

# Case Summary: R v Badrudin

## Defence + Indemnity

February 2020

An insured's statement to his fire insurance adjuster as required by the policy's statutory conditions is inadmissible in criminal proceedings against him because it is a statutorily compelled statement.

***R. v Badrudin*, 2019 NLSC 187, per Thompson, J.**

### Facts + Issues

The Accused Badrudin was charged with one count of arson regarding a fire at a building. His insurer's adjuster took an audio recorded statement from him about the fire. He was not given the standard caution issued to suspects by police nor any right to counsel per s. 10(b) of the *Charter* with respect to that statement.

At his criminal trial, the Crown sought to have the adjuster's statement ruled admissible. The Crown was not seeking to put it into evidence but to be able to rely on it in cross-examination of the Accused.

The Defence argued that the statement to the adjuster was a statutorily compelled statement and thus inadmissible in the criminal proceedings per ss. 7, 11(d) and 24 of the *Charter*. Specifically, the Defence argued that the adjuster statement was given by the Accused/insured under the belief that he was statutorily required to do so by the statutory conditions for fire policies in the *Fire Insurance Act*, R.S.N.L. 1990, c. F-10. Statutory Condition 6 reads:

*Requirements After Loss* - (1) Upon the occurrence of a loss of or damage to the insured property, the insured shall, where that loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11,

1. Immediately give notice of the loss or damage in writing to the insurer;
2. Deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration,
  1. Giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
  2. Stating when and how the loss occurred, and where caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
  3. Stating that the loss did not occur through a wilful act or neglect or the procurement, means or connivance of the insured,
  4. Showing the amount of other insurances and the names of other insurers,

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**Brian Vail** Counsel  
[bvail@fieldlaw.com](mailto:bvail@fieldlaw.com)

5. Showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,
  6. Showing changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,
  7. Showing the place where the property insured was at the time of loss;
3. Where required give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;
  4. Where required, and where practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of another contract.

The Crown argued that the statement was given to the adjuster relating to a statutory condition that was between the insured/Accused and his insurer and was not given to a person in authority. Also, it was acknowledged that the content of the adjuster's interview went beyond the items listed as required per Statutory Condition 6.

**HELD: For the insured/Accused; insured's adjuster statement inadmissible**

Citing *R. v. White* [1992] 2 S.C.R. 417 and *R. v. Fitzpatrick*, [1994] 4 S.C.R. 154, the Court summarized the four elements necessary for a statement to be afforded the immunity for statutorily compelled statements:

16. Both cases focused upon four factors:

1. The lack of real coercion by the state in obtaining the statements;
2. The lack of an adversarial relationship between the accused and the state at the time the statements were obtained;
3. The absence of an increased risk of unreliable confessions as a result of the statutory compulsion; and
4. The absence of an increased risk of abuses of power by the state as a result of the statutory compulsion.

The Court held that all four factors existed in this case.

1. Coercion existed in that the statute mandated statutory conditions in the police and the accused felt under compulsion to give the adjuster his statement
2. The insured/accused were in an adversarial relationship
3. Regarding the unreliable confessions element, "[o]nce engaged by the investigator the accused's personal interest in payment of money has to be taken as significant" and "[t]o the extent he may view himself in jeopardy, he will have to engage his human responses immediately. Inaccuracy, avoidance and error are all potential features attendant on his response choices". (para. 36)
4. Abuse of power was made out in that "the state now wishes to have the ability to use the statements in evidence at the accused's trial without the accused having had the benefit of his rights explained in the normal course of the Crown seeking use of potential inculpatory statements" and "the Crown will be taking the benefit of evidence otherwise not compellable and obtained without *Charter* compliance by a private investigator". (para. 39)

The Court concluded as follows:

40 In my view on the assessment just engaged by me as mandated in *White*, I conclude that the accused's section 7 and 11(d) rights entitle him to the immunity of use of his statement. Compulsion is engaged by the state under the statutory conditions of the *Fire Insurance Act*. I cannot accept that once engaged with the investigator the accused can reasonably differentiate between the lines to be drawn by him. An adversarial relationship with police was concurrent at the time of the statement. Reliability is very much in question. The state ought not to be encouraged to obtain by this means evidence prejudicial or inculpatory so as to circumvent the *Charter* prerequisites and protection.

41 In the end, a fair trial for this accused in any event warrants its exclusion. The Crown here advises that the statement will be introduced only as it sees necessary as evidence of any prior inconsistent statement of the accused. At this stage then it is not proposed in support of the Crown's proof of its case. Its probative value then is somewhat vague and uncertain and on the whole cannot be taken as outweighing the prejudicial effect of the jury having this evidence with its attendant risks as noted.

### Commentary

The Alberta Courts have already applied these principles to rule that an insured's statement to his auto insurance adjuster is an inadmissible statutorily compelled statement: *R. v Porter*, 2014 ABQB 239; aff'd 2015 ABCA 279.