The CCLA seeks no costs and asks that no costs be awarded against it. The CCLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of February, 2026.



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²⁰ *R. v. Korduner*, [2025 ABCA 30](#), at [para. 140](#).

PART VI — TABLE OF AUTHORITIES

<u>CASES</u>	
Reference	Paragraph
<i>R. v. Goldson</i> , 2021 ABCA 193	16
<i>R. v. Hebert</i> , [1990] 2 S.C.R. 151	20
<i>R. v. Korduner</i> , 2025 ABCA 30	31
<i>R. v. MacKenzie</i> , 2013 SCC 50	24
<i>R. v. Orbanski</i> ; <i>R. v. Elias</i> , 2005 SCC 37	12, 13, 14, 15, 16, 17, 18
<i>R. v. P. (M.B.)</i> , [1994] 1 S.C.R. 555	6
<i>R. v. Paterson</i> , 2017 SCC 15	12, 19
<i>R. v. Roberts</i> , 2018 ONCA 411	15
<i>R. v. Rousselle</i> , 2025 SCC 35	16
<i>R. v. S. (R.J.)</i> , [1995] 1 S.C.R. 451	7
<i>R. v. Soules</i> , 2011 ONCA 429	10, 22
<i>R. v. Tessier</i> , 2022 SCC 35	20
<i>R. v. White</i> , [1999] 2 S.C.R. 417	3, 6, 8, 9, 10, 22, 23, 25, 26, 27, 28, 29, 30 32

<u>STATUTES & REGULATIONS</u>	
Reference	Sections
<i>Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11</i>	1, 7, 10(b), 13
<i>Charte canadienne des droits et libertés, Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11</i>	

<u><i>Criminal Code, RSC 1985, c C-46</i></u>	320.31(9)
<u><i>Code criminel, LRC 1985, c C-46</i></u>	