

Keeping Your Cards Close To Your Vest

Protecting Confidentiality for Statements

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Brian A. Vail, QC

bvail@fieldlaw.com

T 780-423-7691

F 780-428-9329

Pablo Retamozo

pretamozo@fieldlaw.com

T 780-643-8796

F 780-428-9329

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I. INTRODUCTION

Insurers invest a significant amount of time and money to collect evidence in anticipation of having to defend a claim in a timely way. This includes gathering information from the insured, witnesses, experts and others before evidence the trail goes cold. Adjusters and other insurance investigators achieve the best results when they "git thar fustest with the mostest"¹. Gaining information and evidence while it is fresh and before it is forgotten, disappears or otherwise becomes unavailable to the opposition provides defence counsel with an enormous tactical advantage.

There are many good reasons why insurers and defence counsel should maintain that advantage by maintaining confidentiality over the information until the right tactical moment to disclose or rely on it in the defence of the claim. They do not want latecomers in the opposition camp to be able to swoop in and acquire the fruits of their labour at little or no cost. Also, the defence should avoid facilitating the claim against the insured by allowing the opposition to acquire evidence that can be used against him/her. Finally, adjusters want their insureds to feel free to disclose what they know truthfully, without fear that it might fall into the wrong hands and be used against them.

Insurance claims often run parallel to related criminal or quasi-criminal (eg. highway traffic) proceedings. For example, the insured in a motor vehicle accident case may have faced, or be facing traffic or criminal charges in the criminal justice system relating to that accident as well as the civil claim for damages. Also, they must keep in mind other related civil actions that the insured or the claimant have been involved in. For example, the fact that the claimant has made previous or subsequent claims for the same types of injury or loss in separate civil proceedings will be of interest.

The defence of an insurance claim can be a multi-front "war". Insurance adjusters cannot afford to ignore the other proceedings. The various criminal and civil proceedings have the potential to impact each other. In defending a claim adjusters should be interested in protecting what evidence and information they acquire from inopportune disclosure to the opposition, while at the same accessing valuable information from the other proceedings to assist in defending the claim.

The police investigation file may contain a wealth of information that would be relevant to the parallel civil claim, often to the detriment of the insured's civil defence if he/she was the accused. Police are trained and experienced in collecting information relevant to their investigations. They also have statutory powers of search and seizure under the *Criminal Code*² and other statutes that are not available to insurance adjusters or private investigators. If the police can obtain evidence against the insured, then the plaintiff may be able to access it to the detriment of the civil defence. However, the powers of the police are restricted by the application of the *Charter*³ as interpreted by the courts. If the police breach an accused's/insured's *Charter* or other rights in the course of the traffic or criminal investigation, the evidence obtained may be ruled inadmissible in the criminal case. It may also impact on the admissibility of the evidence in the companion civil proceeding. Also, if the accused/insured is

¹ Lieutenant General Nathan Bedford Forest, brilliant cavalry commander in the Army of the Confederate States of America

² *Criminal Code*, R.S.C. 1985 c. C-46

³ *Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I*



convicted of the traffic or criminal offence, a civil court can take that into consideration to his/her detriment in the civil proceedings⁴.

Nothing that we express in this paper should be taken as a criticism of the police. Competent defence counsel have a healthy respect for their abilities. They have their job to do, and sometimes that involves “pushing the envelope” by conducting searches where the law on the legality of same is a grey area. In this country, they are basically honest as well as competent.

Similarly, we are not advocating the aiding or abetting of “criminals” in their crimes or to help them to escape from their “just deserts”. Insurers will not always “like” their insureds or share the same moral code. They may not wish to bring every insured home for dinner or to meet their daughters. Yet they owe it to themselves and act in good faith towards their insureds to reduce the exposure to paying out more in claims than they are required to by mounting the best investigation and defence of the claim as ethically and legally possible. Our suggestions and submissions are aimed at assisting insurers to avoid paying out more in claims than they are required to without breaching their duty of good faith to the insureds.

In this paper we will discuss the following:

1. the ability of the police to access information from the insured and the adjuster’s file, including:
 - (a) the insured’s mandatory driver’s statement to police pursuant to s. 71 of the *Traffic Safety Act*⁵; and
 - (b) the statements of the insured and other witnesses to the adjuster;
2. how pre-trial proceedings (such as document production and oral Questioning) can be disclosed for or used in other proceedings (civil or criminal) for or against the insured;
3. how testimony of a witness can be used against them in other proceedings, civil or criminal;
4. how the civil litigants may be able to access the police investigation file or the Crown prosecutor’s file;
5. the impact of a criminal or traffic verdict on the related civil case; and
6. how the civil defence may be able to affect the timing of the civil proceedings in relation to the criminal/traffic proceedings to the best advantage.

⁴ *Alberta Evidence Act*, R.S.A. 2000, c. A-18, section 26

⁵ R.S.A. 2000, c. T-6

II. TRAFFIC SAFETY ACT DRIVER STATEMENTS

A. Traffic Safety Act, Sections 71 and 11

In some provinces, drivers involved in motor vehicle accidents are statutorily required to provide a driver's statement to police. Such is the case in Alberta pursuant to section 71 of the *Traffic Safety Act*⁶.

However, Section 11 of the *Act* restricts the parties to whom the police may release a copy of the information and as to how it might be used against the driver in other proceedings. Police may release a copy of the report to the driver's insurer, a "roadway authority for the purposes of improving traffic circulation or the management of roadways" or the Alberta Transportation Board⁷. Section 11(3) provides that the TSA statement is not open to public inspection and is not admissible in evidence in any legal proceeding except to prove:

1. Compliance with a requirement that a statement be given pursuant to Section 71;
2. That the statement was false, for the purposes of a prosecution for making a false statement; or
3. "The identity of the persons who were driving the vehicles involved in the accident".

Notwithstanding that Section 11(3)(b)(iii) provides that the TSA statement can be used to prove the identity of the drivers, it qualifies as a statutorily compelled statement within the meaning of Section 7 of the *Charter*, such that it cannot be relied upon by police to support investigation procedures (such as applying for a warrant or making an arrest) and cannot be tendered in evidence at all. This has been settled law for some time⁸. The purpose of the mandatory TSA driver's statement has been stated best in *Auer v. Lionstone Holdings Inc.*⁹:

10 The purpose of the privilege is to ensure that drivers give frank statements to the police concerning the cause of accidents. See *Peters v. Turner*, [1948] 1 W.W.R. 412 (Alta. C.A.), at 416, *Cullen v. Demers* (1977), 4 A.R. 55 (Alta. C.A.) at paragraph 22, *Lowe v. Larue* (1996), 197 A.R. 15 (Alta. Q.B.) at paragraph. 12, aff'd (1997), 206 A.R. 397 (Alta. C.A.), and *Klassen v. Dachyshyn* (1998), 217 A.R. 191, 1998 ABQB 39 (Alta. Q.B.) at paragraph. 7.

1. The Right against Self-Incrimination and Section 7 of the Charter

Section 7 of the *Charter* has been held to include a right against self-incrimination which operates such that a statutorily compelled statement cannot be relied upon by police to support their investigative procedures (such as obtaining warrants or making arrests) and cannot be tendered in evidence in many cases. Section 7 provides as follows:

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

⁶ R.S.A. 2000, c. T-6

⁷ Section 11(2.1)

⁸ *Klassen v. Dachyshyn* [1998] AJ No. 159 (Alta.Q.B.); *Michailidis v. Brown* [2000] AJ No. 598 (Alta.Q.B.); *Huer v. Lionstone Holdings Inc.*, 2005 ABCA 78

⁹ 2005 ABCA 78, at paragraph 10



The right against self-incrimination has been held to be a principle of fundamental justice covered by Section 7¹⁰.

The right against self-incrimination is not absolute. In *R. v. Fitzpatrick*¹¹, the Supreme Court set out a four-part test courts are to apply in determining whether or not a statutorily compelled statement engages the self-incrimination rights under Section 7. This involves a balancing of the individual's right against self-incrimination against the interests of society by considering the context in which the statement was provided. The test involves consideration of the following four factors:

1. Whether or not the accused and the state were in an adversarial relationship at the time the statement was provided;
2. Whether or not the statement was coerced;
3. Whether or not there was a risk of false confession arising from the statutory compulsion in the circumstances; and
4. Whether or not there was a risk of abuse of power by the state as a result of the statutory compulsion.

In that case, Fitzpatrick was charged with offenses of fishing in excess of his quota for certain species. The Crown sought to rely on reports he had filed detailing how much fish of whatever species he had caught at specific times, which were required to be filed routinely pursuant to the *Fisheries Act*¹².

The Supreme Court held that these reports were admissible considering the four factors:

1. It was held that the accused and the state were not in an adversarial relationship at the time. Fitzpatrick was only responding to a reasonable regulatory requirement relating to fisheries management, unlike the situation in a criminal investigation or prosecution¹³.
2. Any coercion was indirect in that the accused had freely chosen to engage in fishing and therefore to abide by the regulatory regime that went with it¹⁴.
3. There was no risk of a false confession as there was "no confession at all" here and, even if these reports could be considered to be confessions their potential use at trial would not increase the likelihood that they would be falsified¹⁵.
4. There was "little danger" of abuse of power by the state in these circumstances¹⁶.

This has been applied to mandatory driver statements under s. 71 of Alberta's *Traffic Safety Act* and similar legislation in other provinces.

¹⁰ *R. v. Fitzpatrick* [1995] 4 SCR 154; *R. v. White* [1999] 2 SCR 417, at paragraphs 40 – 44

¹¹ [1995] 4 SCR 154

¹² R.S.C. 1985, c. F-14, Section 61

¹³ At paragraphs 36 – 37

¹⁴ At paragraphs 38 – 40

¹⁵ At paragraph 45

¹⁶ At paragraphs 46 – 47

2. R. v. White

In *R. v. White*¹⁷ the Supreme Court of Canada decided that driver’s statements required by provincial highway provisions analogous to Alberta’s section 71 cannot be relied upon by police or tendered in evidence as that would amount to a breach at Section 7. The trial judge had excluded the evidence of the Accused’s statements to police made pursuant to that legislation. The Supreme Court of Canada upheld this decision, applying the four-part *Fitzpatrick* test:

1. At the time the statements were made, White and the state were in an adversarial relationship¹⁸. Although the state and the Accused were “in a form of partnership aimed at securing safe roads for the benefit of all citizens”, the fact that the statement was to be given to police “has the effect of transforming what might otherwise be a partnership relationship into one that is potentially adversarial”. The police taking such statements are also engaged in investigation a possible crime. The Court noted that there was “no suggestion ... that the use of the accident reports in criminal proceedings is an essential component of the regulatory partnership created by” the traffic safety provisions.
2. Coercion was found to have been involved¹⁹:

55 I agree with the Crown that drivers are deemed to be aware of their responsibilities on the road, and that driving is properly understood as a voluntary activity in the sense described by this Court in the cases cited by the Crown. However, driving is not freely undertaken in precisely the same way as one is free to participate in a regulated industry such as the commercial fishery. Driving is often a necessity of life, particularly in rural areas such as that where the accident occurred in this case. When a person needs to drive in order to function meaningfully in society, the choice of whether to drive is not truly as free as the choice of whether to enter into an industry. While the state should not be perceived as being coercive in requiring drivers to report motor vehicle accidents, the concern with protecting human freedom which underlies the principle against self-incrimination cannot be considered entirely absent in this context. As I view the matter, the issue of free and informed consent must be considered a neutral factor in the determination of whether the principle against self-incrimination is infringed by s. 61 of the *Motor Vehicle Act*.

3. The prospect of unreliable confessions under motor vehicle legislation was held to be “very real”²⁰:

62 Under the Motor Vehicle Act, the prospect of unreliable confessions is very real. In particular, accident reports under the Act are frequently given directly to a police officer, i.e., to a person in authority whose authority and physical presence might cause the driver to produce a statement in circumstances where he or she is not truly willing to speak: see *R. v. Hodgson*, [1998] 2 S.C.R. 449 (S.C.C.) at para. 24, per Cory J. The driver who reasonably believes that he or she has a statutory duty to provide an accident report under the Motor Vehicle Act will likely experience a significant “fear of prejudice” if he or she does not speak. At the same time, there may be a strong incentive to provide a false statement, given the serious consequences which the driver

¹⁷ [1999] 2 SCR 417

¹⁸ At paragraphs 56 – 60

¹⁹ At paragraph 55

²⁰ At paragraph 62



may feel will flow from telling the truth, even if the truth does not in fact support a finding that a criminal offence was committed. It is reasonable to expect that this fear of prejudice and incentive to lie would be dissipated if the driver could be confident that the contents of the accident report could never be used to incriminate him or her in criminal proceedings. A rule which granted use immunity in criminal proceedings would thus serve to enhance rather than impair the effectiveness of the statutory reporting scheme, as was suggested by Esson J.A. in the Court of Appeal below. Indeed, it is possibly for precisely this purpose that the province originally enacted the use immunity set out in s. 61(7).

4. The possibility of abuse of power by the state was found to be “real and serious”²¹:

64 In the present case, again, the 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 over-emphasize the extent of the statutory duty to report an accident under the Act, in order to obtain relevant information. The effect of such an over-emphasis might be to circumvent or defeat a driver’s s. 7 right to remain silent when under investigation for a criminal offence. One can easily imagine the situation of a driver who, confused by the apparent inconsistency between the duty to report and the right to remain silent, would provide a more extensive statement to police than legally required under the Act. Conversely, in a situation where all statements made by the driver under compulsion of the Act are subject to use immunity, police are more likely to conduct an independent investigation rather than to use the compulsory accident reporting system as a source of information.

65 The inability of police to rely upon statements made under the compulsion of s. 61 of the *Motor Vehicle Act* highlights the importance of questioning a driver separately for the purpose of engaging in a criminal investigation. Clearly, police are entitled to question a person who is suspected of a motor vehicle offence, and who is properly advised of and given the opportunity to exercise his or her *Charter* rights. The effect of s. 61 of the *Motor Vehicle Act* is thus to create a logistical difficulty for police. If police wish to use in criminal proceedings information acquired from the driver through questioning, the information must not be provided pursuant to the duty in s. 61. There are several ways in which police might organize their investigation in order to prevent any information acquired independently of s. 61 from becoming “tainted”, as it were, by the accident report that is subject to use immunity. One possibility, which appears to be contemplated by s. 61(4) of the Act, is for police to inform the driver that they intend to secure the details of the accident report, not from the driver himself or herself, but “by other inquiries”, thus terminating the driver’s statutory duty to report the accident and permitting police to begin their investigation immediately.

66 Finally, it should be noted that an accident report is not at all analogous to the hail reports and fishing logs in *Fitzpatrick*, which La Forest J. compared to business records in so far as they were impersonal lists in which the declarant had little expectation of privacy. The spontaneous utterances of a driver, occurring very shortly after an accident, are exactly the type of communication that the principle against self-incrimination is designed to protect. They are a personal narrative of events, emotions, and decisions that are extremely revealing of the declarant’s personality, opinions, thoughts, and state of mind. The dignity of the declarant is clearly affected by the use of this narrative to incriminate. I would note that, while it is well established that there is a reduced

²¹ At paragraphs 64 – 66

expectation of privacy in a vehicle generally, compared to the expectation of privacy in a dwelling, this fact is largely irrelevant to the analysis here. The question in this case involves the expectation of privacy that a declarant has in a confession. The fact that the confession has to do with a car is entirely incidental.

[Emphasis added]

We emphasize that this is not new law. These principles have been settled for more than a decade now. However, there is a recent Alberta case where the police have attempted to make a case against based on statutorily compelled statements against an accused/insured named Porter who was involved in a fatal hit and run accident.

3. The Porter Situation

In our *R. v. Porter*²², the Accused was charged with failing to remain at the scene of an accident contrary to Section 2.5(1)(a) of the *Criminal Code* and careless driving pursuant to Section 115(2)(b) of the *Traffic Safety Act* with respect to a hit and run accident on Anthony Henday Drive in Edmonton on 13 June 2012. A pedestrian named Green was killed.

In their investigation, police pursued two approaches of concern to this paper:

1. They relied upon the evidence provided by Porter in his Section 71 *Traffic Safety Act* statement to obtain warrants that, in turn, enabled him to seize and search his vehicle where they found evidence of damage, DNA, etc. that linked it to the accident.
2. Police obtained a copy of Porter's statement to his insurance adjuster, pursuant to a Production Order under the *Criminal Code* and the Crown sought to tender that in evidence (more about this below).

The day after the accident, Porter and his criminal defence lawyer (Teskey) came into the police station. Teskey had advised Porter that while he had a right to remain silent, he was obligated to provide police with a TSA statement but that it could not be used against him. Teskey told police that Porter was there for the express purpose of providing a statement required by Section 71 of the *Traffic Safety Act*²³. In the statement, Porter admitted that he had been the driver involved in the accident.

Police then arrested Porter and applied for a warrant to seize and search his vehicle supported by sworn Informations To Obtain (ITOs) that were put before a justice of the peace who granted the warrant based on that material. At trial, police admitted that they knew that they were not to rely on TSA statements to find grounds for a warrant and that they omitted to indicate that Porter's admission about being the driver was given in the context of such a statement.

At trial, Madam Justice Shelley found that the police reliance on Porter's TSA statement to obtain the warrant breached his Section 7 *Charter* rights²⁴. Given that the warrant should not have been granted without that information, and that the breach had been deliberate, all of the evidence obtained

²² 2014 ABQB 239; aff'd 2015 ABCA 279

²³ At paragraphs 6 – 8 of the trial decision

²⁴ At paragraphs 94 – 98

pursuant to the warrant was excluded from evidence pursuant to Section 24(2) of the *Charter*. Since Porter's statement to his insurance adjuster was also excluded (as detailed below) the Crown ended up with no case against him and he was acquitted.

The trial judge followed *R. v. White*²⁵ in applying the four-part test relating to statutorily compelled statements announced in *R. v. Fitzpatrick*²⁶. Of note, her Ladyship rejected the Crown argument that the comments of Porter's lawyer to police that Porter was there to provide a TSA statement were not covered by the protection afforded to Porter's TSA statement. The lawyer was found to have been speaking as Porter's agent²⁷.

The Alberta Court of Appeal upheld the trial decision and dismissed the Crown appeal²⁸. The Court followed *R. v. White*²⁹ in concluding that Porter's statement was inadmissible. It accepted the trial judge's conclusion that the Defence had proven that Porter had provided a statement under compulsion³⁰. The Court rejected the Crown argument that even though the statement was inadmissible at trial it could be relied upon by police in applying for the warrant³¹. The Court held that a TSA driver's statement cannot be used for establishing reasonable and probable grounds for the police to believe that the Accused had committed the offence.

Porter has not been appealed and both trial and appellant level decisions have been followed ever since.

In *R. v. Binfet*³² police testified to having formed a belief that Binfet had been impaired while driving, based on their observations of him while he filled out his TSA statement on the hood of a police cruiser at the scene. When asked how he was coming along with the statement and leaning in to see his driver's license to identify him in relation to that statement the police member smelled alcohol on his breath. It is important to note that the Crown did not attempt to enter what Binfet actually wrote in his statement. The Court held that a TSA driver's statement is inadmissible pursuant to *White* and the trial decision in Porter but that the police observations of how Binfet was behaving while writing out the TSA statement were not part of the statement itself. Reliance upon that did not amount to his breach of his right against self-incrimination³³.

In *R. v. Roberts*³⁴, the Accused was charged with impaired driving. At the accident scene she was pointed out to police by paramedics as having been the driver of one of the vehicles. Police approached her and asked her about the accident. She told them that the other vehicle had "come out of nowhere" but was otherwise unable to articulate how the accident had occurred. She also indicated that she had not hit her head but that she had been struck by her airbags when they deployed. She also admitted that she had consumed alcohol before the accident. Based on what she told police, her inability to explain how the accident happened, her inability to form complete sentences and the fact

²⁵ [1999] 2 SCR 417

²⁶ [1995] 4 SCR 154

²⁷ At paragraph 94

²⁸ [2015] ABCA 279

²⁹ [1999] 2 SCR 417

³⁰ At paragraph 20

³¹ At paragraphs 26 – 28

³² 2014 ABPC 259

³³ At paragraphs 22 – 26

³⁴ 2015 ONSC 7974

that alcohol was detected on her breath, she was arrested and asked to supply breath samples. At *voir dire*, Roberts testified that she spoke to police because she understood that she was obligated to report an accident where there was damage in excess of \$1,000.00.

The Court followed *White* and *Porter* in the Alberta Court of Appeal on the question of whether the TSA statements can be relied upon by police to arrest or seek warrants in whether they can be admissible at trial. However, the Court held that the Defence had failed to establish that her statements were made under compulsion³⁵. The Court found that “[t]here was no mention at any time that anything told to her by senior Waterloo police officers regarding her obligation to provide a police report about the accident”. The Court found her not to be a credible witness on this point³⁶:

94 In all the circumstances, therefore, I find that Dr. Roberts is not a credible witness and she has not satisfied me on a balance of probabilities that she spoke to the police about the accident because she was compelled to do so. I find instead that Dr. Roberts is an educated and intelligent woman who spoke freely to the police and constantly spoke about her involvement with the OPC and working with the police in the hope to gain some advantage in extricating herself from the serious situation she found herself in.

The Court concluded that the statements were properly relied upon by police to form the reasonable and probable grounds necessary to arrest her³⁷. However, the statements were held to be inadmissible at trial for a different reason – they had been made while she was under detention and not advised of her right to consult counsel pursuant to Section 10(b) of the *Charter*³⁸.

4. What This Means for Insurers

These judicial conclusions have a number of significant impacts for insurers in defending civil cases against their insureds:

1. The insurer is entitled to be provided with a copy of the TSA statement by police³⁹. However, the insurer is not at liberty to waive the statutory protection over the statement (as only the insured can do that)⁴⁰.
2. To rely on the protection under the *Traffic Safety Act* (to object to police reliance on it and to its admissibility) the Defence must prove that the statement was made under compulsion. This generally requires the driver to credibly testify or provide evidence to the fact that he/she only spoke pursuant to this statutory compulsion⁴¹. When a lawyer brings in his/her client and tells police that the client is attending expressly for the purpose of

³⁵ At paragraphs 92 – 95, 102

³⁶ At paragraph 94

³⁷ At paragraphs 95, 102

³⁸ At paragraph 102

³⁹ *Traffic Safety Act*, R.S.A. 2000, c. T-6, Section 71(2.1)(a)

⁴⁰ *Klassen v. Dachyshyn* [1998] AJ No. 159 (Alta.Q.B.); *Michailidis v. Brown* [2000] AJ No. 298 (Alta.Q.B.); *Huer v. Lionstone Holdings Inc.*, 2005 ABCA 78

⁴¹ *R. v. White* [1999] 2 SCR 417, at paragraph 81; *R. v. Porter*, 2014 ABQB 359, at paragraphs 6 – 8 and 94 – 95; *aff'd* 2015 ABCA 279, at paragraph 20; *R. v. Roberts*, 2015 ONSC 7974, at paragraphs 92 – 94, 102



- providing a TSA statement, the Court can and will infer that the statement was being provided pursuant to the statutory compulsion⁴².
3. Police cannot rely on a compelled TSA statement to proceed with their investigation, such as to form grounds necessary to arrest the accused or to seek a warrant.
 - (a) If police to do and their conduct is not “saved” pursuant to the **Grant** analysis under Section 24(2) of the *Charter*, those actions will be found to have been unjustified and all the evidence obtained as a result will be ruled inadmissible in the criminal court. This will reduce, if not eliminate the insured being found guilty (which can only be of benefit to the civil case).
 - (b) If the subject of making a TSA statement is discussed with the insurer and the adjuster, the insured should be advised of this, i.e. that he/she must make a statement but that he/she must be clear in speaking with police on the basis of his/her legal obligation to provide a statement pursuant to Section 71 of the *Traffic Safety Act*. This should be documented.
 4. In the civil case, the insured’s TSA statement should be disclosed but it need not be produced for inspection or as a copy. The Defence should object to questions about the contents of the TSA statement at Questioning on that basis.

III. POLICE ACCESS TO THE INSURED’S STATEMENT TO THE ADJUSTER

A. Introduction

In addition to relying upon the TSA statement, the police undertook another approach to get evidence to obtain information to implicate the accused in the **Porter** case. They convinced a justice of the peace or Provincial Court judge to grant a Possession Order under the *Criminal Code*⁴³ directing his insurer to disclose a statement Porter had given to his insurance adjuster.

Again, the accident occurred on 13 June 2012 at approximately 11:10 pm. Green had been out of his vehicle at the side of the Anthony Henday Drive in Edmonton when he was struck and killed by a vehicle which did not stop. As noted above, the next day Porter went to police, accompanied by his lawyer and provided a driver’s statement pursuant to Section 71 of the *Traffic Safety Act* in which he admitted to having been the driver. He was arrested and charged at that point.

On 16 July 2012, Porter reported the accident to his insurer (Security National), advising of the possibility of property damage to his vehicle. He did not mention any injuries or fatalities relating to the accident.

On 3 August 2012, Green’s sister called the insurer and advised that Green had died as a result of injuries arising from the accident. The insurer came to believe that the accident was much more serious than it had originally thought, as a fatality was being alleged. Security National opened an

⁴² *R. v. Porter*, 2014 ABQB 359

⁴³ Section 487.014



accident benefits file and a bodily injury file, the latter of which was administered by Ms. Furber. Furber retained an independent adjuster, Ms. Fitzpatrick.

Fitzpatrick obtained a written statement from Porter on 15 August 2012. Fitzpatrick told Porter that it was a condition of his policy that he provide a statement and if he refused to do so his claim would be denied. She told him that nobody outside the insurer would get a copy of it and that the only way anyone else could get a copy would be pursuant to a subpoena or court order, which in her twenty-five years as an adjuster had never happened.

On 20 February 2013, Porter wrote a letter confirming that “any statement provided to my insurance company was provided solely to comply with my statutory obligations pursuant to the *Insurance Act* and for no other purpose”.

B. The Production Order: *Security National Insurance Corp. v. Edmonton Police Service*⁴⁴

Police learned that Porter had provided a statement to his adjuster. On 14 February 2013, they applied for an obtained a Production Order⁴⁵ with respect to that adjuster statement.

On 21 February 2013, Security National applied for an exemption to the Produce Order⁴⁶, claiming litigation privilege over the adjuster’s statement. In support of the application, the insurer filed an Affidavit deposed by the claims examiner Furber. In her Affidavit she deposed:

1. That she handled litigation matters where lawyers were involved from inception to completion;
2. That sometimes claims were paid without litigation;
3. That she determined that Green was survived by her mother, who had a potential claim under the *Fatal Accidents Act*⁴⁷;
4. That fatality accidents which did not result in litigation were “very rare”;
5. That she did not always instruct that statements be obtained, but that she “almost always” did when there was bodily injury, even where no litigation was contemplated, and always did where there were significant injuries or death;
6. That she instructed the adjuster to get a statement from Porter to “get a more detailed account of what happened” and to get the insured’s “version of events”.

She did not retain legal counsel before instructing that the statement be obtained. No Affidavit on behalf of the adjuster Fitzpatrick was tendered, which the Court relied upon to the detriment of the insurer.

⁴⁴ 2013 ABPC 188

⁴⁵ pursuant to Section 487.014 of the *Criminal Code*

⁴⁶ pursuant to Section 487.0193 of the *Criminal Code*

⁴⁷ RSA 2000, c. F-8



That application was dismissed. This case focused on the issue of privilege. The concept of statutory compulsion in making the adjuster statement was only touched upon in passing.

The Court held that, unlike solicitor-client privilege, litigation privilege is not a class privilege and each case must be decided on its own merits. The onus is on the party asserting the privilege to prove it on a balance of probabilities in seeking an exemption to a Production Order⁴⁸. The Court held that it had to follow a two-stage analysis⁴⁹:

1. Whether or not the litigation was ongoing or reasonably contemplated at the time the document was created; and
2. Whether or not the dominant purpose for creating the statement was to prepare for litigation.

The Court found that litigation was reasonably contemplated at the time of the adjuster statement was given, in light of the fact that the claims examiner was aware of potential litigation under the *Fatal Accidents Act* and that it was “very rare” for litigation not to arise from a fatality⁵⁰. However, although litigation was found to have been one purpose behind the taking of the statement, it was not established to have been the dominant purpose. The Court noted that the claims examiner did not expressly depose that it was in her affidavit. There was no evidence from the adjuster as to whether to statement was commissioned for a routine file requiring a statement or to file a Statement of Defence. The Court concluded as follows⁵¹:

66 The evidence of Ms. Furber in the Affidavit and in cross-examination was very candid in relation to the purpose for taking the statement. She did not swear in her Affidavit or testify in cross-examination that the “dominant purpose” of Mr. Porter’s statement was to prepare to defend litigation. Even if there was such evidence it would still be necessary to consider all of the circumstances disclosed in the evidence to determine whether that conclusion was objectively reasonable.

67 Ms. Furber did testify that she “needed a more detailed account of what happened” and that she “needed a complete investigation because it’s a fatality”. I am satisfied that this is why she arranged to obtain a statement from Mr. Porter. This can give rise to a reasonable inference that one of the purposes for taking the statement was so that when, and if, Ms Furber got to the point of retaining counsel to deal with the anticipated litigation, counsel could use the statement in preparing the defence.

68 However, there are other reasonable inferences which can be drawn from the evidence. Ms. Furber testified that she needed the statement from Mr. Porter so that she could “do her job” and so that she could determine whether Security National should pay out claims. These are investigative purposes which would also be aided by having “a more detailed account” and a “complete investigation”. As a result, a reasonable inference can be drawn that one of the purposes for obtaining the statement from Mr. Porter was to determine, through investigation, whether any claims arising from the Accident should be paid out or whether the results of the investigation were such that counsel should be retained.

⁴⁸ At paragraph 27

⁴⁹ At paragraph 37

⁵⁰ At paragraphs 52 – 54

⁵¹ At paragraphs 66 – 71



69 I conclude that it is simply not possible to distinguish the facts before me from the circumstances described in *Moseley [v. Spray Lakes Sawmills (1980) Ltd.]*, 1996 ABCA 141] where the Court of Appeal concluded that the facts supported the existence of an investigative purpose to determine whether there was any potential liability exposure. Therefore in *Moseley*, while litigation may have been one purpose for the work of the insurance adjuster, it was not the dominant purpose.

70 The only material distinguishing feature between *Moseley* and the present case is that there was no evidence in *Moseley* that the insurer had been contacted by a potential claimant whereas in the present case there is evidence that a family member of the deceased had contacted Security National. However, both cases involved serious motor vehicle collisions and in both cases there was a reasonable expectation of litigation. I conclude that the contact by the family member in the present case addresses the issue of whether there is a reasonable likelihood of litigation but, simply does not address the issue of the “dominant purpose” of Mr. Porter’s statement.

71 As a result, I conclude that one of the purposes for obtaining a written statement from Mr. Porter was to prepare for litigation. However, Security National has not proven, on a balance of probabilities, that this was the “dominant purpose” for taking the statement.

A detailed discussion of litigation privilege as it applies to adjuster statements is beyond the scope of this paper. Suffice it to say that the Court’s decision in *Security National* is of doubtful authority, with respect. The fact that the insurer in this case had received notice of the claim from Green’s sister and that fatality cases that did not result in litigation were “very rare” distinguishes this case significantly from the facts that were before the Alberta Court of Appeal in the *Mosely* case. Unlike the situation in *Mosely*, the adjuster was not investigating whether or not there was a “possibility” that a claim may have to be litigated. It was more than a probability. That claim was already announced and on the table. What other purpose could the insurer have had for seeking a statement from its insured other than for the claim that had been reported by Green’s sister? In our view, Porter’s statement should have been seen as privileged so as to justify an exemption to the Production Order.

The Court rejected Security National’s argument that to allow police to access an adjuster’s statement would impose a chill on the insurance industry⁵². This was effectively overruled by the Court of Queen’s Bench and the Court of Appeal at Porter’s criminal trial. The Courts held that this would create an unacceptable risk of false statements being given by insureds to their adjusters if they think that police can ultimately obtain a copy of their statements and that this would work to defeat the goal of insurance law to ensure compensation for accident victims⁵³.

Fortunately, the decision in *Security National* is not the final word on the subject. It did not address the concept of statutory compulsion behind Porter’s adjuster statement, referring to it only to assess the issue of privilege. It did not consider that the statement was statutorily compelled, nor did it apply the *Fitzpatrick* test in determining whether its admission would violate Porter’s rights against self-incrimination under Section 7 of the *Charter*.

The Court referred to the letter from Porter to the effect that he gave his adjuster statement under the statutory compulsion of the *Insurance Act*, but held that it did not assist him or the insurer in this case. His Honour held that this did not establish that the statement was for the dominant purpose of litigation because only some of the Statutory Conditions related to preparing for litigation and others did not. Thus, Porter’s letter only established that one of the purposes behind the statement was

⁵² at paragraphs 73 – 75

⁵³ 2014 ABQB 359, at paragraphs 112 – 113; aff’d 2015 ABCA 279, at paragraphs 36 – 37



litigation, not that it was the dominant one⁵⁴. With respect, the finding that not all of the Statutory Conditions relate to potential litigation is beside the point. The Conditions requiring the insured to provide the insurer with a statement and to cooperate cannot be ignored.

Section 556 of the *Insurance Act*⁵⁵ mandates that certain Statutory Conditions must be included in every automobile owner's policy, including:

1. Condition 3(1)(a) which requires an insured to give the insurer prompt notice of an accident, with particulars;
2. Condition 3(1)(b) which requires the insured to verify by statutory declaration that the claim arose out of the use of an automobile; and
3. Condition 3(3) which requires the insured to cooperate with the insurer, including by way of securing information and evidence.

With respect, the Court appears to have overlooked that by the time Porter gave his adjuster statement, he had already been arrested and criminally charged regarding the accident. What conclusion could be reached other than that he only provided his statement pursuant to his obligation as mandated by statute at that point in time, just as he had provided his statutorily mandated TSA statement back on the date of his arrest?

The insurer did not appeal this ruling and the police obtained a copy of Porter's statement to his adjuster. At his subsequent criminal trial, the Crown sought to rely on it.

C. The Trial and Appeal: *R. v. Porter*⁵⁶

As noted above, the Crown relied on two types of evidence at Porter's trial. First, there was the evidence obtained pursuant to the search warrant that had been granted on the basis of information coming from Porter's TSA statement. Second, there was Porter's statement to the adjuster.

The trial judge ruled that the adjuster statement was inadmissible, finding that it was a statutorily compelled statement obtained by police in breach of Porter's Section 7 *Charter* rights against self-incrimination. In analyzing the issues, the Court dealt exclusively with the issue of the Section 7 *Charter* right against self-incrimination. Privilege was not analyzed at all, and turned out not to be necessary in light of the Court's decision with respect to the self-incrimination issues.

Madam Justice Shelley held that an insured's statement to his/her insurer is a statutorily-compelled statement, rejecting the Crown's argument that it was only required by the contractual provisions of the policy⁵⁷. While there was a contractual relationship between Porter and his insurer it was not a voluntary statement because the contractual terms obligating him to cooperate and provide a statement were mandated by regulation. Drivers are legally obligated to acquire auto insurance⁵⁸. All

⁵⁴ At paragraphs 58 – 60

⁵⁵ R.S.A. 2000, c. I-8

⁵⁶ 2014 ABQB 359; aff'd 2015 ABCA 279

⁵⁷ At paragraphs 99, 111

⁵⁸ *Traffic Safety Act*, R.S.A. 2000, c. T-6, Section 54

auto policies must be in a form approved by the superintendent of insurance⁵⁹ and must contain those Statutory Conditions⁶⁰.

Her Ladyship applied the four-part test regarding statutorily compelled statements that had been enunciated by the Supreme Court in *R. v. Fitzpatrick*⁶¹. She held as follows⁶²:

1. A sufficient adversarial relationship existed at the time the adjuster statement was given. Although Porter was not in an adversarial relationship with his insurer, he was in an adversarial relationship with the state, which had charged him⁶³.
2. The necessary element of coercion was found to exist. The Statutory Conditions under the policy were obligatory and Porter was told that if he did not provide his statement he would be denied coverage.
3. There was the required risk of false confessions⁶⁴:

112 There is a risk of unreliable confessions as a result of this statutory compulsion. Every driver knows that liability for any driving infractions resulting in injury will likely increase insurance premiums. If the insurer is at liberty to pass any information along to the police, that fact may also be a strong incentive to provide a false statement. Clearly, the Applicant was concerned about the possibility that the statement might be released. He had his lawyer review it prior to its release to TD.

4. The Court found a risk of abuse of power by the state which would work contrary to the goal of insurance legislation to facilitate insurance settlements for accident victims⁶⁵:

113 There is a risk of abuse of power by the state as a result of the statutory compulsion. The insured is required to: give notice, with all available particulars, of any accident; verify by statutory declaration that the claim arose out of the use or operation of the automobile and that the person operating or responsible for the operation of the automobile at the time of the accident is a person insured under the contract; produce the vehicle for inspection prior to undertaking certain repairs; aid in securing information and evidence and the attendance of any witness; and co-operate with the insurer in the defence of any action or proceeding or in the prosecution of any appeal. These requirements facilitate the process of determining liability and providing for insurance payments to victims. Permitting the use of insurance statements within criminal proceedings would enable the state to use the required statements to circumvent s. 7 protections. Alternatively, it would encourage non-reporting, which would defeat the purpose of facilitating insurance settlements for victims.

As alluded to above, in applying the *Grant* factors the trial judge held that the evidence from both the results of the warrant searches and the adjuster statement should be excluded⁶⁶. In particular,

⁵⁹ *Insurance Act*, R.S.A. 2000, c. I-8, Section 551(1)

⁶⁰ *Insurance Act*, Section 556

⁶¹ [1995] 4 SCR 154

⁶² At paragraphs 108 – 113

⁶³ At paragraphs 108 – 110

⁶⁴ At paragraph 112

⁶⁵ At paragraph 113

⁶⁶ At paragraphs 132 – 145



society’s interest in traffic safety and fair compensation for those injured in motor vehicle accidents was held to be at least as important as the adjudication of the criminal case on its merits⁶⁷:

143 As for the societal interest in adjudication on the merits, exclusion would adversely affect the prosecution, and the consequence of the alleged crime was serious. Society has a very significant interest in the prosecution of drivers who cause serious personal injury or death and who fail to remain at the scene of an accident.

144 At the same time, society’s interest in traffic safety and in seeing injured victims and their families compensated through compulsory motor vehicle insurance and compelled reporting is arguably at least as significant as the prosecution of the offending drivers.

The Court of Appeal agreed⁶⁸:

1. It found that the adjuster statement was given in the context of an adversarial relationship between the insured and the state. Although there was no adversarial relationship between the insured and the insurer, the existing criminal investigation created one⁶⁹.
2. Coercion was properly found by the trial judge⁷⁰. Porter only gave the statement under the legislated insurance policy conditions. Whether or not to exercise the choice to drive is not a choice because it “is often a necessity of modern life and therefore not freely undertaken in the same way” as filing fishing quota reports after choosing to engage in commercial fishing, as was the case in *Fitzpatrick*⁷¹.
3. There was a prospect of unreliable confessions in that “drivers who find themselves reporting a serious accident to their insurer may feel a strong incentive to produce a false statement, particularly if the information given may be passed onto the police”⁷².
4. The Court also found that an abuse of power had been established⁷³:

37 Abuse of power: As found by the trial judge, there is a risk of abuse of power by the state from the statutory compulsion. The insured is required to provide notice, with all available particulars, of any accident; verify by statutory declaration that the claim arose out of the use of the automobile and that the person operating the automobile at the time is insured under the contract; produce the vehicle for inspection prior to undertaking certain repairs; aid in securing information and evidence; and co-operate with the insurer in the defence of any action or proceeding. We agree with the trial judge that these requirements “facilitate the process of determining liability and providing for insurance payments to victims”. To permit the information so obtained to be used in criminal proceedings would permit the state to avoid the protection of s 7 and accomplish, through the insurance statements, what *White* prohibits the state from doing with TSA statements. Moreover, as was noted in *White*, statements by a driver, occurring shortly after an accident, are the type of communication that the principle of self-incrimination is designed to protect: *White* at para 66.

⁶⁷ At paragraphs 143 – 144

⁶⁸ 2015 ABCA 279

⁶⁹ At paragraph 35

⁷⁰ At paragraph 34

⁷¹ [1995] 4 SCR 154

⁷² At paragraph 36

⁷³ At paragraph 37



D. What This Means for Insurers

Insurers will want to maximize the possibility that statements provided to their adjusters will not be readily accessible by police. They want the insureds to feel free to candidly advise as to the circumstances involved in the accident and to prevent this information from ultimately falling into the hands of claimants, through the police. Insurers want to avoid assisting police to obtain convictions against their insureds, which can only serve to work against their interests in the defence of the civil case. Also, we submit that pursuant to the duty of good faith insurers owe it to insureds not to compromise their criminal or traffic defences to the extent that same can be avoided.

We make the following suggestions:

1. If served with a Production Order for material on your file or your adjuster’s file, seek legal advice before simply turning it over to police. If it turns out that you have the grounds to seek an exemption that can be considered. Also, bringing a lawyer into the case early increases the odds of the statement being held to be privileged.
2. If seeking the statement for potential litigation, the claims examiner/adjuster should document that he/she considers this to be the dominant purpose for obtaining the statement, listing the factors that back up his/her reasoning, such as the fact that the insurer has received a demand notice from the claimant or his/her counsel, or even that the litigation has commenced.
3. Advise the insured that he/she is obligated to give a statement under the policy, as mandated by statute and that refusal may lead to a denial of coverage and document that. This will tend to provide evidence that the statement was only provided under statutory compulsion and also the coercion factor in analyzing the insured’s self-incrimination rights.
4. In compiling evidence to seek an exemption to a Production Order and/or admissibility at trial:
 - (a) Both the instructing claims examiner and the adjuster should depose Affidavits (or give *viva voce* evidence). In the ***Security National*** case, the Court held it against the insurer that it had not provided an Affidavit from the adjuster.
 - (b) If the dominant purpose behind the statement was litigation, depose/testify to that expressly. The claims examiner/adjuster should also depose/testify to the reasons as to why that is the case. Avoid general and non-descriptive statements like “I only wanted to do my job” or “I wanted to find out if we had any exposure” or “I wanted to find out the insured’s version of events”, without more. The Court will recognize a privilege only if it is satisfied that the dominant purpose behind the examiner’s/adjuster’s “doing his/her job” or in “finding out whether or not the insurer has any exposure” or “determining the insured’s version of events” was to gather evidence in the face of impending or existing legislation.
2. We note that the principles relating to statutorily compelled statements as set out in ***Porter*** will not apply to statements or evidence of witnesses other than the insured.



While the insured is statutorily compelled to provide evidence, independent witnesses and experts are not. The insurer's ability to maintain confidentiality over non-insured statements must be justified on the basis of privilege.

IV. ACCESSING AND USING EVIDENCE FROM ONE PROCEEDING IN ANOTHER PROCEEDING (CIVIL OR CRIMINAL)

A. Introduction

The issues in any proceeding (civil or criminal) may also be the subject of litigation in other proceedings (civil or criminal). The defendant insured may be an accused in criminal or highway traffic proceedings relating to the accident. The plaintiff may have made claims for similar injuries in litigation dealing with other accidents. Also a witness may have given evidence under oath court or in oral Questioning in other proceedings. This evidence may be valuable, in terms of providing information and also as ammunition against opposing witnesses or litigants.

B. Pre-Trial Document Production And Oral Discovery (Civil Or Criminal)

Civil litigants are obliged to disclose the existence and produce copies of any documentation within their power or possession that is relevant and material to the litigation at hand. They are similarly obliged to answer questions at oral Questioning that are relevant to the issues. Often, this obliges parties to disclose sensitive or confidential information that, if made public, could harm or embarrass them. Because civil litigants are compelled to produce documents and answer relevant questions in pre-trial procedures, Canadian courts have limited the extent to which that evidence can be used for purposes outside of the litigation in which it arose. Similarly, Crown prosecutors are obliged to provide accuseds in criminal or quasi-criminal cases with disclosure of all the evidence relating to the case that the Crown has in its possession. Again, the courts have limited how the contents of the Crown Disclosure package can be accessed or employed in other litigation.

The courts have recognized the existence of an implied undertaking on litigation (civil and criminal) to the effect that civil document production and oral discovery, as well as the Crown Disclosure Package, will not be used for any purpose outside of the litigation giving rise to it without leave of the other party or the Court.

This undertaking was initially recognized in the context of civil litigation⁷⁴. For civil cases this rule has now been codified in the Alberta *Rules of Court*. Rule 5.33 provides as follows:

⁷⁴ *Ed Miller Sales and Rentals v. Catapillar Tractor Co.* [1986] AJ No. 176 (Alta.QB); *Wyrth Ltd. v. Acadia Pipe & Supply Corp.* [1991] AJ No. 342 (Alta.QB); *Ochitwa v. Bombino* (1997) 56 Alta LR (3rd) 37 (Alta.QB); *LSI Logic Corp. of Canada Inc. v. Logani* [2001] 11 WWR 740 (Alta.QB); *Rennick & Di Pinto v. Coopers & Lybrand* [2002] AJ No. 1232 (Alta.QB); *Lack d'Amiante du Quebec Lté. v. 2852-0702 Quebec Inc.* [2001] 2 SCR 743. More recently see *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8 which has been followed in *Kitchenman v. AXA Insurance Canada*, 2008 ONCA 877; *Kent v. Martin*, 2011 ABQB 298; *Nassar v. Capital District Health Authority*, 2011 NSSC 464; *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 2089; *R. v. Basi*, 2011 BCSC 314; *Automated Tank Manufacturing Inc. v. Miller*, 2012 SKQB 300; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83.



Confidentiality and use of information

5.33(1) The information and records described in subrule (2) must be treated as confidential and may only be used by the recipient of the information or record for the purpose of carrying on the action in which the information or record was provided or disclosed unless

- (a) the Court otherwise orders,
- (b) the parties otherwise agree, or
- (c) otherwise required or permitted by law.

(2) For the purposes of subrule (1) the information and records are:

- (a) information provided or disclosed by one party to another in an affidavit served under this Division;
- (b) information provided or disclosed by one party to another in a record referred to in an affidavit served under this Division;
- (c) information recorded in a transcript of questioning made or in answers to written questions given under this Division.

See also rule 30.4 of Ontario's *Rules of Civil Procedure*, in somewhat different terms. Unlike Alberta's provisions, the Ontario Rule sets out specific principles as to when the undertaking can be modified or waived. Although there was conflicting authority for some time, it has now been settled that the implied undertaking also applies to criminal litigation⁷⁵.

The courts have the inherent power to exempt document production or Questioning from the undertaking on application⁷⁶, including after the fact⁷⁷. The onus is on the party seeking exemption to establish "exceptional circumstances"⁷⁸. The Court will consider numerous factors in an application to waive the undertaking including statutory exemptions (such as child welfare legislation)⁷⁹, public safety concerns⁸⁰, where the lawsuits are connected (such as where they involve the same or similar parties in the same or similar issues)⁸¹, or where the party seeking the exemption could have obtained the information by other means⁸². The Court may weigh very heavily against exempting evidence from the undertaking where it might impair a litigant's right to remain silent in related criminal proceedings⁸³.

⁷⁵ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8; *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 2089, at paragraphs 15 – 16; *R. v. Basi*, 2011 BCSC 314; *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1878; *Jomha v. Hicks Estate* [2008] AJ No. 1073 (Alta.QB), at paragraph 23;

⁷⁶ *Ed Miller Sales and Rentals Ltd. v. Catapillar Tracter Co.* [1986] AJ No. 176 (Alta.QB), at paragraphs 3, 6.

⁷⁷ *Ochitwa v. Bombino* [1997] AJ No. 1157 (Alta.QB), at paragraphs 35, 45.

⁷⁸ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 38.

⁷⁹ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 39.

⁸⁰ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 40.

⁸¹ *Ochitwa v. Bombino* [1997] AJ No. 1157 (Alta.QB), at paragraph 45; *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 30; *Jomha v. Hicks Estate* [2008] AJ No. 1073 (Alta.QB), at paragraph 19; *Kent v. Martin*, 2011 ABQB 298, at paragraph 14.

⁸² *Ochitwa v. Bombino* [1997] AJ No. 1157 (Alta.QB); *Jomha v. Hicks Estate* [2008] AJ No. 1073 (Alta.QB), at paragraph 19.

⁸³ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraphs 31 – 33.



Also, the Court may consider include the importance of maintaining the integrity of the pre-trial process and whether the information could have been obtained by other sources⁸⁴.

Evidence from document production or Questioning may also be used to test the credibility of a witness who testifies to the contrary in a subsequent proceeding⁸⁵. In short, the Court may waive the undertaking to allow a witnesses evidence to be impugned by contradictory evidence from previous proceedings where the applying party can “demonstrate through cogent and persuasive reasons” that the undertaking should be waived because the public interest in seeing justice done and the particular case outweighs the privacy interest of the litigants involved in the other litigation and the integrity of the discovery process⁸⁶ or where there has been wrongdoing⁸⁷. It may be waived to allow a party to make a complaint to the Law Society⁸⁸.

In particular, where the plaintiff is claiming for the same damages or losses that were the subject of prior or subsequent litigation, the Court may waive the implied undertaking with respect to that other litigation without having to prove that the plaintiff gave contradictory evidence. This exemption or waiver can even apply to medical reports from the previous proceeding. In *Jomha v. McAllister*⁸⁹ the Court allowed the defence in the first motor vehicle accident to access document production and Questioning transcripts from the action relating to the second accident, where the defence pleaded that the plaintiff’s injuries were caused by the second accident. In *Orlecki v. Challenge Insurance Group Inc.*⁹⁰, the plaintiff was claiming for compensation under an employment agreement where the defendant employer denied the existence of the agreement but, in a separate related action involving the same parties the employer admitted at Questioning that the agreement existed and accurately reflected the agreement of the parties. In *Wright v. Thomas*⁹¹ the defendants sought production of medical reports in the prior action to show that the plaintiff had the habit of making subjective complaints that were not supported by objective findings. The Court waived the implied undertaking with respect to reports dealing with the same injuries as were involved in the second action. In *Joubarne v. Sandes*⁹² the plaintiff sued for a 2005 motor vehicle accident, alleging physical and psychological injury (depression and driving anxiety). In the wrongful dismissal action against her former employer, the plaintiff had been seen by a psychiatrist. The Court waived the implied undertaking in the wrongful dismissal suit with respect to the psychiatrist report and Questioning transcripts, finding that the information in question was “likely relevant” to the current action. In *Gill v. Gill*⁹³ the wife was suing her husband for an accident where she was a passenger in his vehicle. She had previously sued the insurer (ICBC) for Part VII benefits. The Court waived the undertaking with respect

⁸⁴ *Jomha v. McAllister* [2008] A.J. No. 1073 (Alta.Q.B.), at ¶ 23.

⁸⁵ *Ed Miller Sales and Rentals Ltd. v. Catapillar Tracter Co.* [1986] AJ No. 176 (Alta.QB), at paragraph 3; *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 41; *Jomha v. Hicks Estate* [2008] AJ No. 1073 (Alta.QB), at paragraph 20; *Kent v. Martin*, 2011 ABQB 298, at paragraph 14; *Orlecki v. Challenge Insurance Group Inc.*, 2014 ABQB 664, at paragraphs 5 – 7, 12.

⁸⁶ *Orlecki v. Challenge Insurance Group Inc.*, 2014 ABQB 664, at paragraphs 5 – 7, 118.

⁸⁷ *Ochitwa v. Bombino* [1997] AJ No. 1157 (Alta.QB); *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraphs 32 – 36; *Kent v. Martin*, 2011 ABQB 298.

⁸⁸ *Kent v. Martin*, 2011 ABQB 298, at paragraphs 30 – 33. See also *Jomha v. McAllister* [2008] AJ No. 1073 (Alta.QB), at paragraph 23.

⁸⁹ [2008] AJ No. 1073 (Alta.QB), at paragraphs 17 – 20, 24.

⁹⁰ 2014 ABQB 664

⁹¹ [2012] BCJ No. 2844 (BCSC)

⁹² [2009] BCJ No. 2027 (BCSC)

⁹³ [2013] BCJ No. 2838 (BCSC)



to document production and Questioning transcripts in the insurance action. In a similar vein, see *Easton v. Chen*⁹⁴ and *Elworthy v. Tillit*⁹⁵.

A civil litigant cannot disclose civil document production or Questioning transcripts to the police with respect to a related criminal or traffic investigation or proceeding. There is no automatic exclusion in the implied undertaking rule with respect to disclosure to law enforcement authorities⁹⁶. This was conclusively established by the Supreme Court in *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*⁹⁷. The Court held that the public interest in investigating possible crimes is not in every case sufficient to relieve against the undertaking but it may be sufficient in some cases, and this will be a question of fact in each case⁹⁸. Although a plaintiff's counsel is often sorely tempted to disclose information of the defendant's wrongdoing to police, to do so without leave of the Court or the defendant in question is a breach of the undertaking.

In *R. v. Nedelcu*⁹⁹ the Supreme Court of Canada held it permissible for the Crown to cross-examine the accused Nedelcu on contradictory testimony he had given in his previous civil Questioning. The plaintiff's counsel had provided the police or Crown with the transcript. There was nothing said in the case about whether the plaintiff's counsel had obtained Court approval to disclose it and it was clear that Nedelcu had not consented to it. The Ontario Court of Appeal and Supreme Court of Canada did not pass on the implied undertaking in any depth. These Courts held that the *Doucette* case had not passed on the application of the *Charter* and the implied undertaking was not argued in *Nedelcu*. These Courts certainly did not purport to condone the conduct of the plaintiff's counsel.

That said, in the *Doucette* case the Court held that police are able to employ their powers to obtain a search warrant or a production order to access document production or Questioning transcripts in a related civil case¹⁰⁰. The court observed that strangers to the civil litigation (which includes the police and the Crown) are not bound by the implied undertaking relating to it¹⁰¹. The Court also held that the Crown may be able to access document production and Questioning transcripts from the civil action by serving a witness with a subpoena *duces tecum*, which compels the witness to come to court bringing his or her entire documentary record, all subject to *Charter Rights* and other considerations¹⁰². The Court cited *R. v. Serendip Physiotherapy Clinic*¹⁰³ where police were investigating a physiotherapy clinic for defrauding insurers by exaggerating or falsifying invoices. The police obtained a search warrant of the clinic's records without terms imposed to protect the privacy of patients. The applications judge was held to have erred in quashing the search warrant. The Ontario Court of Appeal held that the justice of the peace granting the warrant can make conditions to protect the privacy but the failure to do so does not affect the jurisdiction of the JP to grant the warrant in the first place¹⁰⁴.

⁹⁴ [2015] BCJ No. 2694 (BCSC)

⁹⁵ [2015] BCJ No. 2310 (BCSC)

⁹⁶ *Ed Miller Sales and Rentals v. Catapillar Tractor Co.* [1986] AJ No. 176 (Alta.QB), at paragraph 3; *Wirth v. Acadia Pipe & Supply Corp.*, 1991 Carswell Alta. 62 (Alta.QB), relying on *755568 Ontario Ltd. v. Linchris Homes Ltd.*, 1990 Carswell Ont. 423 (Ont.Gen.Div.) and *EMI Records Ltd. v. Spillan and others* [1986] 2 ALL ER 1016 (Ch.Div.).

⁹⁷ 2008 SCC 8, at paragraphs 43 – 45.

⁹⁸ At paragraph 3, see also *Jomha v. McAllister* [2008] AJ No. 1073 (Alta.QB), at paragraph 19; *Kent v. Martin*, 2011 ABQB 298, at paragraph 14; *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 2089, at paragraph 15.

⁹⁹ 2012 SCC 59; rev'g 2011 ONCA 143.

¹⁰⁰ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraphs 55 – 57.

¹⁰¹ At paragraph 55.

¹⁰² At paragraph 57.

¹⁰³ (2004) at 189 ccc (3rd) 417 (Ont.CA), at paragraph 35.

¹⁰⁴ At paragraph 38.



Of course, there may be other grounds to oppose police accessing document production or Questioning transcripts by way of a warrant or production orders. One cannot rely on privilege for such an objection, as it does not exist with respect to such evidence. However, production could be opposed on the basis that the documentation sought after was a statutorily compelled statement¹⁰⁵. Also, one may oppose producing documentation in the fact of a warrant or production order where the information sought is testimony of a witness in a prior proceeding that is incriminating in the sense of proving commission of an offence by the witness¹⁰⁶ (discussed in more detail below).

As an aside, civil litigants who want to make trouble for their opponents in criminal court must take care not to engage in the tort of malicious prosecution, which gives rise to a civil cause of action. In *Arsenovski v. Bodin*¹⁰⁷ an ICBC adjuster and Special Investigations Unit investigator (who is a peace officer in BC) caused the Crown to initiate a charge against the insured which the Crown later stayed. The adjuster and SIU investigator were later found liable for malicious prosecution. They are found to have had no reasonable and probable cause for believing that the offence reported to the police had taken place. They were found to have submitted inflated and biased reports to the prosecutor to mislead the Crown into charging, and to have had ill will towards the claimant's lawyer with respect to another case. The Court awarded the insured \$30,000.00 in compensatory general damages, \$7,225.34 in special damages and \$350,000.00 in punitive damages.

By definition, the implied undertaking does not cover evidence that a litigant generates for himself/herself, such as resulting from one's own investigation¹⁰⁸. The undertaking continues to exist and apply even after the litigation in question ends¹⁰⁹. It does not apply to evidence that is admitted into evidence in court or otherwise put into the public domain¹¹⁰.

Accordingly, if the insurer or defence counsel have information from the document production or Questioning with respect to a previous claim that a claimant has suffered prior injuries of a similar type it or is otherwise relevant to the subsequent claim, they cannot rely upon that information, or disclose it to the insurer or defence counsel in the subsequent claim without the plaintiff's permission or leave of the Court. However, the insurer is not precluded from relying upon or disclosing the fruits of its own investigation in the prior claim.

Many remedies can be sought for breach of the implied undertaking, including stay or dismissal of proceedings, striking a Statement of Defence or contempt proceedings¹¹¹.

¹⁰⁵ *R. v. Fitzpatrick* [1995] 4 SCR 154; *R. v. White* [1999] 2 SCR 417; *R. v. Porter*, 2014 ABQB 239; aff'd 2015 ABCA 279.

¹⁰⁶ *R. v. Noël*, 2002 SCC 67, at paragraphs 37, 40 – 41, 46, 48; *R. v. Henry*, 2005 SCC 76, at paragraph 25; *Rue v. Asante Wealth Management (Canada) Ltd.*, 2014 ABQB 109, at paragraphs 20 – 23.

¹⁰⁷ 2016 DCSC 359.

¹⁰⁸ *Floate v. Gas Plus Inc.* [2015] AJ No. 960 (Alta.QB), at paragraph 74 – 75.

¹⁰⁹ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 51.

¹¹⁰ *Edmonton (Police Service) v. Alberta Law Enforcement Review Board* [2014] AJ No. 866 (Alta.CA); *Floate v. Gas Plus Inc.* [2015] AJ No. 960 (Alta.QB), at paragraph 74 – 75; *Klein v. Wolbeck* [2016] AJ No. 44, at paragraph 8.

¹¹¹ *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, at paragraph 29.



C. Use Of A Witness’s Testimony From Previous Proceedings

Statements by way of testimony in one proceeding may be relevant in another. They may be useful as evidence in the subsequent proceeding or simply to challenge a witness’ credibility in the subsequent proceeding. We are speaking here of testimony (which by definition enjoys no privilege), as opposed to formal statements from prior actions.

At common law, witnesses had the right to refuse to answer to a question in testimony (even at trial) on the grounds that the answer would incriminate them. To be clear, this meant that the witness had the right to remain silent and provide no answer at all. In Canada that right has been statutorily replaced whereby the witness cannot refuse to answer but there are limits to the use to which his/her testimony be used against him/her in subsequent proceedings¹¹². The basic principle is that a witness cannot refuse to testify simply because the answer may incriminate them criminally or civilly but incriminating testimony cannot be used in other proceedings with the exception of prosecutions for perjury or to allow the witness to give contradictory evidence in different proceedings scot-free. This is to be contrasted with the law in other jurisdictions, such as in the United States where a witness can refuse to answer completely under the Fifth Amendment¹¹³.

In 1893, the first version of what is now section 5 of the *Canada Evidence Act*¹¹⁴ was promulgated with respect to testimony given in criminal proceedings. It provides as follows:

5 (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

Note that it also applies to use of the evidence to incriminate the witness in either civil or criminal proceedings. Parallel legislation with respect to evidence given in a civil proceeding has been promulgated by provinces, including Alberta in section 6 of the *Alberta Evidence Act*¹¹⁵ which provides as follows:

6(1) A witness shall not be excused from answering any question on the ground that the answer may tend to incriminate the witness or may tend to establish the witness’s liability to prosecution under an Act of the Legislature.

¹¹² See *Summa Corp. v. Meier*, (1981) 127 DLR (3rd) 328 (BCSC), at paragraphs 10 – 15, lv. to app. ref’d 39 NR 538; *R. v. Noël*, 2002 SCC 67, at paragraphs 35 – 36, 73; *R. v. Nedelcu*, 2011 ONCA 143, at paragraph 22; rev’d on other GDS 2012 SCC 59.

¹¹³ *R. v. Noël*, 2002 SCC 67, at paragraphs 40 – 41.

¹¹⁴ R.S.C. 1985, c. C-5.

¹¹⁵ R.S.A. 2000, c. A-18.



(2) A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Finally, similar provisions have been promulgated in section 13 of the *Charter*:

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

These different provisions operate coextensively¹¹⁶. There are some slight differences as to how they apply. The major difference has to do with invocation. Protection of section 5 of the *Canada Evidence Act* for witnesses testifying in criminal proceedings must be expressly asked for by the witness while on the stand¹¹⁷. It is no excuse that the witness was unaware of his/her rights under section 5¹¹⁸. The criminal trial judge's duty when section 5 is invoked by a witness is to satisfy himself/herself that the question is one covered by section 5 (i.e. is one that the witness could have refused to answer at common law)¹¹⁹. On the other hand, section 13 of the *Charter* applies automatically, without the witness having to ask for it and without the witness being aware of it¹²⁰. Section 6 of the *Alberta Evidence Act* probably does not require express invocation because, like section 13 of the *Charter* but unlike section 5 of the *Canada Evidence Act*, it does not expressly require the witness to object to a question on the witness stand on this basis. It merely indicates that the witness "has the right not to have incriminating evidence so given used to incriminate that witness in any other proceedings".

There are many similarities among the three pieces of legislation. Under the *Evidence Act* and the *Charter* the focus is on whether the protection is available at the second proceeding when a litigant seeks to employ the prior testimony against the witness. It is at that point where the Court must determine if the testimony is "incriminating" or falls within the exceptions to the protection of the statutes¹²¹.

The Courts have held that these statute sections are based on a *quid pro quo*, whereby the witness compelled to give evidence in court exposing himself/herself to self-incrimination is offered protection against subsequent use of that evidence against him/her in exchange for his/her full and frank testimony. It was expressed as follows in *R. v. Noël*¹²²:

21 Section 13 reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law, and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. called a *quid pro quo*: when a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against the witness in exchange for his or her full and frank testimony. If the

¹¹⁶ *R. v. Noël*, 2002 SCC 67, at paragraph 34.

¹¹⁷ *R. v. Tass* [1947] SCR 103; *R. v. Noël*, 2002 SCC 67, at paragraphs 37 – 38.

¹¹⁸ *R. v. Noël*, 2002 SCC 67, at paragraph 60.

¹¹⁹ *R. v. Noël*, 2002 SCC 67, at paragraph 41.

¹²⁰ *R. v. Noël*, 2002 SCC 67, at paragraph 21 – 22, 25, 59; *R. v. Henry*, 2005 SCC 76, at paragraph 23.

¹²¹ *R. v. Noël*, 2002 SCC 67, at paragraph 40 – 41, 46, 48; *R. v. Henry*, 2005 SCC 76, at paragraph 26; *R. v. Nedelcu*, 2012 SCC 59, at paragraphs 16 – 17.

¹²² 2002 SCC 67, at paragraphs 21 – 22, 25, 59.



evidence proffered is less than full and frank, the witness is subject to prosecution for perjury or for the related offence of giving contradictory testimony. . . .

22 Under the regime of the *Canada Evidence Act*, and now also under the *Charter*, a different bargain is struck. When a witness provides evidence in any proceeding, whether voluntarily or under legal compulsion, he or she cannot refuse to answer a question that may tend to incriminate the witness, but is offered protection against the subsequent use of that evidence. The question before us is the extent of that protection. To answer that question, it is important to remember its root in the *quid pro quo*. The witness, now accused, gave something in exchange for the protection. This is what makes a statement given in a judicial proceeding different from a statement to a person in authority, which is governed by rules of admissibility that are relevant to the special concerns related to that type of statement, and also different from all other out-of-court declarations and admissions.

. . .

25 I should also add that neither under s. 5 of the *Canada Evidence Act* nor under the *Charter* is there any reason, in my view, to draw a distinction between evidence given under compulsion and evidence given voluntarily, even when the evidence is voluntarily given by an accused who waives his non-compellability and testifies in his own trial. This is made clear by the language of s. 5, and by the rationale behind both provisions. When the witness is on the stand, whether under subpoena or not, the witness is required to answer all relevant questions put to him. He may only object to answering any question that may incriminate him and seek protection. The bargain is engaged when the jeopardy arises. The protection is given in exchange for the answer. It then becomes apparent that in keeping with the *quid pro quo* which lies at the heart of s. 13, the state should not be permitted to introduce as part of its case an incriminating statement made by the accused in another proceeding, even if that “other proceeding” was his previous trial for the same offence (see *Dubois, supra* [[1985] 2 S.C.R. 350]); nor should the state be permitted to introduce, in cross-examination, for the purpose of “incriminating” the accused, an innocuous statement that the accused made while a witness in another proceeding (see *Mannion, supra*).

. . .

59 In this light, the prohibition against any reference to prior incriminating evidence also reflects a more fundamental principle, which is at the heart of s. 13. That principle is the trade-off between the right of the state to compel, under the threat of legal sanctions, the evidence of each and every one of us, under oath, in public, in a court of law, and the need for the state to prove its case without the compelled self-incriminating evidence of the accused. That trade-off, reflected in s. 13 of the *Charter*, is a critical feature of the administration of justice that courts are required to protect and uphold. Only in the exceptional circumstance reflected in a case like *Kuldip, supra*, should courts be satisfied that there is no repudiation or betrayal of the conditions under which the witness, now accused, chose to give the potentially damaging evidence rather than face the alternative sanction of a finding of contempt of court. This is not based on any distrust of juries. It is based on the apparent absurdity of asking juries to disregard a confession under oath, and on the unfairness of allowing them to give effect to it.

This *quid pro quo* has been recognized ever since¹²³. Note that the *quid* is the witness providing “full and frank truth” in the first proceeding¹²⁴.

The statutes apply to testimony whether or not it was voluntarily given. It applies regardless of whether the witness was testifying under subpoena or voluntarily, such as in the case of an accused

¹²³ *R. v. Henry*, 2005 SCC 76, at paragraphs 22, 50; *R. v. Nedelcu*, 2012 SCC 59, at paragraphs 3, 58.

¹²⁴ *R. v. Nedelcu*, 2012 SCC 59, at paragraphs 39 – 41.



(who has the right to remain silent and must choose to voluntarily testify in his/her criminal proceedings)¹²⁵.

There are two major limitations with respect to the testimonial protection:

1. It only applies to “incriminating” testimony; and
2. It is subject to exceptions:
 - (a) for perjury prosecutions; and
 - (b) for the giving of contradictory evidence.

It is critical to note that the statutory protection only protects a witness with respect to testimony that was “incriminating” to the witness at the time it was given¹²⁶. “Incriminating” means evidence which could be used by the Crown (in a criminal case) or the plaintiff (in civil cases) as an element which the Crown or plaintiff must prove¹²⁷. Put another way, incriminating evidence means “something ‘from which a trier of fact may infer that an accused is guilty of the offence charged’”¹²⁸. Again, the time to determine whether or not the evidence in question is “incriminating” is at the subsequent proceeding where a litigant wishes to tender testimony from the prior proceeding¹²⁹.

The exception to the testimonial protection “for the giving of contradictory evidence” is an important one. The statutes were not intended to allow a dishonest witness to have the ability to testify to different versions of the facts at different proceedings, as it suits the witness. The Supreme Court Canada put it as follows in *R. v. Henry*¹³⁰:

It seems a long stretch from the important purpose served by a right designed to protect against compelled self-incrimination to the proposition advanced by the appellants in the present case, namely that an accused can volunteer one story at his or her first trial, have it rejected by the jury, then after obtaining a retrial on an unrelated ground of appeal volunteer a different and contradictory story to a jury differently constituted in the hope of a better result because the second jury is kept in the dark about the inconsistencies.

¹²⁵ *R. v. Noël*, 2002 SCC 67, at paragraphs 21 – 22, 25; *R. v. Henry*, 2005 SCC 76, at paragraph 26.

¹²⁶ *R. v. Nedelcu*, 2012 SCC 59, at paragraphs 6 – 8 where it was held that the *quid* of the witness given incriminating evidence is in return for the *quo* of getting the protection. See also *R. v. Noël*, 2012 SCC 67, at paragraphs 37, 40 – 41, 46, 48; *R. v. Henry*, 2005 SCC 76, at paragraphs 25; *Rue v. Asante Wealth Management (Canada) Ltd.*, 2014 ABQB 109, at paragraphs 20 – 23.

¹²⁷ *R. v. Henry*, 2005 SCC 76, at paragraph 25.

¹²⁸ *R. v. Nedelcu*, 2012 SCC 59, at paragraphs 9 – 10. See also *Rue v. Asante Wealth Management (Canada) Ltd.*, 2014 ABQB 109, at paragraph 21.

¹²⁹ *Saccomanno v. Swanson*, 1987 Carswell Alta. 9 (Alta.QB), at paragraphs 26 – 28; *R. v. Noël*, 2002 SCC 67, at paragraphs 41, 46 – 68; *R. v. Henry*, 2005 SCC 76, at paragraph 26; *R. v. Nedelcu*, 2012 SCC 59, at paragraphs 16 – 17.

¹³⁰ 2005 SCC 76, at paragraph 2.



See also *R. v. Nedelcu*¹³¹:

39 That brings me to the last of my colleague’s concerns — that in construing s. 13 as I have, the objective of the quid pro quo, which is to encourage full and frank testimony, will be undermined.

40 With respect, I do not agree. Full and frank testimony presupposes a witness who wants to tell the truth but is afraid to do so lest the evidence be used to incriminate him at a subsequent proceeding. It does not presuppose a witness who is bent on giving false testimony.

41 Be that as it may, on my construction of s. 13, neither the truthful witness nor the perjurer need be concerned that any incriminating evidence given by them at a prior proceeding will be used against them, for any purpose, at a subsequent proceeding (the perjurer need only fear a prosecution for perjury or for giving contradictory evidence). Thus, the witness who sincerely wants to tell the truth — that is, make full and frank disclosure — need not fear any repercussions. He or she will gain the full protection of s. 13, and the bargain contemplated by s. 13 will have been fulfilled.

[emphasis added]

The exception applies to preclude the use of the prior testimony only for the purpose of impeaching credibility of the witness. That is, the prior testimony cannot be put in for proof of its truth to “incriminate” the witness, but only to test his/her credibility¹³².

The case of *R. v. Nedelcu*¹³³ is a good illustration of these principles. Nedelcu was the driver of a motorcycle involved in a single vehicle accident where his passenger was seriously injured. He was both charged with criminal offences and sued for damages. At civil Questioning, he claimed not to have a recollection of the accident. He testified that he had a memory gap from before the accident until he “woke up in the hospital”. However, in his subsequent criminal trial, he testified to having a detailed memory of the accident and provided those details. The Supreme Court held that his Questioning evidence was not protected by section 13 of the *Charter* because it was not “incriminating”¹³⁴. His civil evidence that he could not remember the accident could not, in and of itself, have been used by the Crown to prove that he was guilty of anything.

We emphasize that this could have occurred the other way around. That is, the same result would have followed if Nedelcu had testified first in his criminal trial to having no recollection and then testifying in the civil action to a total recollection of events.

The distinction between using the prior testimony to test credibility (which is permissible) and using the evidence to directly incriminate the witness (not permissible) is a fine line that can be difficult to draw, especially by a jury. In *R. v. Noël*¹³⁵ the accused and his brother were charged separately with the murder of a boy. Noël testified as a witness in his brother’s criminal proceedings (at preliminary inquiry and trial). In those proceedings, he admitted that he was an accomplice with his brother in the murder and expressly invoked section 5 of the *Canada Evidence Act*. In his own trial for murder, he

¹³¹ 2012 SCC 59, at paragraphs 39 – 41.

¹³² See also *R. v. Henry*, 2005 SCC 76, at paragraphs 2 – 3, 48; *Rue v. Asante Wealth Management (Canada) Ltd.*, 2014 ABQB 109, at paragraph 21.

¹³³ 2012 SCC 59; rev’g 2011 ONCA 143.

¹³⁴ At paragraphs 20 – 25.

¹³⁵ 2002 SCC 67.



testified that he had not been involved in the murder, but had only helped his brother move the body to where it was ultimately discovered because his brother had threatened him. The Crown was allowed to cross-examine him from his evidence given in his brother's criminal proceedings. In response, Noël claimed that he had lied in his brother's criminal proceedings. The Supreme Court held that allowing Noël to be cross-examined from his prior evidence impermissible¹³⁶. The prosecutor had gone beyond merely testing Noël's credibility:

Had the sole intent of the Crown been to discredit the appellant, it would have been sufficient to simply highlight these contradictions and repudiations. However, the Crown went further and, at various points in the cross-examination, attempted to get the appellant to adopt the incriminating portions of his prior testimony. . .

The Court held that it was too much to expect that a jury could distinguish between using the prior testimony to incriminate Noël (which is not allowed) and using it only to test his credibility. It was held that to allow a witness to be cross-examined on his prior testimony, even for the ostensible purpose of testing his credibility, the Court must be "satisfied that there is no realistic danger that his prior testimony could be used to incriminate him"¹³⁷. In a subsequent case of *R. v. Nedelcu*¹³⁸, the majority of the Supreme Court accepted that "it may be difficult for triers of fact to work with that distinction"¹³⁹. The mere possibility that the Crown might take steps to use the evidence to incriminate the witness in a later portion of the trial is insufficient to attract the protection of section 13 of the *Charter*¹⁴⁰ until that point in time arrives.

It is important to note that questions going solely to the issue of a witness' credibility cannot be asked at Questioning¹⁴¹. Accordingly, we submit that the exception to the statutory protection with respect to the giving of contradictory evidence would not be applicable to allow the witnesses credibility to be impugned with prior testimony at a Questioning.

Of course, that does not apply at trial where a witness may be asked questions solely relating to his/her credibility so long as the Court is satisfied that there is no realistic danger that the prior testimony will be used to "incriminate" the witness. Thus, objecting to a witness being cross-examined at Questioning on the basis of a prior transcript may just be postponing the inevitable.

However, there are practical reasons why it may be a good idea to raise the objection. Such an objection allows counsel to quiz his/her client about the prior testimony after the Questioning, but before trial. The other side will not get to hear the witness' explanation at Questioning and will have to be worried that there may be a good one once trial rolls around.

From the questioner's perspective, a witness at Questioning can nonetheless be set up for a fall at trial. Relying on what the witness testified to in a previous proceeding, counsel can question as to the facts without actually putting the prior testimony to the witness. At Questioning the witness can be

¹³⁶ At paragraph 10.

¹³⁷ At paragraph 4. See also paragraphs 18 – 20, 26 – 27, 30, 46 – 47, 50, 54 – 55.

¹³⁸ 2012 SCC 59

¹³⁹ At paragraph 15.

¹⁴⁰ At paragraph 22.

¹⁴¹ *Medicine Hat Wheat Co. v. Norris Commission Co.*, 1916 Carswell Alta. 4 (Alta.SCAD), at paragraph 26; *Provincial Sanitation Ltd. v. Excel EX CEL Class 1 Services Ltd.*, 1960 Carswell Alta.308 (Alta.QB), at paragraph 18; *Rutherford v. Swanson*, 1992 Carswell Alta 54 (Alta.QB), at paragraph 6 – 10; *Lambert v. Lomore*, 1997 Carswell Alta 1049 (Alta.CA), at paragraphs 41 – 42.

trapped into giving the same evidence which the questioner knows can be contradicted decisively at trial with the witness' evidence in a prior proceeding.

V. ACCESSING THE POLICE INVESTIGATION FILE

The police members involved directly in the investigation of a matter can be extremely valuable sources of information. In traffic accident cases, their file may contain witness statements, reports by specially trained police traffic accident analysts setting out their opinions on such matters as speed on impact, in whose lane the accident took place, etc., (along with their measurements, photographs and test results).

If approached diplomatically, police may provide information, including their insights and opinions, over and above what is set out in their formal documentation. On occasion, they will answer questions over the telephone or even submit to an interview with respect to an accident. They often have sympathy towards one side with respect to an accident and may be willing to provide information to at least that party.

Most police services have a correspondence unit which processes written requests for information. Parties involved in a motor vehicle accident or other incident can simply write to that unit, forwarding the appropriate fee, to get copies of motor vehicle accident documents (including the police Collision Report), photographs, measurements of the scene, etc. If a consent is enclosed from the appropriate person, copies of that person's witness statements and other information can be obtained in this fashion. Where the police are prepared to consent to disclose their third party records about a litigant if that litigant consents, the Court can direct that litigant to consent by application in a civil proceeding¹⁴².

More formal requests can be made to obtain police documents. Applications can be made under the relevant freedom of information or protection of privacy legislation¹⁴³: However, responses to freedom of information requests often are replete with redactions of information, reducing the value of the response. An in-depth discussion of freedom of information and protection of privacy legislation is beyond the scope of this paper

Additionally, applications can be made pursuant to Rule 5.13 to compel third parties to produce relevant records. However, the reach of rule 5.13 may be limited with respect to police files.

In general, agents of both the provincial and federal Crown are not bound by provincial rules of court unless the Crown is a party to the litigation¹⁴⁴. The *Rules of Court* will usually apply to provincial or municipal police forces, as they are not agents of the Crown and are entities in their own right.

However, the provincial *Rules* do not apply to the RCMP while engaged in criminal investigations, in which capacity they are acting as federal agents, immune from provincial legislation

¹⁴² J. Côté, W. Stevenson, *Alberta Civil Procedure Handbook 2016*, at. 5-47, citing *Banberick v. Myktiuk*; unreported, 16 June 2009, Manitoba.

¹⁴³ *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

¹⁴⁴ *Interpretation Act*, R.S.A. 2000, c. I-8, section 14; *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, sections 8, 11; *Interpretation Act*, R.S.C. 1985, c. I-21, section 17; *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, sections 3, 27 and 33; *Omega Techno Ltd. v. East Central Gas Co-op Ltd.* [1979] AJ No. 345 (Alta.CA), at paragraph 7; *Barry v. Maertens-Poole* [1992] AJ No. 1194 (Alta.QB).



and regulations pursuant to the federal *Interpretation Act*¹⁴⁵. That said, the RCMP is subject to provincial civil procedure rules where they are acting in a provincial capacity.

For provinces other than Quebec and Ontario, the RCMP are often acting as a provincial police force pursuant to an agreement with the province provided for by provincial policing legislation¹⁴⁶. It has been noted that “Crown immunity arises from the function being performed, not just the office held by the person performing the function”¹⁴⁷. Where the RCMP investigation is pursuant to a provincial statute, as opposed to under a federal statute (such as a criminal investigation of the *Criminal Code* or federal drug legislation), the RCMP are considered a provincial police force in those provinces, agents of the provincial Crown and bound by the *Alberta Rules of Court*. In *Kavka v. Family Insurance Corp.*¹⁴⁸ the RCMP were investigating a house fire (not as part of a criminal investigation). See also *L’Heureux v. Unum Life Insurance Co. of America*¹⁴⁹ where the Court held that “[s]imply stated, when acting pursuant to federal legislation, or in matters such as its internal management, the RCMP are subject to federal jurisdiction, but otherwise when acting under provincial legislation they are subject to provincial jurisdiction”. In that case, the RCMP investigation was pursuant to an engagement by the chief medical examiner under the provincial *Fatality Enquiries Act*¹⁵⁰. In *Gougen v. Leger Estates*¹⁵¹ the Court ordered disclosure of the RCMP file with respect to the RCMP investigation of a motor vehicle accident.

Police are also subject to provincial procedural rules where they are a party to the litigation in question, pursuant to both Provincial and Federal Statutes¹⁵². When police are called as witnesses at trial, they can be compelled to bring their documents with them pursuant to a subpoena *duces tecum*¹⁵³.

How should police evidence obtained by way of a *Charter* breach be treated in the civil case? The better view is that such evidence must be disclosed and produced, but there may be an argument as to its admissibility to proceedings in that civil case, as decided by the Ontario Court of Appeal in *(P.D.) v. Wagg*¹⁵⁴.

¹⁴⁵ R.S.C. 1985, c. I-21, section 17; *Rutherford v. Swanson* [1993] AJ No. 326 (Alta.QB); *Canada (Attorney General) v. Teetee Investments Ltd.*, 1994 Carswell Alta. 869 (Alta.CA); *L’Heureux v. Unum Life Insurance Co. of America* [1998] AJ No. 724 (Alta.QB), at paragraphs 5 – 8; *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.*, 2004 ABQB 740, at paragraph 4; *Beourgeois v. Bolen* [2004] AJ N. 50 (Alta.QB), at paragraph 29; *Schnick v. Rosen*, 2009 ABQB 189, at paragraphs 44 – 46.

¹⁴⁶ In Alberta: *Police Act*, R. S.A. 2000, c. P-17, section 21.

¹⁴⁷ A. Fradsham *Alberta Rules of Court, Annotated, 2016* (Carswell 2016) at page 538.

¹⁴⁸ [1994] 9 WWR 602 (BCSC).

¹⁴⁹ [1998] AJ No. 724 (Alta.QB), at paragraphs 10 – 14, 28 – 30.

¹⁵⁰ R.S.A. 2000, c. F-9.

¹⁵¹ [2004] NBJ No. 60 (NBQB).

¹⁵² Provincially: *Proceedings Against the Crown Act*, R.S.A. 2000, c.P-25, section 8. Federally: *Crown Proceedings and Liability Act*, R.S.C. 1985, c. I-50, section 27. See also: *Temelini v. Ontario Provincial Police Commissioner* (1999) 174 DLR (4th) 418 (Ont. CA); *Faltenhine v. Bragg Communications* (c.a.b. Eastlink Cable Systems) [2007] NSJ No. 320 (MSSC).

¹⁵³ *L’Heureux v. Unum Life Insurance Co. of America* [1998] AJ No. 724 (Alta. QB), at paragraph 3, citing First Investors Corp. (re) [1988] AJ No. 138 (Alta. CA); *Law Society of Upper Canada v. Canada (Attorney General)* [2008] OJ No. 210, at paragraph 28.

¹⁵⁴ [2004] OJ No. 2053 (Ont. CA), at paragraphs 57-62 & 70; ie ‘G [2003] OJ No. 3808 (Ont. Div. ct.), at paragraph 67-68. See also *Motorola Inc. v. OR*, 2010 ONSC 487, at paragraphs 4-6; *British Columbia (Director of Civil Forfeiture) v. Huynh* 2012, BCSC, 740; *Canada v. Dorion*, 2012, FCA, 71 at paragraph 47. In *Co-Operators General Insurance Company v. Mayer*, 2005 AD PC 81; additional reasons 2005 AD PC 197 the Court held a *Charter* breach was a relevant factor in determining whether or not the evidence should be admissible in civil case, without passing upon the issues of disclosure or production. The Alberta case of *Bourgeois v. Bolen*¹⁵⁴, holding that



For civil litigation, the general common law principle is that the fact that evidence has been obtained illegally does not thereby render it inadmissible unless the illegality affects its probative value. However, there are exceptions¹⁵⁵. Evidence obtained by breach of *Charter* rights may be excluded from evidence by virtue of section 24(2) of the *Charter* which provides as follows:

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

An in-depth analysis of the operation of section 24(2) is beyond the scope of this paper. However, there are some key points that should be emphasized.

The courts have held that whether or not evidence obtained by way of a *Charter* breach is admissible in a related civil proceeding is a decision for the civil court, which is not bound by the prior decision of the criminal court. The law is unclear as to whether a civil judge who finds a *Charter* breach is to apply the same analysis in determining whether or not to exclude the evidence as remedy as that employed in criminal cases. Some earlier cases suggest that a different analysis is to be applied in the civil case or, alternatively, the same analysis is to be applied with lesser force. That is, some suggest that a less stringent analysis should be applied by the civil court, or that the “bar should be set higher” to exclude evidence than would be the case in a criminal proceeding¹⁵⁶. However, some more recent cases suggest that the same standards should be applied in civil court as in the criminal proceedings, finding that prior cases to the contrary have been superseded by the Supreme Court of Canada decision in *R v. Grant*¹⁵⁷ (which sets out a tree-step analysis for considering the admissibility of evidence arising from a *Charter* breach)¹⁵⁸.

evidence obtained by way of a *Charter* breach must be disclosed but not produced in a civil case is of doubtful value after the Ontario Court of Appeal’s decision in *Wagg*.

¹⁵⁵ A.W. Bryant, S.N. Lederman and M.K. Fuerst, *Sopinka Lederman and Bryant, The Law of Evidence in Canada*, (3rd edition on-line) paragraphs 9.1, 9.2. They note that an exception to this rule relates to evidence obtained by *Charter* breach and a right to seek a remedy for that pursuant to Section 24 of the *Charter*.

¹⁵⁶ *R. v. Daley*, 2001 ABCA 155, paragraph 24; *P.(D.) v. Wagg* [2004] O.J. No. 2053 (Ont.C.A.), at paragraphs 69, 77; *Charette v. Sault St. Marie (City) Police Service* 2011 ONSC 3447, at paragraph 89; *Bourgeois v. Bolen*, 2004 ABQB 35; *Co-operators General Insurance Company v. Mayer*, 2005 ABPC 81; additional reasons 2005 ABPC 197; *v. West.*, [2005] O.J. No. 3548 (Ont.C.A.), at paragraphs 46-48; *R. v. West* [2005] O.J. No. 3548 (Ont.C.A.), at paragraphs 46 – 47; *R. v. Oien* [2006] A.J. No. 410 (Alta.P.C.), at paragraph 31; *R. v. Acero* [2007] B.C.J. No. 2293, at paragraph 27; *Alberta (Minister of Justice and Attorney General) v. Petros*, 2011 ABQB 541, at paragraphs 27 –37.

¹⁵⁷ [1993] 3 S.C.R. 223.

¹⁵⁸ *Alberta (Minister of Justice and Attorney General) v. Squire*, 2012 ABQB 194, at paragraphs 59 – 64; *Alberta (Minister of Justice and Attorney General) v. Wong*, [2012] A.J. No. 820 (Alta.Q.B.), at paragraphs 68 – 73.



VI. ACCESSING THE CROWN PROSECUTOR’S FILE

The accused in a criminal or quasi-criminal case is entitled to access the complete package of evidence that the police or prosecuting Crown have¹⁵⁹, whether the evidence is inculpatory or exculpatory, whether or not the Crown intends to rely on it or call it in evidence. Privacy issues may apply to some portions of the Crown disclosure package (such as personal contact information of the Complainant or other Crown witnesses)¹⁶⁰. No privacy rights attach to police notes or reports¹⁶¹. Also, privilege may apply to some documents in the hands of the Crown¹⁶². This can include the identity of confidential informants (although their evidence must be disclosed¹⁶³). Other items which may be privileged in the hands of the Crown include “outlines of unproven allegations; statements of complainants or witnesses – at times concerning very personal matters; personal addresses and phone numbers; photographs; medical reports; bank statements; search warrant information; surveillance reports; communications intercepted by wiretap; scientific evidence including DNA information; criminal records, etc.”¹⁶⁴.

The Crown has the discretion with respect to vetting the Crown disclosure package before producing it to the defence only with respect to privilege, relevance, and the time and manner of disclosure. The Crown’s decisions in this regard are reviewable by the court¹⁶⁵. The obligation of the Crown prosecuting agency to produce its Crown disclosure package to the accused does not cover documents in the hands of other agencies of the same government (federal or provincial) such as child welfare authorities. However, the prosecuting Crown is required to make reasonable inquiries of other Crown entities¹⁶⁶.

The police are also under a duty to produce the fruits of their investigation to the prosecuting Crown¹⁶⁷. Police can be held liable in civil court for failing to produce its material to the Crown, even if due to negligence¹⁶⁸. There is no excuse for the Crown prosecutor to claim that the police did not turn it over to the Crown¹⁶⁹.

The mere fact that a document is in the Crown’s possession gives rise to a presumption that the document is relevant to the accused’s criminal case; otherwise it would not be there¹⁷⁰. The Crown disclosure package almost always contains information relevant to the civil case¹⁷¹.

¹⁵⁹ *Charter*, s. 7; *R. v. Stinchcombe* [1991] 3 S.C.R. 326; *R. v. McNeil*, 2009 SCC 3.

¹⁶⁰ *R. v. McNeil*, 2009 SCC 3, at paragraphs 12, 19.

¹⁶¹ *R. v. Little* (2001) 285 A.R. 85 (Alta.P.C.), at paragraph 40.

¹⁶² *R. v. Stinchcombe* [1991] 3 S.C.R. 326, at paragraph 20.

¹⁶³ *R. v. Illes*, 2008 SCC 57.

¹⁶⁴ *R. v. McNeil*, 2009 SCC 3, at paragraph 19.

¹⁶⁵ *R. v. Stinchcombe* [1991] 3 S.C.R. 326, at paragraphs 21-23.

¹⁶⁶ *R. v. McNeil*, 2009 SCC 3; *R. v. Dick*, [2009] (N.B.Q.B.) 98.

¹⁶⁷ *R. v. McNeil*, 2009 SCC 3, at paragraph 24; *R. v. Illes*, 2008 SCC 57, at paragraph 63.

¹⁶⁸ *Driskell v. Dangerfield*, 2008 MBCA 60.

¹⁶⁹ : *R. v. McNeil*, 2009 SCC 3, at paragraph 13.

¹⁷⁰ : *R. v. McNeil*, 2009 SCC 3, at paragraph 20.

¹⁷¹ *Consolidated NBC Inc. v. Price Waterhouse* [1994] O.J. No. 263 (Ont.C.A.); aff’g [1992] O.J. 1345 (Ont.S.C.); *Popowich v. Saskatchewan* [1996] S.J. No. 477 (Sask.C.A.), at paragraph 46; *P.(D.) v. Wagg* [2002] O.J. No. 3808 (Ont.Div.Ct.), at paragraph 10; *Jackson v. A.D.(No.1)* [2005] ABQB 702 (Alta.Q.B.); *Vaughne Realty (2005) Ltd. v. LeBlanc*, 2012 NSSC 261.



Civil litigants cannot get the Crown disclosure package directly from the Crown by applying under Rule 5.13 for production of documents in the possession of a third party because the Crown is not bound by that Rule¹⁷². Proper procedure is to request production of the Crown disclosure package from criminal defence counsel.¹⁷³ This information is not privileged in criminal defence counsel's file¹⁷⁴. However, criminal defence counsel is almost always precluded from disclosing the Crown disclosure package because of trust conditions precluding that (now almost always imposed by Crown prosecutors) and the implied undertaking.

The Crown can impose trust conditions on a disclosure package when providing it to criminal defence counsel, subject to review of the court¹⁷⁵. Trust conditions bind both criminal defence counsel and his/her client, the accused¹⁷⁶. However, the defence counsel or the accused must produce and disclose the Crown disclosure package if the Crown waives the trust conditions¹⁷⁷. There is some authority that precludes disclosure of the Crown disclosure package by criminal defence counsel even where the same lawyer acts as criminal defence counsel and civil defence counsel for the accused/defendant¹⁷⁸.

In addition, the implied undertaking not to produce pre-trial evidence outside of the litigation in question applies to criminal litigation and the Crown disclosure package¹⁷⁹. The applied undertaking can be waived, just as is the case in civil proceedings¹⁸⁰.

The accused is considered to have sufficient power and control over the Crown disclosure package to require disclosure of its existence in the civil proceedings but the accused is not to produce or provide access to the package unless the Crown has consented or the court has so ordered¹⁸¹. The procedure for disclosure and production of the Crown disclosure package in civil cases has been set out in *P.(D.) v. Wagg* by the Ontario Divisional Court¹⁸². The proper procedure is for the litigant who was the accused in the criminal proceedings to disclose the evidence of the Crown disclosure package in his/her Affidavit of Records and to describe its contents. That litigant can then object to producing a copy of the Crown disclosure package without leave of the Crown or the court, based on the interests of privacy, safety rights of third parties or public interest privilege. The factors that will be taken into account by the court in determining whether or not to allow production of the Crown disclosure package include the following:

¹⁷² *Barry v. Maertens-Poole* [1992] A.J. No. 1194 (Alta.Q.B.), citing *Omega Techno Ltd. v. East Central Gas Co-Op Ltd.*; [1979] A.J. No. 345 (Alta.C.A.), at paragraph 29.

¹⁷³ *St. Jean v. Western Union Insurance Co.*, 2002 ABQB 928, at paragraph 8; *Scnick v. Rosen*, 2009 ABQB 189, at paragraphs 44-46.

¹⁷⁴ *P.(D.) v. Wagg*, [2002] O.J. No. 3808 (Ont.Div.Ct.); varied regarding other points [2004] O.J. No. 2053 (Ont.C.A.); *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.* [2004] A.J. No. 1160 (Alta.Q.B.).

¹⁷⁵ *R. v. Little*, [2001] A.J. No. 69 (Alta.P.C.); *R. v. Wiebe*, [2007] A.J. No. 135 (Alta.P.C) at paragraphs 26 – 27.

¹⁷⁶ *Jackson v. A.(D.)(No. 1)*, 2005 ABQB 702; *Jackson v. A.(D.)(No. 2)*, 2005 ABQB 824.

¹⁷⁷ *Jackson v. A.(D.)(No. 1)*, 2005 ABQB 702.

¹⁷⁸ *Beson v. Korens* [1997] S.J. No. 100 (Sask.Q.B.).

¹⁷⁹ *R. v. Little*, [2001] A.J. No. 69 (Alta.P.C.), paragraph 38; *Juman v. Doucette*, 2008 SCC 8, followed in *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 2089.

¹⁸⁰ *St. Jean v. Western Union Insurance Company* [2003] A.J. No. 1393 (Alta.Q.B.); *Bourgeois v. Bolen*, 2004 ABQB 35.

¹⁸¹ *P.(D.) v. Wagg* [2002] O.J. No. 3808 (Ont.Div.Ct.); varied regarding other points [2004] O.J. No. 2053 (Ont.C.A.); *Jackson v. A.(D.)(No. 1)*, 2005 ABQB 702; *Jackson v. A.(D.)(No. 2)*, 2005 ABQB 824; *Wong v. Antunes*, 2008 BCSC 1739; *Floate v. Gas Plus Inc.*, [2015] A.J. No. 960 (Alta.Q.B.), at paragraph 110.

¹⁸² *P.(D.) v. Wagg* [2002] O.J. No. 3808 (Ont.Div.Ct.); aff'd on this point [2004] O.J. No. 2053 (Ont.C.A.).



1. Whether or not there are any safety concerns for civilian witnesses;
2. Whether or not any statement or other evidence is “sensitive in any respect”, such as in sexual offences;¹⁸³
3. Whether or not there is any evidence for which there is a need to protect the privacy of a civilian witness¹⁸⁴;
4. Whether or not there is “a need to protect the integrity of the administration of justice in the circumstances of this particular case” (for example, where the Crown disclosure package may reveal sensitive information about police investigative techniques)¹⁸⁵.

The *Wagg* procedure has been followed ever since, including in Alberta¹⁸⁶. Indeed, where the Crown waives the trust conditions, the accused as civil litigant must both disclose and produce the Crown disclosure package to the opposing litigants – failure to do so can result in an award of costs against the accused/defendant¹⁸⁷.

VII. IMPACT OF A CRIMINAL OR TRAFFIC VERDICT ON THE RELATED CIVIL CASE

At common law, the British position was that evidence of a conviction is inadmissible in a civil case (except where the conviction is an element of a civil claim). It is doubtful that this decision has been adopted in Canadian common law¹⁸⁸.

Criminal convictions, where relevant are now admissible in evidence in a civil case, with respect to the facts necessary to support the conviction by virtue of provincial legislation¹⁸⁹. These provisions stipulate that the civil trier of fact may give such weight to the conviction as it considers appropriate. This usually means that where the conviction is used the verdict becomes at least prima facie evidence of the offence (which may or may not be all of the facts that the plaintiff must prove in a civil case). The issue becomes how much weight the criminal conviction should be given – should it be conclusive on the issue of guilt? The equivalent of Alberta’s legislation has been held to be of little assistance in determining this question¹⁹⁰.

¹⁸³ *R. v. Little*, [2001] A.J. No. 69 (Alta.P.C.), at paragraph 40; *R. v. Smith* [1994] S.J. No. 38 (Sask.Q.B.).

¹⁸⁴ *R. v. Smith* [1994] S.J. No. 38 (Sask.Q.B.).

¹⁸⁵ *R. v. Little*, [2001] A.J. No. 69 (Alta.P.C.), at paragraph 40.

¹⁸⁶ *Bourgeois v. Bolen*, 2004 ABQB 35; *Jackson v. A.(D.)(No. 1)*, 2005 ABQB 702; *Jackson v. A.(D.)(No.2)*, 2005 ABQB 824; *Aylmer Meat Packers Inc. v. Ontario* [2006] O.J. No. 2296 (Ont.S.C.); *College of Physicians and Surgeons of Ontario v. Peel Regional Police* (2009) 311 D.L.R. (4th) 530 (Ont.Div.Ct.); *R. v. Harris*, 2011 ONSC 5955; *Sazant v. College of Physicians and Surgeons of Ontario*, [2011] O.J. No. 192 (Ont.C.A.P, at paragraph 102.

¹⁸⁷ *Jackson v. A.(D.)(No. 1)*, 2005 ABQB 702; *Jackson v. A.(D.)(No.2)*, 2005 ABQB 824.

¹⁸⁸ A.W. Bryant, S.N. Lederman and M.K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, (3rd Ed. Online) paragraph 19.158-19.159, citing *Demeter v. Pacific Life Insurance Co.* (1983) 150 D.L.R. (3rd) 249 (Ont.H.C.J.); aff’d (1984) 13 D.L.R. (4th) 318 (Ont.C.A.).

¹⁸⁹ In Alberta, see the Alberta Evidence Act, R.S.A. 2000, c. A-18, s. 26.

¹⁹⁰ *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at paragraphs 17 – 18.



With respect to verdicts from another civil proceeding, the doctrines *res judicata* and issue of estoppel may apply and provide a bar to a single issue where applicable:¹⁹¹

§187 No court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they claim litigating under the same title in a court competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. For the doctrine of *res judicata* to be applicable, there must be two parties adverse in interest and a finding in the first case in favour of one party against the other.

The elements of issue estoppel are¹⁹²:

1. The same question has been decided;
2. A decision is final; and
3. The parties or their privies are the same (mutuality)¹⁹³.

However, issue estoppel and *res judicata* do not apply to criminal verdicts in relation to a civil case. The only exception to this is where the finding of guilt or the defendant's criminal record are relevant facts, in of themselves, in a civil action. The parties in the criminal litigation (the state and the accused) are not the same as the parties in the civil action¹⁹⁴. Even if the plaintiff was the complainant in the criminal action, the he/she was not a party in the criminal case but only a Crown witness.

Civil courts are reluctant to allow a civil litigant to essentially re-litigate a final criminal verdict on the basis that, in many cases, it would amount to an abuse of process.

The leading case is ***Toronto (City) v. C.U.P.E., Local 79***¹⁹⁵. Oliver worked as a recreational instructor for the City of Toronto. He was arrested, charged and convicted of sexually assaulting a young boy under his responsibility. He exhausted his right to appeal regarding his conviction without success. Oliver then grieved his dismissal. The employer Toronto produced the complainant's testimony from the criminal case and the notes of Oliver's supervisor in the grievance arbitration. It did not call the complainant to testify. Oliver testified and denied the sexual assault. The arbitrator held for Oliver, finding that he had been wrongfully dismissed. It was held that the conviction was admissible pursuant to the *Ontario Evidence Act*¹⁹⁶.

The employer applied for judicial review. The Ontario courts quashed the arbitration decision and held at the arbitrator had erred in not giving full effect to the criminal conviction. The Court held that civil courts have an inherent jurisdiction to prevent abuse of their process where the proceedings are

¹⁹¹ *CEJ(West)* V.1 section 187.

¹⁹² *CEJ(West)* V.2 section 193; ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, at paragraph 23.

¹⁹³ Although mutuality has been abandoned to some extent in the US and the UK, the Supreme Court of Canada upheld it as a requirement in ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, at paragraphs 29 – 32. The reasons underlying the abandonment of this requirement in other jurisdictions are dealt with in Canada under the doctrine of abuse of process.

¹⁹⁴ A.W. Bryant, S.N. Lederman and M.K. Fuerst, ***Sopinka, Lederman & Bryant: The Law of Evidence in Canada***, (3rd Ed. Online) section 19.156; ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63.

¹⁹⁵ 2003 SCC 63.

¹⁹⁶ R.S.O. 1990, c. E.23, section 22.1.



“vexatious or oppressive” or “violate the fundamental principles of justice underlying the community’s sense of fair play and decency”¹⁹⁷. In particular, “to preclude the litigation in circumstances with the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice”. The motive of the party seeking to re-litigate the criminal decision and whether the re-litigation is attempted offensively or defensively are irrelevant¹⁹⁸. The focus on applicability of the criminal conviction must concentrate on the integrity of the judicial process:¹⁹⁹

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that, from the system’s point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

The same law has been annunciated by many other legal authorities²⁰⁰.

In such cases, it is not an answer for the party seeking to challenge the criminal verdict to argue that the accused/defendant did not testify or call evidence that he/she now wishes to call in the civil case if that evidence was available at the time of the criminal trial, or that the criminal defence counsel was ineffective²⁰¹. Tactical decisions by the defence to call no evidence or for the accused not to testify in a criminal case do not bind the civil court.

¹⁹⁷ At paragraph 35.

¹⁹⁸ At paragraphs 44-49.

¹⁹⁹ At paragraphs 51-52.

²⁰⁰ A.W. Bryant, S.N. Lederman and M.K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, (3rd Ed. Online) section 19.162-19.175; *Holt v. McMaster* (1993) 140 AR 235 (Alta QB); *F.(K.) v. White* (2001) 198 D.L.R. (4th) 541 (Ont.C.A.); *Cho v. Phimsarath*, 2003 ABQB 235; *Caci v. MacArthur*, 2008 ONCA 750; aff’g [2007] O.J. No. 156 (Ont.S.C.); lv. to app dismissed [2009] S.C.C.A. No. 2; *Plishka-Humphreys (Guardian ad litem of) v. Bolen*, 2012 BCSC 235.

²⁰¹ *Hanna v. Abbott*, 2006 CarswellOnt 4937 (Ont.S.C.), at paragraphs 55 – 56.



However, the courts have found that there are at least three situations where the challenge of a prior criminal verdict will not amount to an abuse of process²⁰²:

1. “when the first proceeding is tainted by fraud or dishonesty”;
2. “when fresh, new evidence, previously unavailable, conclusively impeaches the original results”; or
3. “when fairness dictates that the original result should not be binding in the new context”.

This is not an exhaustive list²⁰³.

As to when “fairness dictates that the [criminal verdict] should not be binding” in a civil court, the Supreme Court noted as follows in **Toronto (City) v. C.U.P.E., Local 79**²⁰⁴:

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *F. (K.), supra*, at para. 55).

[emphasis added]

An accused may plead guilty in a criminal case for a number of reasons, quite apart from the question of whether or not he or she is actually guilty. A plea may be entered for economic and practical reasons. For example, it is common for an individual (without legal advice) to plead guilty to a minor traffic or criminal matter rather than pay for legal counsel and attend court appearances, especially where the accused has language difficulties. This would be a situation of where the “stakes in the original proceeding were too minor to general a full and robust response, while the subsequent stakes were considerable”. In *Becamon v. Wawanesa Mutual Insurance Co.*²⁰⁵ the Ontario Court of Appeal held as follows:

- 19 In *C.U.P.E., Arbour J.* enunciated the need to strike a balance between finality and fairness and provided illustrations pointing towards the fairness side of the scales, at paras. 52 and 53:

[F]rom the system’s point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. *There may be instances where relitigation will enhance, rather than impeach, the*

²⁰² *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at paragraph 52.

²⁰³ *Hanna v. Abbott*, 2006 CarswellOnt 4937 (Ont.S.C.), at paragraphs 30 – 31.

²⁰⁴ 2003 SCC 63, at paragraph 53.

²⁰⁵ 2009 ONSC 113



integrity of the judicial system, for example: ...⁽³⁾ where fairness dictates that the original result should not be binding in the new context.

...

The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. *If, for instance, the stakes of the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail.*

[Emphasis added by the Court.]

This remains good law. In **Holt v. McMaster**²⁰⁶ the Court held as follows:

[12] Similarly, there may be circumstances where an explanation for a guilty plea will be put forward by the defendant, for example, lack of access to legal advice or a desire to deal with a matter quickly without having fully understood the implications of a guilty plea. In that sort of situation, the test for summary judgment may not be met.

In **K.(F.) (Litigation guardian of) v. White**²⁰⁷, the Ontario Court of Appeal held as follows:

[49] Summary judgment does not follow automatically upon a criminal conviction if the defendant can show that despite the conviction, there is an issue to be tried. In **G. v. Chaykowski** (1998), 1998 ABCA 348 (CanLII), 64 Alta. L.R. (3d) 282, [1999] 4 W.W.R. 228 (C.A.), a summary judgment obtained on the strength of a criminal conviction was set aside on appeal on the basis that the convictions were vague and that it was not clear whether there was a sufficient similarity between the facts giving rise to the civil claim and the facts underlying the conviction. Similarly, in **McCauley v. Vine**, supra, the English Court of Appeal set aside a summary judgment in a motor vehicle action granted on the strength of a conviction for dangerous driving. It was noted that the defendant may have lacked adequate incentive to fully defend a relatively minor quasi-criminal charge, and that it would be unfair to hold the defendant to that result when facing the more serious consequences of a civil action for substantial damages. In **Ridley v. Bانشard Mutual Insurance Co.**, [1995] O.J. No. 1922, summary judgment was refused where the convicted party had uncovered evidence not available at his criminal trial.

Accordingly, a guilty plea would not necessarily be conclusive of civil liability in such cases because it is not necessary a true admission of guilt.

Sometimes insurers of a defendant facing a related criminal or traffic charge may fund the defence of that charge, to prevent a conviction from hampering their ability to contest liability in the civil case. Whether or not to do this is rarely an easy decision. Where the charge is a minor one, such as a traffic offence, the accused/defendant/insured may be better off to just send in his payment (i.e. plead

²⁰⁶ (1993) 140 A.R. 235 (Alta.Q.B.) at paragraph 12.

²⁰⁷ 2001 CanLII 24020 (Ont.C.A.), at paragraph 49.



guilty) without counsel. In the subsequent civil case, the court may give the plea little weight. For the insurer to successfully defeat the traffic charge is a good outcome, as there will be no conviction for the civil court to consider. However, the downside is that if the traffic or criminal charge is contested with counsel through to a trial and a conviction results, the civil court is more likely to consider an attempt to dispute that verdict in the civil case to be an impermissible abuse of process. In our view, the insurer should consider running that risk where the criminal charge is a serious one (e.g. criminal negligence causing death) and the insured would otherwise not be able to afford a serious defence.

On the other hand, evidence of a criminal acquittal has absolutely no evidentiary value in the civil case, unless the fact of an acquittal is an element in the civil tort alleged (e.g. malicious prosecution or negligent investigation). Given the different standards of proof between criminal and civil cases, the fact of an acquittal in criminal charges is considered irrelevant to the issue of whether the accused has an arguable defence in the civil action. This is the case even where the criminal court judge has issued detailed reasons for acquittal, not based on a reasonable doubt but upon an express finding of fact that the accused was innocent²⁰⁸. The reasons for a criminal acquittal are not even admissible for an application by the accused for security for costs²⁰⁹.

VIII. AFFECTING THE TIMING OF THE CIVIL PROCEEDINGS IN RELATION TO THE CRIMINAL/TRAFFIC PROCEEDINGS TO THE BEST ADVANTAGE.

The pace of criminal investigations and proceedings is largely controlled by the police and the Crown. Often the criminal proceedings are commenced and even concluded before the related civil claim is finished, especially in the case of traffic matters. However, civil litigants may be able to take some steps to affect the conduct of the civil proceedings in relation to the criminal/traffic case, to the advantage of the accused/defendant/ insured.

In criminal proceedings the court may judicially stay the matter on the basis of negligence or misconduct on the part of the police or the Crown such as deliberate non-disclosure or falsification of police notes²¹⁰, physical or psychological abuse of a prisoner²¹¹, police brutality in obtaining a confession²¹², loss of key evidence in police possession²¹³, or reliance upon unreasonable procedures in opposing bail²¹⁴. Such stays are generally permanent, bringing the case to a conclusion. That is helpful to the civil defence as no conviction results.

The Crown also has a power to unilaterally stay proceedings, meaning to suspend them, by filing the relevant documentation²¹⁵. The Crown may unilaterally re-start the proceedings from the point where they left off by filing documentation within the earlier of one year after the stay was entered or the expiry of a limitation period²¹⁶. The Crown's power to stay is considered part of its prosecutorial

²⁰⁸ *Polgrain Estate v. Toronto East General Hospital*, 2008 ONCA 427

²⁰⁹ *Sorenson Estate v. Holden Hotel Co.*, 2001 ABQB 296

²¹⁰ *R. v. Spagnoli*, 2011 ONSC 4843

²¹¹ *R. v. Bellusci*, 2012 SCC 44

²¹² *R. v. Singh*, 2013 ONCA 750

²¹³ *R. v. W.(C.)*, 2013 ONSC 4713

²¹⁴ *R. v. Hotte*, 2015 ABQB 323

²¹⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 579

²¹⁶ Six months from the date of the alleged offence for summary conviction matters: *Criminal Code*, R.S.C. 1985, c. C-46, s. 786(2)



discretion and is only reviewable by the Court or the Law Society on the grounds of abuse of process (such as employing the criminal process for improper purposes)²¹⁷. Sometimes the Crown re-starts the proceedings to look for more evidence during the period of the stay²¹⁸.

There are a number of reasons why an accused (who is also a defendant in a civil case) might want to stay civil proceedings or suspend some aspects of them pending the outcome of a related criminal matter:

1. In criminal proceedings the accused usually wants to exercise his/her right to remain silent, at least until the defence begins calling evidence at trial. An accused generally does not want the police or prosecution to anticipate the defence evidence beforehand. The Crown's mere knowledge of what the defence evidence might be gives rise to an opportunity for the Crown or police to prepare its case more effectively. Also, the Crown or police may canvass the issues with the Crown witnesses (which may include the plaintiff in the civil case). This, in turn, gives unscrupulous Crown witnesses the opportunity to tailor their evidence to meet the anticipated evidence of objective fact.
2. More importantly, as noted above, the police and Crown may be able to access the document production and Questioning evidence from the civil case for the purposes of the criminal proceedings by either having a litigant in the civil case apply to waive the implied undertaking or, alternatively, to exercise their powers of search and seizure. Often, the civil proceedings involve more in-depth evidence about the matter in question, which may assist the Crown to more effectively prosecute the accused/defendant, increasing the odds of a conviction (which may impair the ability to contest liability in the civil case).
3. Civil litigants may want to hold off on pursuing or defending the civil case pending revelation of the evidence that may come to light in the criminal proceedings. Sometimes the outcome of the criminal or traffic case may render some or all of the issues in the civil case moot.

Many civil lawyers erroneously believe that a court will readily grant a stay of the civil proceeding pending the outcome of a related criminal matter. However, the court's jurisdiction to completely stay a civil proceeding is not automatic but discretionary, only to be exercised in exceptional circumstances²¹⁴. A stay of the civil case will only be granted if the accused can show some specific way in which he/she would be prejudiced otherwise. This is especially the case when charges have not yet been laid in a criminal investigation because it is only speculation that the suspect will be charged.

In *Rue v. Assante Wealth Management (Canada) Ltd.*²¹⁹, Associate Chief Justice Rooke summarized the two pre-conditions that must be met for the stay of a civil case because of a related criminal case:

²¹⁷ *Krieger v. Law Society of Alberta* (2002) 168 C.C.C. (3d) 97 (S.C.C.); *Kvello v. Miazga*, 2009 SCC 51;

²¹⁸ E.g. *R. v. Vader*, 2016 ABQB 55

²¹⁴ *Saccomanno v. Swanson*, 1987 CarswellAlta 9 (AltaQB), at paragraphs 9, 15; *R. v. Nedelcu*, 2011 ONCA 143, at para.28; rev'd on other gds 2012 SCC 59; *Italian Centre Shop South Ltd. v. Moreira*, 2011 ABQB 41; *Rue v. Assante Wealth Management (Canada) Ltd.*, 2014 ABQB 109, at paragraphs. 15, 28 – 29

²¹⁹ 2014 ABQB 109, at paragraph. 15, citing *Saccomanno v. Swanson*, 1987 CarswellAlta 9 (AltaQB), at paragraphs. 11 – 19



1. The pending criminal charges are interrelated to a major degree with the issues apparent on the pleadings in the civil action; and
2. Given such [a] close interrelation, there is an onus upon the applicant to show a degree of prejudice, if civil action is not stayed, which warrants the case being regarded as exceptional

[Emphasis added by the Court].

“Exceptional circumstances” justifying a civil stay usually do not include the mere fact that the accused/defendant may have to incriminate himself/herself at Questioning or in document production in the civil case, at least prior to the Questioning stage²²⁰. Indeed, the case law is divided on whether civil forfeiture actions pursuant to the *Victims Restitution and Compensation Act*²²¹ based on pending criminal charges can be stayed on this basis. These are proceedings where the Crown seeks to acquire property linked to an accused on the basis of crime, even before the accused has been convicted. The civil remedy sought is directly and inextricably related to the alleged crimes. Some authorities approve of a stay²²² but at least one does not²²³.

While civil courts are reluctant to completely stay a civil case pending the outcome of the related criminal case, they have been prepared to grant the accused/defendant significant relief to protect his/her rights against self-incrimination in the criminal matter.

In *Saccomanno v. Swanson*²²⁴ the plaintiff sought the return of money he had paid to the defendant for a vehicle that turned out to be stolen while the defendant faced criminal charges related to the sale. The defendant sought a stay before Questioning had taken place. The Court declined the stay. However, in light of the defendant’s concerns that his civil Questioning evidence might incriminate him and assist the prosecution, the Court issued an order prohibiting anyone else being in the room at Questioning and allowed the defendant to object to questions touching on his criminal liability.

In *Schwartz v. Stinchcombe*²²⁵ the defendant Stinchcombe was both sued and charged for, among other things, misappropriation of funds. When the time came for him to produce documents and submit to Questioning, he applied for a stay of the civil matter. The Court held that the stay application was premature, citing the *Saccomanno* case and the ability of the Court to excuse the defendant from answering questions relating to the criminal case before that criminal matter is concluded.

In *Italian Centre Shop South Ltd. v. Moreira*²²⁶ the defendant was being sued for having stolen from his employer while he was facing criminal charges based on the same facts. When the employer applied for summary judgment, Moreira applied for a stay. The Court declined to stay the entire civil case but stayed the summary judgment application until after the conclusion of the criminal proceedings

²²⁰ *Saccomanno v. Swanson*, 1987 CarswellAlta 9 (AltaQB), at paragraphs 26 – 28; *Schwartz v. Stinchcombe*, 1990 CarswellAlta 202 (Alta.Q.B.); *R. v. Nedelcu*, 2011 ONCA 143 at ¶ 28 ; rev’d on other gds 2012 SCC 59; *Rue v. Assante Wealth Management (Canada) Ltd.*, 2014 ABQB 109,

²²¹ *Victims Restitution and Compensation Act*, S.A. 2001, c. V-3.5

²²² *Alberta (Minister or Justice and Attorney General) v. To* [2010] A.J. No. 1190 (Alta.Q.B.); *Alberta (Minister of Justice and Attorney General) v. Chau* [2010] A.J. No. 1599 (Alta.Q.B.)

²²³ *Alberta (Minister of Justice) v. McNair* [2014] A.J. No. 43 (Alta.Q.B.)

²²⁴ 1987 CarswellAlta 9 (Alta.Q.B.)

²²⁵ 1990 CarswellAlta 202 (Alta.Q.B.)

²²⁶ 2011 ABQB 41



because Moreira would otherwise have had to respond to the application with evidence that might impair his criminal defence.

In *Rue v. Asante Wealth Management (Canada) Ltd.*²²⁷ the defendant financial advisor Malley was charged with murder by sending a bomb to one of his clients. The civil case was a class action against him and others for negligence and fraud in the handling of his clients' funds. Malley applied for a stay on the basis that evidence of mismanagement of client funds might assist the Crown's prosecution by tending to prove a motive for the murder. The Court refused the stay but issued an order precluding questioning and disclosure or use of civil document production or Questioning evidence having "any direct relationship to the Criminal Proceedings, unless directed to answer by the Court, with such conditions as may be appropriate".

Thus, the accused/defendant not be entitled to a civil stay but he should be able to be excused from disclosing documents or answering questions relating to his/her criminal liability pending the outcome of the criminal proceedings on application. Civil defence counsel should be aware of this and take steps to make such an application where appropriate.

IX. CONCLUSION

Many cases, civil or criminal, do not proceed in a vacuum. Information, investigations and evidence from other cases (civil or criminal) have the capacity to impact the case at bar. Insurers and counsel are well advised to keep in mind the possibility of other proceedings as they may provide information or evidence that may either significantly assist or hinder the conduct of the claim that is on their desk.

²²⁷ 2014 ABQB 109

