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Lilburn in Uniform? A Charter Analysis of “Ordered Statements” Under the R.C.M.P. Act

Craig S. MacMillan*

R.C.M.P. officers can be ordered to respond in an internal investigation. Although the statements are not to be used in any proceeding, no derivative use immunity is proscribed. Several constitutional questions are raised: the right against self-incrimination, the right to silence, the right to counsel, and the right against arbitrary detention. Recent pronouncements of the Supreme Court of Canada on disclosure and impeaching credibility may also invalidate the legislative exclusion of ordered statements in subsequent proceedings. Particularly when ordered statements are sanctioned as interrogative powers at the investigative stage, the failure to provide derivative use immunity leaves ordered statements constitutionally suspect.

Les agents de la G.R.C. peuvent recevoir l'ordre de répondre aux questions posées lors d'une enquête interne. Mais les déclarations faites ne peuvent pas être utilisées dans d'autres poursuites judiciaires, aucune exception d'usage administratif ou criminel est prescrite. Plusieurs questions d'ordre constitutionnel sont soulevées: le droit contre l'auto-incrimination, le droit au silence, le droit de consulter un avocat, et le droit contre la détention arbitraire. Des déclarations récentes par la Cour Suprême du Canada sur la révélation et la réclusion de la crédibilité peuvent aussi invalider l'exclusion législative des déclarations obtenues "sous ordre" dans des procès subséquents. Particulièrement lorsque les déclarations sont obtenues sous ordre de répondre et sanctionnées en tant qu'autorités interrogatrices au niveau de l'enquête. L'omission de fournir à ces déclarations ainsi données l'exemption d'usage dérivé laisse suspecte leur validité constitutionnelle.

* Dalhousie Law School, LL.B. anticipated 1993. The author wishes to thank Mr. John Pearson (Director of Public Prosecutions for Nova Scotia) for his supervision.
"I am not willing to answer you any more of these questions because I see you go about this examination to ensnare me; for seeing the things for which I am imprisoned cannot be proved against me you will get other matters out of my examination; and therefore...I shall answer no more;...and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think of the law of the land, that I may stand upon my just defence and not answer to your interrogations."  

— John Lilburn before the Court of the Star Chamber, (1637).

“What we can do as a result of the ordered statement – and even this causes us problems from time to time before the courts and with members - is go out and get what you might call independent evidence.”

— R.C.M.P. Commissioner, R.H. Simmonds, before the House of Commons Legislative Committee, (1985).

For police officers, the statement of Mr. Lilburn before the Court of the Star Chamber, over three hundred and fifty years ago, encapsulates one of the contemptible features of ordered statements: the obligation of officers to incriminate themselves by responding to questions. As a corollary, the former Commissioner of the R.C.M.P. adeptly highlights the second: ordered statements enable the Force to acquire evidence that can be used against the officer. Given this background, it is unusual that the function and validity of “ordered statements” has escaped both judicial and academic scrutiny in relation to the Canadian Charter of Rights and Freedoms.

The purpose of this paper is to examine the constitutional validity of the 1986 amendments to the Royal Canadian Mounted Police Act relating to the internal investigation of alleged misconduct by R.C.M.P. officers. In particular, the focus will be upon s. 40 of the R.C.M.P. Act (Part IV “Discipline”), that sets out the procedure for investigating an alleged contravention of the Code of Conduct. Section 40(1) of the Act directs an officer or member in charge of a detachment to institute an internal investigation where it “appears” that a

1 Lilburn’s Trial (1637-45), 3 How. St. Tr. 1315 (Star Chamber) at 1318, cited in R.S.M. Woods, Police Interrogation (Toronto: Carswell, 1990) at 59.

2 Canada, House of Commons, Legislative Committee on Bill C-65, An Act to Amend the Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof, Minutes of Proceedings and Evidence, Issue no. 7 (27 November 1985) at 7:16.


4 R.S.C. 1985, c. R-10 as am. by R.S.C. 1985, c. 8 (2nd Supp.), s. 16 enacting Part IV, inter alia [hereinafter R.C.M.P. Act]; c. R-10 was in principle a re-enactment of the revised statute of 1970 until amended by c. 8.

5 The Code of Conduct is found in the Royal Canadian Mounted Police Regulations, 1988, S.O.R./88-361 and sets out the standards of conduct and duties for members of the R.C.M.P.
member has contravened (or is contravening) the Code of Conduct. Section 40(2) states:

In any investigation under subsection (1), no member shall be excused from answering any question relating to the matter being investigated when required to do so by the officer or other member conducting the investigation on the ground that the answer to the question may tend to criminate the member or subject the member to any proceeding or penalty.

In other words, during an internal investigation the officer under inquiry is required to answer any questions that relate to the investigation. Refusing to comply with a lawful order is an offence under s. 40 of the Code of Conduct. The internal investigation is distinct from a criminal or statutory investigation wherein the officer can exercise the right not to provide a statement. Of course, given the fact that the officer can be ordered internally to answer questions may make this right somewhat transparent.

Section 40(3) of the R.C.M.P. Act purports to privilege any ordered disclosure by stating that “[n]o answer or statement made in response to a question described in subsection (2) shall be used or receivable in any criminal, civil or administrative proceeding.” This measure is to protect the police officer by preventing the formal introduction of the ordered statement into evidence in any subsequent proceeding. In other words, the section provides the statement with a “use immunity.” Any evidence derived from the statement is not protected, however, and can be used at a subsequent proceeding. Thus, the officer is not afforded “derivative use immunity” under the Act.

In general, proponents of the ordered statement\(^6\) justify this mechanism functionally; police management has a right to demand an accounting from its employees.\(^7\) Nonetheless, critics of the “ordered statement” argue that such a measure is unnecessary, and violates the police officer’s right to silence and right to be free from self-incrimination.\(^8\) Concerns have also surfaced about the

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\(^7\) Canada, House of Commons, Legislative Committee on Bill C-65, An Act to Amend the Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof, Minutes of Proceedings and Evidence, Issue no. 11 (10 December 1985), at 11:114. Commissioner Simmonds stated that it is not “...unreasonable to expect an accountability statement from a member of the force as to what he has done during his tour of duty.”

\(^8\) Ibid. at 11:113-115. See also: House of Commons Debates (September 1985) at 10511. Svend Robinson Member of Parliament, argued for abolition of the ordered statement. Supra note 6. Lewis et al., discuss the concerns of officers in this regard.
use of ordered statements as a means to obtain (to use former R.C.M.P. Commissioner Simmond's term), "independent evidence" (or "derivative evidence"), upon which an investigation can be furthered. The Force could then charge the officer for a statutory or internal conduct offence. In effect, s. 40 permits the Force to expedite a criminal investigation under the guise of an internal investigation.

Without question, the ordered statement is a controversial measure in the police profession. The validity of such a mechanism, however, has not been the subject of a Charter analysis, probably for two reasons. First, changes in the R.C.M.P. Act were not instituted until 1986, at which time the requirement to give a statement became explicit in legislation. Second, in 1987, the Supreme Court of Canada in R. v. Wigglesworth raised the threshold regarding the applicability of the Charter to "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline." Thus, the protections contained in s. 11 of the Charter are not available unless a true criminal proceeding is involved or a conviction would lead to a "true penal consequence." This decision severely curtails the basis upon which anyone subject to internal disciplinary proceedings can invoke certain constitutional protections. For instance, in the case of ordered statements, it appears that the police officer cannot refuse to answer questions by relying on any of the procedural protections outlined under s. 11 of the Charter.

The recent pronouncement of the Supreme Court of Canada in Thomson Newspapers Ltd. v. Canada (Dir. of Investigations and Research), however, may have a significant impact on the continued viability of ordered statements in relation to s. 7 of the Charter. The Court disagreed fundamentally on the constitutionality of the Combines Investigation Act provision that required a person to attend and answer questions before the Restrictive Trade Practices Commission. The decision offers an important theoretical analysis of the extent to which self-incrimination, the right to silence, and the use of derivative
evidence are interdependent and protected under s. 7 of the Charter. This forms one of the foundations for evaluating the validity of s. 40(2) of the R.C.M.P. Act.

In addition, the recent decisions of the Supreme Court of Canada in R. v. Kuldip on the use of testimony in previous judicial proceedings, and R. v. Stinchcombe discussing disclosure requirements, raise questions regarding the purported veil created by s. 40(3) of the R.C.M.P. Act. As will become evident, officers may be ill-advised to rely on s. 40 to prevent the use of their statements or their contents in a proceeding.

The integral relationship of statutory and internal investigations will be critical in determining if there is a constitutional basis upon which to question the validity of ordered statements. Despite the statutory compartmentalization of the various investigations under the R.C.M.P. Act, a criminal investigation frequently proceeds concurrently with the internal matter. Thus, reference to the possible criminal implications that are attached to an ordered statement will be a recurring theme throughout this paper. In the end, the issue is whether the Charter will permit an officer to refuse to answer any questions, or in the alternative, whether any constitutional restriction on the use of derivative evidence exists.

SECTION 11 OF THE CHARTER AND INTERNAL DISCIPLINARY PROCEEDINGS

The Wigglesworth Case

Before 1986, a member of the R.C.M.P. convicted of a “Major Service Offence” under the Royal Canadian Mounted Police Act was subject, by virtue of s. 36(1), to one or more of the following punishments: a term of imprisonment not exceeding one year; a fine not exceeding five hundred dollars; loss of pay for a period not exceeding thirty days; reduction in rank; loss of seniority or reprimand. Punishment for a “Minor Offence” under s. 36(2) could include: confinement to barracks for a period not exceeding thirty days; dismissal and fine not exceeding three hundred dollars; fine not exceeding fifty dollars; and

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18 Supra note 11.
19 The provisions of R.S.C. 1970, c. R-9, were simply re-stated in c. R-10 of the 1985 revised statutes; s. 25 defined “major service offences,” and s. 26 “minor offences.” It should be noted that members of the R.C.M.P. under s. 27 who had committed, were found committing, suspected of, or charged with a service offence were subject to arrest under the Act. In addition, s. 28 permitted the Force to hold the member in custody until trial for an internal offence. These invasive provisions were in place until amended in 1986 by c. 8.
loss of seniority or reprimand.

Wigglesworth was an R.C.M.P. officer charged with common assault under the Criminal Code\(^{20}\) for slapping an "uncooperative" motorist during an investigation for impaired driving. Prior to being tried on the assault, the officer was charged, found guilty, and fined for a Major Service Offence by an R.C.M.P. Service Court. At the subsequent criminal trial, the judge quashed the common assault information under s. 24(1) of the Charter, reasoning that the officer was being tried twice for the same misconduct, contrary to s. 11(h) of the Charter.\(^{21}\) The issue before the Supreme Court of Canada was whether the conviction of Cst. Wigglesworth for the Major Service Offence precluded a further trial under the Criminal Code, since the second proceeding would be a violation of the right not to be tried twice for the same offence (commonly known as double jeopardy), accorded by s. 11(h) of the Charter.

As noted by Eberts, Madame Justice Wilson adopted a clear "functional and philosophical distinction between disciplinary matters and those proceedings affecting society at large."\(^{22}\) Writing for the majority, Wilson, J. found that "proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute" were not the type of "offence proceedings" to which s. 11 of the Charter applied.\(^{23}\) The court envisioned two circumstances in which someone can invoke s. 11: where the proceeding by "its very nature...is a criminal proceeding," or, in a situation where a finding of guilt "may lead to a true penal consequence."\(^{24}\) A true penal consequence, for the purposes of s. 11, occurs when the individual is subject to "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline."\(^{25}\) In this regard, a factor in evaluating the true penal consequence would be that service offence fines were paid to the R.C.M.P., instead of the Consolidated Revenue Fund of the government. In any event, a member of the R.C.M.P. was subject to imprisonment, thereby meeting the penal consequences branch of the test.

In the end, however, Wigglesworth was not given the benefit of s. 11(h) of

\(^{20}\) R.S.C. 1970, c. C-34, s. 245(1).
\(^{21}\) The Sask. Court of Queen's Bench disagreed and permitted an appeal, finding that the assault and service offence constituted separate offences; see (1984), 38 C.R. (3d) 388 (Sask Q.B.). A further appeal to the Sask. C.A. was dismissed.
\(^{23}\) Wigglesworth, supra note 11 at 560.
\(^{24}\) Ibid. at 559.
\(^{25}\) Ibid. at 561.
the Charter, because the majority, following the distinction in *Kienapple v. The Queen*, found he was not being tried for the same offence. The Major Service Offence was an internal accountability matter, whereas the criminal offence was to "account to society at large" for his conduct. In dissent, Estey, J. postulated that the protection of s. 11 could arise if the conviction before the first tribunal was performed as part of a legislated task that permitted a penalty recognizing the "general public's interest in the administration of criminal law...over and above the limited interest of internal discipline."

A trilogy of police discipline cases from Ontario, reported at the same time as the *Wigglesworth* decision, removed any lingering doubt that s. 11 of the Charter is inapplicable to "domestic, internal or disciplinary matters which are of a regulatory nature designed to maintain discipline and professional integrity."

### Legislative Developments

In the aftermath of *Wigglesworth*, it is evident that the Supreme Court had promulgated a test which restricts severely, if not eliminates, the application of the protections enshrined in s. 11 of the Charter to the administrative-discipline process. Although the Supreme Court found that s. 11 was available in *Wigglesworth*, the R.C.M.P. Act was the subject of several significant changes, one of which was the removal of the fine and imprisonment provisions contained in the earlier Act. These former punishments were replaced by a two tier remedial disciplinary system wherein a member can be dealt with either by an "Informal Disciplinary Action," or a "Formal Disciplinary Action," depending on the gravity and surrounding circumstances of the Code of Conduct contravention.

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27 *Wigglesworth* supra note 11 at 566.
28 Ibid. at 570.
29 The Supreme Court of Canada found in *Burnham v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 572 (sub nom. *Burnham v. Ackroyd*) that s. 11(d) of the Charter (independence and impartiality of a tribunal) did not apply to *Police Act* R.S.O., c. 381 as per Reg. 791 R.R.O. 1980 (creating the Code of Offences) disciplinary proceedings involving "discreditable conduct" because they were not "criminal in nature nor did they involve penal consequences" (Wilson, J. at 575). The Ontario legislation governing police did not have imprisonment provisions. The independence and impartiality of police disciplinary tribunals was also challenged under s. 11(d) of the Charter in *Trumbley & Pugh v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 577 (sub nom. *Re Trumbley*) and *Trimm v. Durham Regional Police*, [1987] 2 S.C.R. 582 with the same result – i.e. s. 11 did not apply to the forum of internal/domestic discipline.
Under s. 41(1) of the *R.C.M.P. Act*, informal disciplinary action can consist of counselling, special training, professional counselling, recommendation for transfer, close supervision, forfeiture of time off not exceeding one day, and reprimand. In accordance with s. 45.12(3), where an Adjudication Board (the internal discipline proceeding) decides that a *Code of Conduct* contravention is established, it can impose any one or more of the following sanctions: dismissal, direction to resign, demotion, forfeiture of pay for a period not exceeding ten work days, and any of the informal actions noted above. These amendments have removed the “true penal consequences” that existed under the previous scheme, thereby ensuring that s. 11 of the *Charter* will not apply to the R.C.M.P. disciplinary process.

Another consideration in the application of s. 11 of the *Charter* to ordered statements is the condition that the person be “charged with an offence”. Even if the internal disciplinary offence was one that met either the criminal or true penal consequences branch for the insurance of s. 11, in many cases the officer will not have been “charged” with an offence, because most ordered statements will be required at the pre-charge or investigative stage. Therefore, under s. 11(c) of the *Charter*, there is no basis to assert that the officer “cannot be compelled to be a witness in proceedings against” that officer. The significance of distinguishing between a testimonial and investigative compulsion was understood even prior to the decision in *Wigglesworth*. As R.C.M.P. Commissioner Simmonds observed before the Legislative Committee dealing with the proposed changes to the *R.C.M.P. Act*, s. 11 would not apply to ordered statements because the member would not be “charged.” Thus, the term “proceedings” has been limited to “compelled testimony,” and, has not been judicially extended to prevent conscription at the investigative stage of offences. Protecting persons at the investigative stage has, in part, been assumed in the right to silence under s. 7 of the *Charter*.

These limits underscore the artificial distinction made in the application of s. 11 not only to police, but also all disciplinary proceedings in general. Rogers has concluded that:

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31 In some cases there is a variance in the sanction based on the rank of the member. “Officers” (i.e. commissioned rank) are only recommended for demotion or dismissal by the Board, while non-commissioned officers can be demoted (inspectors and Constables are excepted from demotion under subsection (5)); see s. 2 for definitions.

32 *Supra* note 2 at 11:115.

[S]imply pinning labels of “administrative” or “criminal” on impugned conduct is not the way for courts to proceed. What is called for is a careful examination of the conduct itself and the rights affected, within the particular statutory scheme.34

A review of the current R.C.M.P. Act does not disclose any investigational conditions on the use of ordered statements, other than the invocation of an internal investigation. The mere fact that the authority to order an officer to give a statement is limited to an “investigation” under s. 40(1) is little assurance this mechanism could not be used improperly.

Asserting that an ordered statement can only be used during internal investigations, which may result in an Adjudication Board hearing, belies the fact that a criminal investigation may also be underway, followed by an R.C.M.P. Public Complaints Commission (an independent-civilian review) investigation or public inquiry or both.35 In addition, a “Board of Inquiry” may be struck by the Commissioner of the R.C.M.P. or the Solicitor General under s. 24.1 to “investigate and report on any matter connected with the organization, training, conduct, performance of duties, discipline, efficiency, administration...of the Force or affecting any member” (emphasis added). It is also possible that the officer may have a “grievance” relating to the actions of the Force, which may ultimately have to be resolved by a hearing before the R.C.M.P. External Review Committee, by authority of s. 34(4) of the R.C.M.P. Act. Although varying levels of protection are offered, in all instances, testimony before the Board of Inquiry, the P.C.C., and the E.R.C. is required, irrespective of any incrimination. Of course, the member may also be the subject of a civil suit.

The context in which the ordered statements operate is extremely complicated. Eberts illuminates the complexity and unsettled nature of administrative procedures in general:

> There exists nowhere in administrative law any formal mechanism for determining an order of precedence among these various kinds of proceedings, for preventing abuse of

34 B.M. Rogers, “Charter Limits on Administrative Investigative Powers,” in Finkelstein and Rogers, supra note 22, 129 at 130.

35 Part VI of the R.C.M.P. Act established the P.C.C., which, if not satisfied with the Force’s disposition of a complaint, may, by virtue of s. 45.42(3)(c), investigate a public complaint or institute a public hearing to inquire into the complaint. See also, the “Public Complaints Against the RCMP” brochure (Canada: Supply and Services, 1988); R.C.M.P. P.C.C., Annual Report 1989-90 (Ottawa: Supply and Services, 1990).
multiplicity of proceedings, or for safeguarding the rights of a respondent.\textsuperscript{36}

The constitutional door was not closed in \textit{Wigglesworth}, however, as Wilson, J. declared that "constitutionally guaranteed procedural protections may be available in a particular case under s. 7 of the \textit{Charter}, although s. 11 is not available."\textsuperscript{37}

\section*{GENERAL PROVISIONS REGARDING SELF-INCRIMINATION}

In 1882, the Court of Queen's Bench in \textit{Lamb v. Munster},\textsuperscript{38} found that the common law recognized that persons were not required to answer any questions during a civil discovery process for libel, if they swore that the answer may tend to incriminate them in a criminal prosecution. The New Brunswick Supreme Court, in 1963, affirmed that no person can be compelled to incriminate him or herself at common law, and "[n]o abrogation or curtailment of the common law privilege can be effected save through legislation couched in clear and explicit terms."\textsuperscript{39} Section 40(2) of the \textit{R.C.M.P. Act} explicitly states that "no member shall be excused from answering...on the ground that the answer...may tend to criminate the member or subject the member to any proceeding or penalty." There seems to be little doubt about the "explicit" nature of subsection (2). Section 40(3) of the \textit{R.C.M.P. Act} attempts to provide some redress for the denial of the common law protection by proclaiming that an internal statement will not be used in a criminal, civil or administrative proceeding (use immunity), except where the member knowingly gives a false or misleading statement to the investigator.\textsuperscript{40}

\textsuperscript{36} \textit{Supra} note 22 at 105.
\textsuperscript{37} \textit{Supra} note 11 at 562.
\textsuperscript{38} (1882-3) 10 Q.B.D. 110, (1881-85), All E.R. 465 (Q.B.).
\textsuperscript{40} It should also be noted that s. 8(3) of the \textit{Criminal Code} R.S.C. 1985, c. C-46 recognizes that common law defences, justifications, and excuses are still available in Canada, to the extent they remain unaltered and consistent with any Act of Parliament. As noted by Gonthier, J., in \textit{R. v. Jobidon}, \textit{supra} note 39 at 736, there has been "little judicial analysis of this section of the Code...[and] the references made to it have predominantly concerned exceptional circumstances which provide defences or which deny certain features of an offence." Gonthier, J. (at 258) recognizes that s. 8(3) can interact with the common law to develop "entirely new defences not inconsistent with the Code" or to give meaning to justifications and defences, which may provide a basis to argue that ordered statements or derivative evidence cannot be used in criminal proceedings contrary to the common law. This seems possible given the fact that four members of the Supreme Court concurred with Gonthier, J. while essentially reading a
Section 40(2) resembles s. 5(1) of the Canada Evidence Act, which states:

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 (emphasis added).

It is settled in Canada that s. 5(1) has abolished the common law privilege of a “witness” (i.e. someone not charged) to refuse to answer questions in a proceeding which may tend to incriminate. As noted by Dickson, J. (as he then was) in Marcoux & Solomon v. The Queen, the privilege against self-incrimination “extends to the accused qua witness and not qua accused, it is concerned with testimonial compulsion specifically and not with compulsion generally.” Since 1982, however, if the person is charged with a criminal offence, s. 11(c) of the Charter provides that the accused cannot be compelled to be a witness and testify against him or herself in that proceeding. The “charged” exception was also recognized earlier under s. 4(1) of the Canada Evidence Act. The result, as noted by Schiff, is that s. 11(c) and s. 4(1), “give an accused [charged] person the power to choose to testify” (emphasis added).

Section 5(2) of the Canada Evidence Act provides that a witness’s testimony cannot be used subsequently if the witness objects to the question. It remains to be seen if questioning an officer qua suspect (i.e. not charged) in an internal investigation will be a consideration for the court under s. 7 of the Charter.

Section 2(d) of the Canadian Bill of Rights states that “no law of Canada

new intent into the assault provisions of the Criminal Code, which created a new offence: for a comment see, S.J. Usprich, “Annotation” (1991), 7 C.R. (4th) 235. It would be open to debate whether self-incrimination is a common law principle envisioned by s. 8(3); nevertheless, it appears unassailable that s. 40(2) has abrogated the common law right not to answer incriminating questions. Thus, to the degree that declining to answer is inconsistent with the R.C.M.P. Act, the common law privilege or justification for not answering would be nullified by the Criminal Code. In any event, it is clear that the common law privilege against self-incrimination was to be abrogated by s. 40(2) of the R.C.M.P. Act.

45 R.S.C. 1985, Appendix III.
shall be construed or applied so as to...authorize a court or tribunal, commission, board or other authority to compel a person to give evidence if he is denied...protection against self crimination” (emphasis added). In Curr v. R.46, Laskin, J. (as he then was), declined to find a general right against self-incrimination beyond that set out in s. 2(d) of the Bill of Rights. Curr is authority for the testimonial right against self-incrimination operating before a criminal court, and for the proposition that any statutory provision compelling a witness to testify must be accompanied by criminatory protection.47 The Bill of Rights has not figured prominently in the post-Charter era,48 and given the restriction in Curr making it consistent with the Canada Evidence Act, it is evident that ordered statements would not be subjected to any meaningful redress here.

The Charter states that any incriminating testimony by a witness cannot be used in any subsequent proceedings. Unlike s. 5(2) of the Canada Evidence Act, s. 13 of the Charter provides protection for a witness’s incriminatory testimony without an objection by the witness.49 The fundamental problem, of course, is that neither provision extends beyond a “testimonial privilege,” or in other words, before the proceeding to the investigative stage. More importantly, as Whitten points out, s. 13 of the Charter does not preclude the use of derivative evidence.50 Moreover, as will be seen, the courts have eroded the protection provided in s. 13 by permitting the Crown to use previous testimony in a subsequent proceeding to impeach credibility.

Distinctions Between Proceedings and Ordered Statements

It is clear that a witness can be compelled to appear before an administrative board and provide testimony subject to exclusion in subsequent proceedings. The testimony may, however, disclose damaging evidence that can lead to serious consequences, such as criminal charges. Although there can be similar consequences when disclosing derivative evidence, either before an administrative proceeding or in an ordered statement (i.e. a charge), there are three important distinctions. First, the ordered statement is not obtained in the

47 Ibid. at 912.
48 Although Beetz, J. did rely on the Bill of Rights in Singh v. Can. (Min. of Employment and Immigration), [1985] 1 S.C.R. 177, to strike down federal legislation dealing with the immigration process that denied certain claimants a right to a full hearing, there has been little judicial activity otherwise in this regard.
49 Section 13 states: “A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate the witness in any other proceedings, except in a prosecution for perjury.”
context of a "proceeding," which substantially alters the forum under consideration. How is the internal investigator to be held accountable given the non-existence of any external judicial review of the acquisition process? There is neither a transcript of the process, (other than the statement), nor a public or quasi-public nature to the procedure. There is no monitoring mechanism or independent adjudicator to ensure the officer is receiving fair treatment. A member of the R.C.M.P. can be the subject of an interrogation in a context which is not even remotely associated with the limited "proceeding" safeguards afforded by the Charter and Canada Evidence Act when a witness is called upon to testify. Second, an internal investigation, and attending ordered statement, can be instituted where it merely appears there has been a contravention of the Code of Conduct. This threshold is very low. Third, under s. 40(1), the member is not being questioned as a "witness," he or she is under investigation as an "accused" on the basis that it "appears" there has been a contravention of the Code of Conduct. This distinction is even more striking when a criminal investigation is in parallel to the disciplinary investigation.

SECTION 7 OF THE CHARTER AND SELF-INCRIMINATION

The Criminal Context

Even before the Charter, the law was settled that a person charged with a criminal offence could not be compelled to testify against him or herself at trial. This common law principle was further enshrined in the Charter. The right not to be compelled to testify against one's self under s. 11(c) (and s. 4(1) C.E.A.), however, is limited to persons charged in the criminal trial process.

The judicial distinction between the privilege against self-incrimination and the right to silence is sometimes difficult to perceive. Without mentioning s. 7, the Ontario Court of Appeal in R. v. Esposito, found that there is a common law right to remain silent at both the investigative and trial stage of the criminal process. Further, the right to silence, possessed by an accused person in the criminal context, was proclaimed a "tenet of our legal system" in R. v. Woolley. Probably one of the clearer judicial statements regarding incrimination and silence is found in R. v. Greig, where Dupont, J. of the Ontario High Court asserted:

51 Supra note 2, Commissioner Simmonds advised the Legislative Committee on Bill C-65 that the legal advice regarding the self-crimination provisions of s. 13 of the Charter indicated that it did not apply to the member, as they were not a "witness."
52 R.E. Salhany, A Basic Guide to Evidence in Criminal Cases (Toronto: Carswell, 1990) at 11. See also supra note 1 at 60.
53 Supra note 33 at 362.
54 (1988), 40 C.C.C. (3d) 531 at 539 (Ont. C.A.), Cory, J.A.
The accused's common law right to remain silent, which is historically linked to the presumption of innocence and the right against self-incrimination, is one of the pillars of the criminal justice system (emphasis added).55

It was not until the Supreme Court of Canada ruled in Hebert56 that conclusive Charter guidance was provided about the right to silence and self-incrimination under s. 7.57 The stage for an analysis of the right to silence and incrimination had been set in Re B.C. Motor Vehicle Act,58 where Lamer, J. interpreted the phrase “principles of fundamental justice.” It was found that ss. 8 to 14 of the Charter were specific illustrations of the principles of fundamental justice to be accorded in criminal and penal law under s. 7.59 Lamer, J. concluded in the B.C. Motor Vehicle Act reference that:

[T]he principles of fundamental justice are to be found in the basic tenets and principles of our legal system, not only our judicial process, but also of the other components of our legal system....[w]hether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system as it evolves.60

Returning to Hebert, McLachlin, J. writing for the majority, reviewed the jurisprudence on the right to silence. She concluded that s. 7 is founded on two common law principles: the “confessions rule” (involuntary statements are inadmissible), and, the “privilege against self-incrimination” (the accused is not required to testify at trial).61 Thus, a person “in the power of the state in the course of the criminal process has the right to choose whether to speak to the police or to remain silent.”62 It is on this basis that McLachlin, J. finds that:

From a practical point of view, the relationship between the privilege against self-incrimination and right to silence at the investigational stage is equally clear. The protection conferred

56 Supra note 33.
57 Section 7 states: “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.”
59 Ibid. at 502.
60 Ibid. at 512-513. See also, R. v. Beare, [1988] 2 S.C.R. 387, wherein the court states that legal principles can be reflected in legislative history.
61 Supra note 56 at 164.
62 Ibid.
by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory.\(^{63}\)

The court recognized "that an accused person has no obligation to give evidence against himself...there is a right to choose."\(^{64}\) The majority limited the scope of the right to silence (the choice to speak to the authorities), as it relates to police interrogation and the use of undercover operators, to that period of time when the person is in detention. It was on this point that Sopinka and Wilson, JJ. parted with the majority. Justice Wilson declared that if the purpose of the s. 7 right to silence were to be achieved:

[It] must arise whenever the coercive power of the state is brought to bear upon the citizen...this could well predate detention and extend to the police interrogation of a suspect.\(^{65}\)

From this analysis, it is evident that the courts have evolved a right to silence and non-incrimination in the criminal process that is triggered at the moment an individual is "subjected to the coercive powers of the state," simply by virtue of detention.\(^{66}\) An interesting dilemma is created for the courts. A police officer providing a statement under an "order" cannot leave the presence of the investigating officer until such time as the questioning is completed, yet the officer is being detained within the context of an "administrative" process, and not the criminal process \textit{per se}. The question is whether an internal statement also provides the officer with a right to choose under s. 7 of the \textit{Charter}.

The Administrative Context

The Canadian judiciary has not always been comfortable with the witness-accused dichotomy, particularly where an administrative inquiry can, for the most part, be substituted for the criminal proceeding. For example, in \textit{Batary v. A.G. of Saskatchewan},\(^{67}\) the Supreme Court of Canada found that someone charged with murder could not be compelled to attend and testify with respect to the circumstances of the death at a coroner's inquest. Such testimony would have enabled the prosecution to usurp the accused's privilege against incrimination and right to silence. It was the view of Cartwright, J. that the

\(^{63}\) \textit{Ibid.} at 174.
\(^{64}\) \textit{Ibid.}
\(^{65}\) \textit{Ibid.} at 190.
\(^{66}\) \textit{Broyles v. The Queen,} [1991] 3 S.C.R. 595 at 606 \textit{as per} Iacobucci, J. [hereinafter \textit{Broyles}]
Canada Evidence Act did not have the effect of making an accused compellable at an inquest.68

Since 1892, the coroner’s inquest has not been part of the criminal justice structure in Quebec. Thus, the Supreme Court of Canada in Faber v. The Queen69 found that individuals were compellable and examinable. In a five to four judgment, the majority found that the coroner’s inquiry was neither concerned with the investigation of crime, nor was it a trial with an “accused,” because the witness had not been charged.70 The dissent, led by Pigeon, J., were of the mind that the coroner’s inquisition was not sufficiently delineated from the criminal structure to find that it had no criminal jurisdiction, particularly when the sole purpose was to determine who might be charged with the crime.

Two years later, the issue of compelling testimony before an administrative-investigative tribunal arose again in Di Iorio & Fontaine v. Montreal Jail Warden,71 where the appellants were found guilty of contempt and sentenced to one year in gaol for refusing to testify before a commission of inquiry into organized crime in Quebec. The Supreme Court found, based on Faber, that if an inquiry can be held to determine who could be charged with murder, it would be no less permissible to identify persons involved with organized crime. Justice Dickson (as he then was), brusquely declared that “[w]hether or not one agrees with a result which may force a person to assist in an investigation of his criminal activity, the provisions of s. 5 of the Canada Evidence Act...compel such a result.”72

In dissent, Laskin, C.J.C. expressed concern that the province, in the form of an administrative commission, could do “wholesale” what the Criminal Code did “retail.” Although this analysis is premised on the division of powers in relation to criminal law, there seems to be an implicit concern that the province could use the administrative-investigatory mechanism to impose disclosure on individuals in the criminal context. It is evident then, that prior to the Charter, the Supreme Court was not receptive to a broad application of the privilege against self-incrimination, despite the apparent discomfort this caused for some.

Early in the history of the Charter, however, Scheibel, J. of the

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68 The criminal law in force in Saskatchewan was that of England as it existed in 1870, subject to any subsequent alterations or modifications by Parliament; in this case the criminal law had not been amended, as it pertained to Saskatchewan, to permit the examination of someone charged with murder by the coroner. Ibid. at 475-79.
70 Ibid. at 33, de Grandpré, J.
71 Supra note 42. The primary issue, which is not as important here, was whether the province was engaged in criminal law, thereby making the commission ultra vires and unconstitutional under the division of powers.
72 Ibid. at 222.
Saskatchewan Court of Queen’s Bench, included administrative proceedings in his analysis of self-incrimination under s. 7. He stated in *R.L. Crain Inc. v. Couture & Restrictive Trade Practices Commission*:

An administrative inquiry, on the other hand, may be directed at uncovering illegal activity on the part of the witness. The denial of that witness’s privilege against self-incrimination in this situation may result in the witness being compelled to assist in an investigation into his criminal activity.\(^{73}\)

The British Columbia Court of Appeal disagreed with this approach, and, in *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.*,\(^{74}\) the majority found that s. 7 of the *Charter* did not provide a general right against self-incrimination, insofar as ss. 11(c) and 13 established the extent to which such protection would be available.

In light of the *Charter*, new battle lines were drawn over the right of the state to compel individuals or corporations to attend before an administrative board to answer questions, even though such answers may incriminate the person or provide the state with a tool to “discover” the evidence upon which a charge could be laid. Since s. 11 rights were not necessarily applicable to quasi-criminal or disciplinary proceedings (*Wiglesworth*), judicial clarification on the nature of self-incrimination under s. 7 of the *Charter* was required.

**The Thomson Newspapers Case**

When faced with an opportunity to rule conclusively on the scope of the right to silence and self-incrimination under s. 7 of the *Charter* in the quasi-criminal process, the Supreme Court was unable elucidate a clear majority judgment. In *Thomson Newspapers*,\(^{75}\) the appellant newspaper was served with orders to appear before the Restrictive Trade Practices Commission to answer questions and produce documents; the R.T.P.C. would thus be able to determine whether evidence existed that the corporation had committed the indictable offence of predatory pricing contrary to the *Combines Investigation Act* (now *Competition Act*).\(^{76}\)

Both LaForest and L’Heureux-Dubé, JJ. found that s. 7 of the *Charter* was not violated. Sopinka and Wilson, JJ. held that s. 7 had been breached, and the impugned measure was not saved under s. 1 of the *Charter*. Lamer, J. (as he then was), found it was inappropriate to deal with s. 7 in this instance. This


\(^{74}\) [1986] 2 W.W.R. 289.

\(^{75}\) *Supra* note 14.

\(^{76}\) *Supra* note 15.
same division arose in *Stelco Inc. v. Canada (A.G.)*,77 which was decided at the same time and involved the same issues and legislation.

Although LaForest, J. found that s. 7 can protect individuals from adverse self-incriminatory results not covered by s. 13 or s. 11(c) of the *Charter*, any such protection must be analyzed in the context of these sections. In his view, an absolute right to refuse to answer questions would create a "dangerous and unnecessary imbalance" between the rights of the individual and society.78 Upon reviewing the "inquisitorial" nature of the process, and the fact that the *Canada Evidence Act* has recognized for almost one hundred years that the privilege of self-incrimination extends only to "testimonial immunity," (and not derivative use immunity), LaForest, J. concluded that s. 7 does not extend to "evidence derived from compelled testimony."79 Justice LaForest asserted, by analogy to the s. 24(2) exclusion analysis used under the *Charter*, that there is a distinction between derivative evidence that exists independently of the compelled testimony which *could* be discovered independent of the testimony (i.e. the "real" evidence analysis) and evidence that would be virtually undiscoverable without the incriminatory testimony (i.e. "conscripted" evidence).

In response to the conscripted evidence scenario, LaForest, J. posited that "undiscoverable" derivative evidence obtained from compelled testimony can, in some cases, be excluded by the trial judge where its admission would "violate the principles of fundamental justice" by creating an unfair trial.80 Admission of independently existing evidence does not affect the fairness of the trial, and as such, any compelled testimony that identifies the evidence does not breach s. 7.

It is not explained how this ad hoc reliance on the common law rule of exclusion for derivative evidence, obtained through self-incriminatory testimony, coincides with the right not to be deprived of the protection of s. 7. Justice L'Heureux-Dube, on the other hand, relied on the traditional witness-charged dichotomy to find that s. 7 does not afford a constitutional right of silence and non-incrimination for "witnesses."81 In her view, the *Charter* has not created an unassailable right against self-incrimination. Rather, it has "preserved the division of the rules"82 regarding witnesses and compellability under ss. 11(c) and 13. With regard to derivative evidence, L'Heureux-Dubé, J. noted that the *Canada Evidence Act* never extended beyond the "actual
testimony" of the witness, and derivative evidence improperly obtained from an accused in pre-Charter cases was routinely admitted.83

Madame Justice L'Heureux-Dubé concluded that “[t]here is no inflexible rule that the admission of derivative evidence will affect the fairness of the judicial process.”84 As a result, s. 7 does not contain a derivative use immunity in relation to witnesses compelled to appear before boards of inquiry and related agencies. In the end, both LaForest and L'Heureux-Dubé, JJ. find that it is not a principle of fundamental justice that individuals be afforded a blanket immunity from self-incrimination in these circumstances.

Conversely, Wilson, J. held that any discernment between an investigatory versus prosecutorial process is “irrelevant when a criminal prosecution is a potential consequence of the...investigation”85 (emphasis added). After canvassing several Commonwealth jurisdictions and the United States, she concluded that the only way to protect a person from being “conscripted” and having derivative evidence utilized from an investigatory proceeding, is to exclude such evidence. Wilson, J. rejected the s. 24(2) analogy:

[The discretion of the judge is] no guarantee of protection against the use of derivative evidence obtained as a result of a witness’s compelled testimony....exclusion must be a matter of principle and of right, not of discretion.86

The purpose of s. 7 is to protect witnesses from the use of derivative evidence in any subsequent criminal proceeding, to the extent that ss. 11(c) and 13 are unavailable. Madame Justice Wilson concluded that:

Where a person’s right to life, liberty and security of the person is either violated or threatened, the principles of fundamental justice require that such evidence not be used in order to conscript the person against himself (emphasis added).87

Turning to s. 1 of the Charter, Wilson, J. asserted that any legislative measure that breaches a principle of fundamental justice will be almost impossible to support as demonstrably justified in a free and democratic society88 – which is her finding here.

In agreeing with the reasons of Wilson, J., Justice Sopinka observed that:

84 Thomson Newspapers, ibid. at 582.
85 Ibid. at 461.
86 Ibid. at 483.
87 Ibid. at 484.
88 Ibid. at 487.
[The right to remain silent under s. 7] is a right not to be compelled to answer questions or otherwise communicate with police officers or others whose function it is to investigate the commission of criminal offenses. The protection afforded by the right is not designed to protect the individual from the police qua [sic] police, but from the police as investigators of criminal activity.89

Lamer, J. was of the view that the wrong section of the legislation had been challenged, as it was not the contempt punishment for a refusal to answer that was in issue, but the enactment that ultimately removed the right to refuse to answer under the common law.90 He declined to pronounce on the s. 7 issue, since this would by inference lead to a judicial statement on s. 5 of the Canada Evidence Act. If this were known to the other Attorney Generals, there would probably have been further interventions. Justice Lamer conditioned these observations on the assumption that he agrees with Wilson, J. that it is a principle of fundamental justice that a witness may refuse to give incriminating testimony.

The result, as described by Gold, is that compulsory state questioning violates s. 7. Where testimony is compelled despite any objections over self-incrimination, s. 1 will require either subsequent use and derivative use immunity (Justices Wilson, Sopinka, Lamer), or use and discretionary use immunity (LaForest, J.) or use immunity only (L'Heureux-Dubé, J.).91

**Extracting Commonalities**

Where does this leave ordered statements? The first important consideration is the entire panel in *Thomson Newspapers* agreed that ss. 11(c) and 13 are not the final statement on the right to silence and self-incrimination. Section 7 holds some "residual content" that extends to a situation not contemplated by specific provisions of the *Charter*. Second, the court was unanimous in finding that the appellants in *Thomson Newspapers* were subject to a deprivation of liberty under s. 7. Third, the context and consequences of an ordered statement may prove sufficiently troublesome for the court to provide an impetus for re-alignment on self-incrimination. Fourth, it is an accepted constitutional principle that either the purpose or effect (consequences) of a legislative measure can breach the *Charter*.92 It is on this basis that an examination of the constitutional validity of ordered statements can be initiated.

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90 *Ibid.* at 443-444.
ORDERED STATEMENTS UNDER SECTION 7 OF THE CHARTER

Is There A Deprivation of Liberty?

Does s. 7 of the Charter afford officers a right of silence and non-incrimination during an internal investigation? Significant to this inquiry is the extent to which a police officer can be compelled to incriminate him or herself, either by ordered or derivative evidence. The first question is whether the officer is subject to a deprivation of life, liberty or security by being required to provide a statement? The Supreme Court agreed in Thomson Newspapers and Stelco that compelling a person to attend before an investigative board involved a deprivation of liberty within the meaning of s. 7 of the Charter.93

Therefore, it can be asserted that a police officer is under administrative “detention” when providing a required statement; failure to comply can subject the officer to additional discipline under the Code of Conduct for disobeying an order from a superior officer.94 Justice LeDain in R. v. Therens, defined “detention” within s. 10 of the Charter, to include situations where:

[A] police officer or other agent of the state assumes control over the movement of a person by demand or direction which may have significant legal consequences and which prevents or impedes access to counsel95 (emphasis added).

Is there a delineation to be made between an investigator of the internal and statutory offence qua police? The internal investigator is acting under the authority of an act of Parliament (R.C.M.P. Act). It is difficult to assert that the internal investigator does not function as an “agent of the state,” especially where there is a legislated duty to investigate the allegation. Moreover, there is a clear legal obligation on the officer to answer, and, significant legal consequences accrue for not answering. A charge under the Code of Conduct may be laid which could in turn lead to dismissal. Even without the formal detention analysis, there is a basis to argue that the officer under investigation is “psychologically detained,” since the officer may believe that there is no choice but to answer, even though he or she was not ordered to respond.96 Even more

93 Thomson, supra note 14 at 459. Wilson, J. notes that it is not necessary for the party to prove that all three components of s. 7 have been violated (i.e. life, liberty and security of the person). See also: Singh v. Can. (Min. of Employment & Immigration), [1985] 1 S.C.R. 177.
94 Supra note 5.
disturbing is the fact that there is no right to counsel during an ordered statement. R.C.M.P. policy states:

During an internal investigation, legal counsel or representative may be excluded when a statement is being taken or during the questioning of a suspect member or member witness (emphasis added).97

It is true that a suspect in the criminal process may also not have a right to have counsel present during the taking of a statement, but the criminal suspect, as noted in Therens, at least has the choice whether or not to provide a statement to the authorities. The officer has no such choice. Moreover, the above policy is probably in violation of the right to counsel under s. 10(b) of the Charter. The officer is clearly detained (by legislative authority) within the meaning of Therens, yet there is no opportunity to instruct counsel. Even if the court constitutionally excepted this as an “administrative detention,” it is still possible that there will be criminal consequences from denying (or impeding) the right to retain, instruct, and be informed of the right to counsel; the Force will have conscripted the officer against him or herself by seeking to utilize derivative evidence at a subsequent criminal proceeding.

Questions about arbitrary detention under s. 9 of the Charter are also raised. An officer detained under statute is required to respond to questions on the basis that there “appears” to be a Code of Conduct contravention.98

As an interpretive aside, s. 50 of the R.C.M.P. Act states that “[e]very and recognize the “subtle and coercive pressure which an employer can exert on an employee.”

97 R.C.M.P. Administration Manual: “Internal Investigations,” XII.4.E.3., dated 89-01-11. The following words of the majority in Big M Drug Mart, supra note 92 at 336-7 are also apt:

Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on the pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others (emphasis added).

98 There seems to be little distinction between the consequences of this scenario and a charge under s. 129 of the Criminal Code for obstructing a police officer in the execution of a duty, or being found in contempt for refusing to answer questions before the R.T.P.C. These situations all carry a penalty for non-cooperation that is legislatively imposed. For example, if a citizen refuses to identify themselves after committing an offence the police have authority to arrest that individual under s. 495 of the Criminal Code. In Moore v. R., [1979] 1 S.C.R. 195, the Supreme Court found the principle of identification extended beyond “criminal offences” to permit an arrest for provincial offences where the officer observes the offence. Although the police officer who refuses to give an internal statement cannot be placed in gaol (unless of course there is a basis under the criminal law), he or she can ultimately be penalized by being dismissed from their position.
person who, (a) on being duly summoned as a witness or otherwise under Part...IV...makes default in attending...is guilty of a summary conviction offence” (emphasis added). It appears that this section contemplates testimonial proceedings of some sort; in fact, the other subparagraphs refer to “proceedings.” The word “otherwise” in paragraph (a) could be construed to apply to an officer who has been directed to attend the office for the purposes of taking of an ordered statement. Does this mean an officer is subject to arrest by committing the summary conviction offence of failing to attend and give an ordered statement? Could such action result in a charge under the Criminal Code for refusing to comply with an Act of Parliament, because the investigating officer is in the execution of a duty authorized by the R.C.M.P. Act?99 Does “duly summoned” apply to internal investigations at all?

Clearly, a member of the R.C.M.P. who is being ordered to give a statement is subject to a deprivation of “liberty” in the strict sense of detention or coercion, and to the extent that failure to comply can result in further punishment. In part, this highlights the artificial and impractical administrative distinction made in Wigglesworth on the basis of penalty.

PRINCIPLES OF FUNDAMENTAL JUSTICE

Is it contrary to the principles of fundamental justice that a police officer can be forced to incriminate him or herself? The context of this query is different than that of a person appearing in an administrative proceeding. First, unlike a tribunal, the disciplinary investigation is compelling an officer to provide responses which are not the subject of judicial scrutiny. Second, there is no guidance in the R.C.M.P. Act on the procedural implementation of ordered statements. As noted above, there does not appear to be a right to have counsel present during questioning. Third, the internal investigative process does not even achieve the “inquisitorial” threshold discussed by LaForest, J. in Thomson Newspapers.100 There is no independent moderator to ensure that the nature and extent of the interrogation is properly limited. For example, does failing to respond to a question that may be irrelevant result in a contravention of the Code of Conduct? Are questions limited to the conduct under investigation, or, is it a dock from which “fishing expeditions”101 can be launched? Fourth, the officer is being investigated where there “appears” to be an infraction of the Code of

100 Supra note 14.
101 E. Ratushny, Self Incrimination In The Canadian Criminal Process (Toronto: Carswell, 1979) at 349.
Conduct. What is the meaning of appears? Is the threshold a mere suspicion, reasonable grounds, or balance of probabilities? There is no clear elucidation of the term. The threshold to institute an investigation may be almost non-existent, and, indeed, perhaps arbitrary.

Given the serious consequences of a formal disciplinary action, one must ask if it is reasonable for a member to rely on the protection provided under s. 40(3) of the R.C.M.P. Act. What prevents the R.C.M.P from using an ordered statement as a mechanism to obtain evidence for the purpose of conducting a criminal investigation? As previously stated by Commissioner Simmonds, the ordered statement permits the Force to obtain "independent evidence" arising out of the statement.

Both L’Heureux-Dubé and LaForest, JJ. placed considerable emphasis on the fact that the Canada Evidence Act and Charter implicitly recognized that derivative use protection was not available to a witness in the context of an administrative or judicial proceeding. The gravamen of this argument appears to hinge on the fact that it involves a "proceeding" of some sort. Yet, unlike the "witness" appearing before the R.T.P.C. in Thomson Newspapers, the Force initiates its investigation against a suspect member, based on the preliminary determination that there has been a violation of the Code of Conduct. The aim of the internal investigation is not to determine if there are grounds upon which to initiate an investigation (which is the purpose of appearing before the R.T.P.C.) but to obtain evidence upon which to prosecute a case. Is it not a different argument entirely to assert that the same principles apply to an investigative process where none of the rules and safeguards found in a "proceeding" are applicable? Once the officer enters the interview room, there is no judicial scrutiny of what transpired.

The lack of legal counsel should also not be under-estimated in this process. For example, R.C.M.P. policy states that officers are not eligible for legal counsel at public expense when they are a party to an internal proceeding that can lead to, inter alia, disciplinary action, discharge or demotion. Even where there is no misconduct, officers in the normal course of duties can be the subject of numerous potential complaints which can lead to an internal investigation and ordered statement. Are officers expected to engage counsel at their own expense every time they are called upon to provide an ordered statement? Regardless of any misconduct by the officer, any reasonable and prudent member of a police organization would certainly desire legal advice. Yet, the personal costs would be prohibitive if an officer took this course of action on each occasion. The

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result is that many officers provide statements without the benefit of legal advice. Given the breadth of an internal investigation, it is a situation ripe for exploitation.

There is no question that, based on Thomson Newspapers, Wilson, J. (expressly), Sopinka, J. (implicitly), and Lamer, C.J.C (by assumption), would find s. 40(2) violates s. 7 of the Charter, and is not saved by s. 1, especially where the statement provides derivative evidence that could be used against the officer in subsequent proceedings. There is no statutory prohibition in the R.C.M. P. Act to prevent the use of the internal statement for gathering criminal (or disciplinary) inculpatory evidence against the officer. Section 40(3) only states that no answer or statement can be used or received in a subsequent proceeding. This would not extend to the admissibility of real derivative evidence, which is a matter LaForest, J. would leave to the trial judge’s discretion – only if the evidence could not have been located or discovered without the officer’s statement.

The analysis of LaForest, J. places two onerous burdens on an officer. First, the officer is required to abide by the requirement and to incur the legal liability of any administrative and criminal repercussions before arguing that the evidence was derivatively prejudicial. Second, the officer is required to prove that the evidence would lead to an “unfair trial.” This result, it is suggested, conflicts with the tenets of fundamental justice in Canada.

The R.C.M.P. Act is novel to the extent that it requires responses from individuals outside the context of “proceedings” as identified in the Canada Evidence Act and Charter. Police officers under investigation for a Code of Conduct violation can be required, upon demand, to provide a statement that can provide evidence upon which a criminal charge could be based. In such circumstances, it is difficult to envision that ordered statements do not violate the fundamental principle of justice that individuals should not be required to incriminate themselves by any means in a criminal matter. The jeopardy created by the criminal application of derivative evidence obtained from the internal context, it is suggested, alters the focus of the s. 7 analysis.

Although L’Heureux-Dubé, J. would be satisfied by the use immunity accorded by s. 40(3), it should be noted that she made her comments in the context of the “legal tradition recogniz[ing] the usefulness of commissions of inquiry and other investigative inquiries.” The ordered statement is not obtained as part of the “testimonial” compulsion considered by L’Heureux-

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102 Supra note 22 at 103. Eberts argues that the individual is being forced to seek redress from the court if the administrative investigation is being improperly conducted. Intentionally or not, LaForest, J. has created a damaging judicial reverse onus.

104 Supra note 14 at 583.
Dubé, J. and it is possible her position would be different with respect to a non-proceeding investigative authority. There can be a world of difference between a “testimonial compulsion” in the context of a “proceeding” and an “investigative compulsion” in the context of an “interrogation.”

Given the factional nature of the Thomson Newspapers decision, and the fact that it was limited to compelled testimony within a proceeding, there is a clear basis to assert that an ordered statement is not obtained in accordance with the principles of fundamental justice. This is particularly true with respect to the failure to provide derivative use immunity.

Ordered statements have only existed legislatively in the R.C.M.P. since 1986, although, as the Marin Commission noted, there was a significant policy change in the “Standing Orders” of the Commissioner of the R.C.M.P. in 1962, authorizing a charge for disobeying an order if a member refused to answer questions during an internal investigation. In 1976, the Marin Commission referred to the abuse of ordered statements by the Force as a cause of “mistrust” and “bad faith” between members and management. This was also a topic of contention before the Legislative Committee, where Svend Robinson M.P., stated:

There are circumstances which have been brought to my attention, Mr. Chairman, in which, in the guise of a service investigation, questions have been directed to members which really go to criminal investigations.

The Supreme Court would hardly tolerate any citizen being subjected to a legislative authority that permitted the police to detain, deny counsel, and conduct forced interrogations for the purposes of obtaining derivative evidence. Why should an officer qua suspect be treated any differently? Clearly there is a need to ensure that officers who find themselves the subject of an internal investigation derive protection from the principles of fundamental justice, particularly in light of the related investigations and attending public obligations that can accrue to the Force in such a situation. In moving to a s. 1 analysis, certain fundamental questions about the treatment accorded to police officers as individuals will be raised.

SECTION 1 OF THE CHARTER

If the court finds that s. 7 of the Charter was violated by an ordered statement under s. 40(2) of the R.C.M.P. Act, the onus would be upon the Force to

105 Supra note 9 at 32.
106 Ibid. at 153.
107 Supra note 7 at 11:115.
convince the court on a "preponderance of probabilities" that it is a justified limit. Section 1 of the Charter provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

As a general rule, the Supreme Court has stated that both the purpose and effect of a legislative measure are capable of invalidating the provision as unconstitutional. Although this approach is, for the most part, central to the initial evaluation of whether there has been Charter breach, it also provides a useful conceptual model in which to maintain an ongoing consideration of the underlying justifications surrounding ordered statements.

Limit Prescribed By Law and the "Oakes Test"

If s. 40(2) is a limit on the right against self-incrimination contained in s. 7, it follows that its inclusion in the R.C.M.P. Act creates a "limit prescribed by law" within the meaning of s. 1. To find that s. 40 is a reasonable limit demonstrably justified in a free and democratic society requires the satisfaction of both branches of the "Oakes test."

In R. v. Edwards Books and Art Ltd., it is generally acknowledged that Dickson, C.J.C. restated the "Oakes Test" to include a recognition that the criteria will vary depending on the context. In this case, the context is disciplinary, but the criminal implications attached to an ordered statement, in the form of derivative evidence, must also be noted.

Legislative Objective

First, the objective of s. 40(2) must be of sufficient importance to warrant overriding the right to silence and the right not to answer incriminating questions. At a minimum, the objective must be "pressing and substantial" in a free and democratic society. The government might be prepared to argue that police misconduct is at such a level, or could attain such proportions, that the need for internal discipline requires ordered statements. This assertion would

108 Big M Drug Mart, supra note 92.
110 Supra note 96.
111 See also Thomsen, supra note 95, LeDain, J.; R. v. Hufsky, [1988] 1 S.C.R. 621.; R. v. Ladouceur, [1990] 1 S.C.R. 1257, Cory, J. for comments on the contextual nature of the analysis under s. 1. It is important that the administrative "purpose" of ordered statements not be permitted to overshadow the criminal consequences that can arise.
most certainly be founded on the findings of the McDonald Commission into R.C.M.P. activities in the 1970s.\textsuperscript{112}

According to the 1990-91 report of the R.C.M.P. Public Complaints Commission, there were 17,742 members of the R.C.M.P. posted across Canada and there were a total of 2,652 “public complaints” received by the Force regarding its members.\textsuperscript{113} The P.C.C., however, provides no details on how many of these complaints were found to be unsubstantiated or vexatious. Of the complaints, 857 were received directly by the P.C.C.; of those, 488 related to “attitude” or “service,” while the use of force accounted for 111 complaints.\textsuperscript{114} This data is open to interpretation as to whether it indicates a pressing and substantial concern with police misconduct. The number of internal complaints is not given.

On the other hand, the purpose of ordered statements is to hold members accountable internally for their conduct, which is a pressing and substantial concern. The underlying premise is that without a mechanism to ensure disclosure of the member’s conduct, there would be no means to apply disciplinary control. The problem is that the statement could have consequences that extend well beyond the disciplinary process. Therefore, ordered statements are not circumscribed or limited to internal control and accountability.

The Proportionality Test

This raises the second criteria, are the “means” “reasonable and demonstrably justified”? More succinctly, is the requirement to provide statements reasonable and justified? Has the legislature “balanced” the interests of society with the officer’s right not to be forced to incriminate him or herself? Chief Justice Dickson proposed a three part “proportionality test” in \textit{Oakes} to make this determination.

Rational Connection

First, the means, in this case the ordered statement, must be “rationally connected to the objective.” More importantly, the provision for ordered

\begin{itemize}
\item \textsuperscript{113}R. Gosse (Chairman), \textit{R.C.M.P. Public Complaints Commission Annual Report 1990-91} (Ottawa: Supply and Services, 1991) at 17-20.
\item \textsuperscript{114}\textit{Ibid}.
\end{itemize}
Ordered Statements

Statements must not be arbitrary, unfair, or based on irrational considerations. This analysis would probably generate the most divisiveness on the question of ordered statements. For example, police officers may assert that they are being subjected to invasive investigative measures that are not required of other "professions" that administer considerable discretion and authority in society.\textsuperscript{115}

It is probably valid to assert that an "accountability statement" is in the best interests of the Force, but there is also a serious question of good faith, in light of the obvious abuses to which the ordered statement can be turned. For example, in both its 1989-90 and 1990-91 reports, the P.C.C. advocates a policy that would require a statement from a member whose conduct is the subject of a "public complaint" under Part VII of the \textit{R.C.M.P. Act}.\textsuperscript{116} Apparently, when requested for explanations under Part VII (which is \textit{not} a disciplinary investigation), some members declined to make a statement. In the P.C.C.'s view, members should have no option to decline to give statements, and the Force has not been zealous enough in resorting to an ordered statement as part of disciplinary investigations.

If the R.C.M.P. were to bend to such pressure, an officer could be ordered to provide a statement whenever there was a complaint, whether or not it involved a contravention of the \textit{Code of Conduct}. This would not appear to accord with the purpose of the legislation. It also highlights the arbitrary nature upon which a statement could be demanded. It appears ordered statements are a vehicle to which the P.C.C. would routinely resort, without any consideration to the obligations of fairness to the member.

In Borovoy's view, "[p]olice officers are endowed with extraordinary powers for the protection of the public,"\textsuperscript{117} and, as such, are not exempt from providing a "reasonable account" of their conduct. Representing the Canadian Civil Liberties Association before the Legislative Committee on Bill C-65, Borovoy conceded that R.C.M.P. officers are "especially vulnerable" to criminal charges, and in this regard, a limited immunity for answers was necessary; it should not, however, exempt the use of the answers in a civilian administrative action.\textsuperscript{118} A more detailed analysis, though, would reveal that individual officers are prone to systemic vulnerabilities not contemplated by Borovoy.

\textsuperscript{116} \textit{Supra} note 114 at 43.
\textsuperscript{117} A. Borovoy, \textit{When Freedoms Collide} (Toronto: Lester & Orpen Dennys, 1988).
\textsuperscript{118} Canada, House of Commons, Legislative Committee on Bill C-65, \textit{An Act to Amend the Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof}, Minutes of Proceedings and Evidence, Issue no. 6 (26 November 1985) at 6:7.
Some have suggested that such explanations are not unlike the accountability that arises in any employer-employee situation, such as an auto worker.\(^{119}\) This analogy is a substantial and uninformed over-simplification. First, as Goldstein observes, policing is an occupation that, by its very nature, is often "adversarial," "emotionally charged," "hostile," and often requires "physical force."\(^{120}\) The average employment situation in Canada does not place employees in situations that remotely resemble the occupational climate of police officers. Second, the auto worker probably operates under a collective agreement which, in most cases, sets out in detail the obligations and procedures for the employee and employer when an allegation of misconduct is made. Third, the R.C.M.P. is not unionized,\(^{121}\) which, unlike unionized police forces, means there is no standing access to legal counsel.\(^{122}\) The auto worker, as part of the union, has recourse to funded counsel and representation during an employer discipline investigation. As noted above, R.C.M.P. policy states specifically that a member will not be provided publicly funded counsel for internal disciplinary matters. Any "representation" provided by a Force lawyer (employee) at the hearing, by definition, follows the investigation. Fourth, although the use of ordered statements in a proceeding may be circumscribed, the use of evidence arising from the statement is not excluded by the R.C.M.P. Act.

In general, there is no obligation on an employer to make or pursue a criminal complaint against an employee who has engaged in improper conduct. The police, however, have a legislated duty and social obligation to investigate criminal, public and internal allegations of misconduct; the Force is in a much different situation than other employers. Further, the finder of fact, in this case the R.C.M.P. as an organization, wears several hats: one as the investigator and evidence gatherer (internally and statutorily) and another as adjudicator. The auto worker may have to attend a proceeding, but, at least the adjudicator does not work for the company.

Holding officers accountable is an objective of significant social and domestic merit, but it is not rationally connected to the arbitrary and unfair uses of an ordered statement. Even if concerns regarding the possible use of derivative evidence in a criminal process were not an issue, is it necessary that the Force have the authority to require answers for a Code of Conduct investigation, especially when the forms of conduct caught in this net can range

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\(^{119}\) Borovoy, *supra* note 117 at 254-5.


\(^{122}\) Goldstein, *supra* note 120 at 111-22 outlines the effect (and importance) of having counsel for officers. See also: Lewis *et al.* note 6.
from pilfering paper clips to abusing prisoners? Perhaps ordered responses are necessary only where specific allegations of serious misconduct are involved, and all other reasonable investigative measures have been unsuccessful in illuminating the matter.

**Minimal Impairment**

The second criteria of the proportionality test revolves around whether the use of ordered statements impairs the officers right to be free from self crimination as little as possible. Under s. 40, a disciplinary investigation can be instigated when there “appears” to have been a contravention of the *Code of Conduct*. Given the low threshold, the ordered statement could be used as a way to “short circuit” the criminal and administrative investigative process by going directly to the member, instead of conducting a thorough investigation. For instance, a situation can arise in which the Force, in order to appease the public, may resort to an ordered statement rather than wait for the results of a thorough and complete criminal or internal investigation. The inability to rely on ordered statements may ensure management does not exploit this mechanism in the pursuit of a criminal charge. If the officer has committed a criminal act, the need for “public accountability” must follow. Should it, however, arrive on the horns of an “internal” accountability mechanism, which according to *Wigglesworth*, is not the object of domestic discipline?

The Marin Commission conducted a thorough inquiry of the use of ordered statements and concluded:

> [T]he abandonment of the ordered statement will not alter, to any significant degree, management’s ability to administer the Force with efficiency.125

The Commission received a number of submissions which argued that ordered statements had little credibility, and were not necessary to conduct a successful investigation.126 In the end, the Marin Commission recommended that ordered statements be abolished. It is doubtful, then, that s. 40 minimally impairs the officer’s fundamental right to justice and fairness.

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123 Sec. 39(1) of the *R.C.M.P. Regs.* states that “A member shall not act or conduct himself or herself in a disgraceful or disorderly manner that brings discredit on the Force.” One wonders not what is included in this description, rather, what is not covered by such an amorphous charge. One of the few specifics is subsection (2), which notes that conviction for a provincial summary conviction offence (e.g. speeding ticket, or perhaps a parking ticket?) is a “disgraceful act or conduct.”

124 *Supra* note 101 at 348.

125 *Supra* note 9 at 153.

In this regard, the observations of Wilson, J. in Singh v. Can. (Min. of Employment and Immigration), are applicable:

No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognizes that a balance of administrative convenience does not override the need to adhere to these principles\(^{127}\). (emphasis added).

It seems unlikely that the Supreme Court would be receptive to an argument that administrative efficiency and convenience in managing the Force is a basis for insisting that officers do not have the protection of non-incrimination.

It has also been suggested that providing statements is merely a condition of employment\(^{128}\), one which the officer accepts upon joining the R.C.M.P. If the consequences of an ordered statement were strictly limited to administrative proceedings this might appear reasonable, but two points must be made. First, in 1976 the Marin Commission found 25 percent of R.C.M.P. “constables and non-commissioned officers indicated that they had no knowledge or only slight knowledge” of the public complaints process\(^{129}\). At the time, an officer was only subject to an internal and statutory investigation. The invocation of the current scheme has created a legally complex and inter-related process of possible investigations and hearings that would mystify even the most capable legal mind (e.g. public complaint investigation and hearing, internal investigation, statutory investigation, inquiry boards, external review hearings). Without question, many officers are performing their duties with little or no understanding of the current accountability process, or the derivative consequences of providing a statement in an internal investigation. Second, a recruit entering the police profession probably has some notion that accountability is an important “condition” of employment, but there is a substantial likelihood that the recruit has no appreciation of the complex process. An officer is not advised by the Force at the time of engagement that he or she may be forfeiting the right to silence and non-incrimination\(^{130}\).

\(^{127}\) Supra note 48 at 218-219.
\(^{128}\) Borovoy, supra note 117.
\(^{129}\) Supra note 9 at 61.
\(^{130}\) Equal treatment of officers in the criminal context was an important feature of the report by the Marin Commission, supra note 9.
At the end of the day, the question is whether the ordered statement is necessary to complete a thorough *Code of Conduct* investigation. It seems incongruous for a police organization - that is in the business of investigating and in possession of advanced investigative technology - to assert that it would be stymied and unable to hold officers accountable without the ability to order officers to answer questions. Even if one accepts the administrative accountability argument, it does not eliminate the fact that derivative evidence from the statement could have criminal consequences. This is not to be taken as an assertion that police officers should not be held to a high standard for their conduct. It does not entitle the Force, however, to possess a mechanism that would enable the officer to be conscripted against him or herself for the purposes of successfully laying a criminal or disciplinary charge.

It would be naive to believe that an internal investigator would not, either formally or informally, make known crucial evidence arising from an ordered statement that could convict an officer of a crime, particularly if it were heinous. This presumption assumes, of course, that the internal and criminal investigators are always different individuals. This is not to be taken as a criticism of the investigator's, rather, it points out what would be an incredible desire to do what is perceived to be proper, regardless of the legal niceties. Further, intense media and public pressure can prompt departments to ignore basic legal principles when dealing with individual officers.

What happens if the officer under investigation declines to give a statement to the statutory investigator, and during the subsequent ordered statement provides evidence, which if true, would exonerate the officer? A review of the *R.C.M.P. Act* and *Regulations* does not provide any guidance on the use of exculpatory evidence. Given the significance of an ordered statement, is it proper to permit the R.C.M.P. to have an unreviewable discretion to use the ordered statement outside of a criminal, administrative or civil proceeding? Currently, the investigative process appears to be completely arbitrary, to the extent that no formal mechanism is available to protect officers during the acquisition stage of the investigation.

**Proportionality Between Effects and Objective**

The third and final factor in the Oakes test is the proportionality between the "effects" and "objective." In *Oakes*, Dickson, C.J.C. held that the more deleterious the effects of the measure on the right, the more important the objective must be for society. Despite establishing a rational connection and minimal impairment, the severity of the effects may still not justify the limitation on the *Charter* right.

As the Ouimet Report notes, removing the privilege of self-incrimination
"places an additional and powerful weapon in the hands of law enforcement" (emphasis original).\textsuperscript{131} Lewis \textit{et al.}, observed that the concerns of police officers regarding "duty statements" in the Metro-Toronto Police led to an agreement among management, the Public Complaints Commission, and the police association, that no statement would be required if the subject matter of the complaint could result in criminal charges.\textsuperscript{132} This concession eliminates the argument that ordered statements are necessary to hold officers accountable in the discipline process.\textsuperscript{133} The consequences of an ordered statement are not limited to one context and any argument to the contrary would be purely specious.

It may be possible to sustain s. 40(2) if its effects were limited to the disciplinary forum. Because of the problem with derivative evidence, however, it is possible that the court would find the "deleterious" effects of an ordered statement disproportionate to its objective, particularly where the difference may amount to a criminal conviction, and not just a disciplinary disposition.

It appears that a constitutional balance has not been achieved between the interests of the department (and society) in holding officers accountable, and the interest of the officer's individual right to be treated fairly.

\textbf{Alternative Results}

To find the \textit{Charter} limitation justified under s. 1, the Force must convince a court that there is a clear delineation between internal and statutory investigations. Further, the Force must show that there is no possibility that the contents, or evidence arising from an ordered statement, would be the basis for a criminal investigation. This would mitigate any argument regarding the effects of the ordered statement on the member's right not to be placed in a position of incrimination. Thus, the statutory and internal contexts will be a critical factor under this head of examination.

If the court found that s. 40(2) of the \textit{R.C.M.P. Act} was not justified under s. 1 of the \textit{Charter}, it must declare the provision to be of "no force and effect" under s. 52(1) of the \textit{Constitution Act, 1982}. Section 52 may also provide

\textsuperscript{131} \textit{Supra} note 112 at 68.

\textsuperscript{132} \textit{Supra} note 6 at 140. This was a 1986 article and it is unknown if this agreement continues to operate. For our purposes, this indicates that internal accountability is possible without the ordered/duty statement.

\textsuperscript{133} Commenting on the problem of developing procedures for investigating "public complaints," the Solicitor General's Report on the \textit{Future of Policing in Canada}, observed that "one has to bear in mind the possibility that the authority of the department may be undermined and, with it, morale seriously damaged": A. Normandeau & B. Leighton, \textit{A Vision Of The Future Of Policing in Canada: Police-Challenge 2000} (Ottawa: Sol. Gen. Cda., 1990) at 73.
several alternatives regarding the invalidity of s. 40(2) "to the extent of the inconsistency." Although the courts have been reluctant to read constitutional validity into legislation, there are several possible alternatives here. First, the court could accept that ordered statements are necessary, but that derivative evidence is not to be admitted in any proceeding. Such a finding would accord with the statement of the then Solicitor General of Canada, Perrin Beatty, that the "proposed legislation [Bill C-65, 2nd reading] will firmly entrench the rights of members of the Force with respect to matters like internal discipline." Second, the court could read into s. 40(3) the condition that derivative evidence from ordered statements cannot be used in criminal trials, but is available only in internal proceedings. The comments of Lamer, C.J.C. on the possible inequalities that can arise regarding the application of s. 5(2) of the Canada Evidence Act in R. v. Kuldip, are poignant. He held that "it is up to Parliament to redress the unfairness by amending or repealing the problematic elements of the provision."

EXCLUSION OF EVIDENCE

If a court finds a violation of the privilege against self-incrimination under s. 7 of the Charter, would the derivative evidence be admissible in an administrative or criminal proceeding? Recall that s. 40(3) precludes the use of the statement or answer, per se, in either proceeding. Before analyzing s. 24(2) of the Charter, it will be helpful to review several recent Supreme Court of Canada decisions that may affect the scope of s. 40(3), as well as the common law power of a trial judge to exclude evidence.

Impeaching Credibility

In R. v. Kuldip, the Supreme Court of Canada found that s. 13 of the Charter and s. 5(2) of the Canada Evidence Act did not preclude the Crown from using the accused's previous testimony at a second trial to undermine or


135 House of Commons Debates, (1 September 1985) at 6517.

136 Supra note 16 at 638.

137 Ibid.
impeach credibility. Leading a four to three majority, Lamer, C.J.C. found that the Crown is only prevented from using previous testimony of the accused if the purpose is to incriminate the individual. 138 Recognizing that the accused has the right to remain silent, it was reasoned that when the accused took the stand he placed his credibility in issue, and the Crown was permitted to rely on the prior inconsistent testimony, since it was not being used to incriminate the accused. 139 This analysis does not appear to contradict s. 13 of the Charter, since the protection extends to preventing evidence from being "used to incriminate" the witness at a subsequent proceeding. Section 5(2) of the Canada Evidence Act states the incriminatory testimony is "not to be used or admissible in evidence against him" (emphasis added). Kuldip represented a fairly narrow interpretation on the protection provided by the Charter on the use of previous testimony. The question remains, does the phrase "used or receivable" in s. 40(3) avoid the potential use of an ordered statement to attack credibility at a criminal or administrative proceeding? 140

The Supreme Court placed emphasis on the fact that the accused in Kuldip chose to enter the witness box to make the "statement," or testify. 141 The officer, however, will have no such choice. An ordered statement will, in effect, force an officer to take the stand at an adjudication hearing if he or she wants to explain the derivative evidence that was disclosed. Further, based on the distinction in Kuldip, the "testimony" before the disciplinary hearing, albeit extracted, could be used at a subsequent criminal proceeding, as the member "chose" to take the stand at the disciplinary hearing.

The Supreme Court confirmed in Kuldip that the protection against the use of previous testimony under s. 13 of the Charter "inures to an individual at the moment an attempt is made to utilize previous testimony to incriminate its author" (emphasis added). 142 On this basis, any protection of s. 40(3) concerning derivative evidence would not arise until the officer is before the tribunal, be it disciplinary or criminal. Therefore, an unchecked freedom exists to acquire any

138 Ibid. at 641.
139 Ibid. at 634-635.
140 The Evidence Act, R.S.N.S. 1989, c. 154, s. 59(2) also states that incriminatory answers "shall not be used or receivable in evidence," which, given the findings in Kuldip, supra note 6, would not appear to extend any exception argument for the protection offered by s. 40(3) of the R.C.M.P. Act, to include a use immunity, because clearly this is not a unique legislative enactment.
141 As we already know, and this was recently affirmed in R. v. Amway Corporation, [1989] 1 S.C.R. 21 at 29 an accused charged with a criminal offence cannot be compelled to enter the witness box.
evidence arising out of a statement, because the protection of s. 40(3) only accrues when an attempt is made to introduce the statement in a criminal or administrative proceeding. One wonders how frequently an officer can be required to succumb to an interview during a single investigation? Can the officer be re-examined every time a new piece of evidence is located?

Disclosure

More recently, the Supreme Court of Canada, building on the foundation of *Boucher v. The Queen*,\(^\text{143}\) ruled in *R. v. Stinchcombe*\(^\text{144}\) that the Crown has a legal duty to disclose all relevant information to the defence in a criminal trial. Justice Sopinka, writing for the majority, indicated that “all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses” (emphasis added).\(^\text{145}\) The court accepted that the existence of a legal privilege could justify the non-disclosure of material, but “full answer and defence” for the accused will prevail. Such a privilege is reviewable on the ground that it is not a “reasonable limit.” Is it now possible, on the basis of “full answer and defence,” for counsel to request disclosure of ordered statements from officers that relate to a situation involving a criminal charge against a client?

Section 40(3) of the *R.C.M.P. Act* states that answers are not to be “used or receivable” in a criminal or administrative proceeding. Nevertheless, if defence counsel convinces a judge that the ordered statement is relevant to making full answer and defence for his or her client, the likely result would be an order for disclosure, regardless of s. 40(3) or the fact that the statement was provided during an internal investigation. It would appear that there is little distinction to be made between the Crown and the police, and between internal and criminal, when full answer and defence is raised. There is no reason these principles would not also apply to the adjudication hearing. Presumably, as an accused before an internal or criminal court, the officer will also be able to demand disclosure of all statements taken during the course of the internal investigation.

The privilege provided in the *R.C.M.P. Act* does not limit the use of statements to incriminate the officer; it refers to receipt in proceedings. If the veil of s. 40(3) is partly or completely pierced under disclosure, what could be the repercussions? It is possible that the statement would be released unedited to the defence, which could jeopardize ongoing investigations or investigative techniques being utilized by the *R.C.M.P.?* Certain personal details of the

\(^{144}\) *Supra* note 17.
\(^{145}\) Ibid. at 345.
officer could also be in jeopardy. The statement itself may not be used, but any activity disclosed in the statement that goes to the officers credibility could be used, as was the case in Kuldi. Is it now possible for an individual to make a complaint against an officer, whether legitimate or vexatious, and use "full answer and defence" as a mechanism to access files of the R.C.M.P. pertaining to the conduct of the officer? This raises Canada Evidence Act and privacy arguments that are beyond the scope of this paper; they are noted, however, to indicate that s. 40(3) is not as comprehensive as some may believe.

Civil Proceedings

The only judicial pronouncement on s. 40(3) to date has been by the New Brunswick Court of Queen's Bench (Trial Division), in Murphy v. Keating. The case involved a civil action initiated by the plaintiff as a result of a confrontation between the plaintiff, and members of the R.C.M.P. and Moncton Police Force. The plaintiff was arrested by the defendant R.C.M.P. officer and three Moncton officers during a visit by Prime Minister Mulroney, and sought damages for assault, battery, and unlawful imprisonment. In preparing for trial, the plaintiff requested an order from the court to have the contents of the internal investigation conducted by the R.C.M.P. disclosed. The defendant officer objected on the basis of the privilege contained in s. 40(3) of the R.C.M.P. Act. The court clearly applied a very narrow interpretation to "answer and statement." Landry, J. found that although the officer's statement was protected by the privilege contained in s. 40(3), the report of the internal investigator was subject to disclosure in its entirety. It is not stated, however, whether the internal report gave a precise transcript of the officer's statement, as most do. In addition, any material collected, or other interviews conducted on the basis of the officer's statement, were also subject to disclosure.

The New Brunswick Court also rejected the application of the "public interest privilege" in the confidentiality of police investigations. The court ruled that statements provided by individuals to the police do not fall within the privilege to prevent disclosure in civil proceedings. If the officer was interviewed under s. 40(2), however, was the internal investigator acting qua domestic discipline and not qua police? If so the public interest argument in "police" investigations is inapplicable.

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146 For example, s. 37 of the C.E.A. and the common law permit objections regarding the disclosure of government information in the public interest.
147 (1990), 96 N.B.R. (2d) 412.
148 Ibid. at 422.
149 Ibid.
Interestingly, in the *Keating* case, the internal investigator did not “order” the member to provide answers *per se*. In the affidavits before the court, both Keating and the investigating officer stated it was their collective belief the statement was “required” and therefore the privilege was operating.

Recently, the Chairman of the R.C.M.P. External Review Committee issued “findings and recommendations” in relation to the meaning of “required” under s.40(2). In *Special Cst. “A” v. The R.C.M.P.*, Judge Marin (as Chairman), found the requirement to answer under s. 40(2), with the attendant protection of subsection (3), arises whenever an investigation under s. 40(1) is instituted. Judge Marin was of the view that s. 40 was more closely equated to s. 13 of the *Charter*, and, it did not therefore require an objection before the privilege accrued. If the officer refuses to answer, the authority to order a response still operates. Judge Marin did refer to the *Thomson Newspapers* case, but limited his analysis to the comments of LaForest J. He concluded that members are not placed in any more of an “exceptional situation” than a citizen appearing before the R.T.P.C.

With the greatest of respect, Judge Marin has chosen to agree with only one opinion of the divided panel that heard *Thomson Newspapers*. Further, there is some question whether the two situations are sufficiently similar to make such a broad generalization. At most, the witness appearing before the Trade Commission may ultimately face a “criminal charge,” whereas the officer faces a panoply of possible internal, criminal, and inquiry consequences, not to the mention the disparate procedural protections available to the officer. The comments of Lamer, C.J.C. in *Kuldip* are apposite:

> It is possible that, in certain circumstances, the rights protected by statute will be greater in scope than comparable rights affirmed by our Constitution. The Charter aims to guarantee that individuals benefit from a minimum standard of fundamental rights. *If Parliament choose to grant protection over and above that which is enshrined in our Charter, it is always at liberty to do so* (emphasis added).

Although police officers are granted significant powers in society, it must also be recognized that they are vulnerable to a complaints process that can very easily become oppressive to the individual R.C.M.P. officer.

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150 R.C.M.P. External Review Committee File #2200-90-005 reported at (1990), 3 Adjudicative Decisions 168 (R.C.M.P. Trib.).
152 *Ibid.* at 22. In contrast, an objection is required by the *C.E.A.*
154 *Supra* note 16 at 638.
A Common Law Exclusion?

In 1971, the Supreme Court in *R. v. Wray* virtually eliminated any discretion a trial judge had to exclude evidence during a trial. Mr. Justice Martland recognized that a judicial discretion existed to exclude evidence that operated unfairly against the accused, but not if the evidence was relevant:

> It is only the allowance of evidence *gravely prejudicial* to the accused, the admissibility of which is *tenuous*, and whose *probative force in relation to the main issue before the court is trifling*, which can be said to operate unfairly *(emphasis added)*.

This test was restated ten years later in *Rothman v. The Queen*, where Lamer, J. (as he then was), citing *Wray*, found exclusion of relevant evidence was only permissible where it was “unduly prejudicial” and of “slight probative value.”

Because the trial judge has a duty to ensure that a trial is fair, there appears to be authority to exclude evidence which will countenance this common law principle. An officer ordered to give a statement might attempt to object to the admission of any derivative evidence arising from the statement, but the threshold will be difficult to meet.

Section 24 Analysis

If there has been a violation of the right against self-incrimination under s. 7 of the *Charter*, because of an attempt to rely on derivative evidence at either the administrative or criminal proceeding, would the evidence be excluded under s. 24(2) of the *Charter*? It is necessary to establish that the *Charter* was violated

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156 Ibid. at 293.

in the course of obtaining the evidence. The nexus between an ordered response and any related Charter breach will be clear. Whether any derivative evidence was “discovered” as a result of the breach, however, may not be as clearly demarcated. The next consideration is whether the evidence should be excluded because its “admission in the proceedings would bring the administration of justice into disrepute.” The judgment of Lamer, J. (as he then was), in R. v. Collins,\textsuperscript{158} identified three sets of factors to be considered for excluding evidence under s. 24(2). For our purposes, R. v. Strachan provides the most succinct summary:

The first group concerns the fairness of the trial. The nature of the evidence, whether it is real or self-incriminating evidence produced by the accused, will be relevant to this determination. The second group relates to the seriousness of the Charter violation. Consideration will focus on the relative seriousness of the violation, whether the violation was committed in good faith or was of a merely technical nature or whether it was willful, deliberate and flagrant, whether the violation was motivated by circumstances of urgency or necessity, and whether other investigatory techniques that would not have infringed the Charter were available. The final set of factors relates to the disrepute that would arise from exclusion of the evidence.\textsuperscript{159}

\textsuperscript{158} [1987] 1 S.C.R. 265 [hereinafter Collins].


This Court’s cases on s. 24(2) point clearly,...to the conclusion that where the impugned evidence falls afoul of the first set of factors set out...in Collins (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation). These two factors are alternative grounds for the exclusion of evidence, and not alternative grounds for the admission of evidence” (emphasis original).

Stuart sees this analysis as “problematic,” preferring to find that these “obiter” statements were not intended to create an automatic exclusion of evidence that affected the fairness of the trial: D. Stuart, “Annotation” (1991), 4 C.R. (4th) 125: given that other recent Supreme Court of Canada rulings continued to use the complete Collins analysis, and did not enjoin the automatic exclusion approach of Iacobucci, J. this development will not be taken as a new strict basis for exclusion under s. 24(2). See: R. v. Evans, [1991] 1 S.C.R.
Fairness of the Trial

As noted by Iacobucci, J. in Broyles v. R., "the admission of self-incriminating [evidence] obtained as a result of a breach of the Charter [sic], unlike the admission of real evidence which would have existed regardless of the breach, will make the trial unfair." In this case, the Force would not be using "incriminatory" evidence per se, although the member was required to incriminate her or himself, since s. 40(3) excludes the use of the statement.

The courts have held that real evidence, even if it is derivative evidence, does not necessarily render a trial unfair under s. 24(2), and can be admissible. Yet, the officer, not unlike an accused who unknowingly speaks to an undercover operator, does not exercise a choice whether to speak. The statement may not be obtained in a criminal-Charter context, but as noted above, the officer is detained, and subject to the power of the state, arguably within the meaning of Hebert. Because the Supreme Court of Canada has recognized the right to remain silent and right against self-incrimination as "fundamental tenets" of a fair trial, the introduction of conscripted derivative evidence would be unfair during a criminal trial of the officer. As for the disciplinary hearing, because of its administrative context, the court may be less inclined to find unfairness, in light of the non-criminal "consequences."

Seriousness of the Violation

A breach of the right to silence and incrimination in the criminal context is considered to be serious violation. The internal investigator will seldom, if ever, be in a position to assert that an ordered statement was required to prevent the loss of evidence, or on an urgent basis. Furthermore, in most circumstances there will be other investigatory avenues that could provide the same evidence as the officer. There is a danger that required statements could be the subject of

714 [hereinafter Evans]; R. v. Smith, [1991] 1 S.C.R. 869. In any event, such a course by the Supreme Court would be advantageous to an argument that derivative evidence should be excluded, since they create an unfair trial based on coercion.

160 Supra note 66 at 617. See also Collins, supra note 158.

161 Even without the Hebert analysis regarding the right to choose to speak to an agent of the state, it was settled by the Privy Council in Ibrahim v. R., [1914] A.C. 559 as per Lord Sumner, that in a criminal prosecution, the Crown, in order to have the accused’s statement admitted, must establish that the statement was a "voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority." See also: Ratushny, supra note 101 at 59; Horvath v. The Queen, [1979] 2 S.C.R. 376.

162 See e.g.: Black, supra note 159.

163 Supra, note 33, Hebert and note 158 Collins.

164 Ibid.
abuse, particularly without any legislated priority as to the use of the s. 40(2) investigation. Are statements to be held in abeyance until such time as the criminal repercussions are addressed? For the officer, the res judicata of the criminal charge is the only true guarantee that the derivative evidence from the ordered statement will not arise prejudicially. Of course, this could result in problems of "unreasonable delay" in proceeding with the disciplinary hearing.

Although "good faith" has been identified as a factor for consideration here, there is no assurance that an investigator, acting under the authority of s. 40(2), will be able to assert this authority as a valid basis for the admission of the evidence found as a result of the statement. In R. v. Therens and Broyles, good faith is essentially rejected as a basis to mitigate the seriousness of the violation.

As discussed above, the R.C.M.P. currently employs policy that permits the internal investigator to deny the right to consult counsel during the interview of a suspect member. If the officer is detained, and the internal statement produces inculpatory evidence that the Crown seeks to introduce at a criminal trial, the officer will be able to argue that there has been a violation of the right to retain and instruct counsel, and to be so informed under s. 10(b) of the Charter. If a proper nexus is made between the denial of counsel, the internal ordered statement, and the discovery of the evidence sought to be introduced in the criminal trial, the results should be constitutionally fatal for the admission of the derivative evidence. The Supreme Court has been exceptionally vigilant in ensuring that the provisions of s. 10 are met. As Iacobucci, J. observed in Elshaw, "[a] series of decisions by this court, beginning notably with Collins, makes it clear that the exclusion of inculpatory statements obtained in violation of s. 10(b) should be the rule rather than the exception." By extension, McLachlin, J. writing in R. v. Evans, concluded that:

Generally speaking, the use of an incriminating statement, obtained from an accused in violation of his rights, results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way – by supplying evidence which would not be otherwise available (emphasis added).

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165 Supra note 95.
166 Supra note 66. See also, Hebert note 33. Sopinka, J. indicates that some of the bench believe that good faith can never mitigate the seriousness of the violation.
167 See R. v. Brydges, [1990] 1 S.C.R. 190, for one of the strongest statements on the right to counsel, regardless of the exclusionary consequences.
168 Supra note 159 at 45.
169 Supra note 159 at 896.
Although these comments also speak to the fairness of the trial, it is clear that any violation of the right to counsel is considered to be one of the most serious constitutional violations. Connecting the ordered statement to any derivative evidence, in the context of s. 10 of the Charter, will provide a powerful judicial impetus for exclusion.

Effect of Excluding the Evidence

The determinative factor on the effect of excluding evidence will be the effect on the fairness of the trial, and the repute of justice in the exclusion of the evidence. In R. v. Brydges it was noted that repeated judgments from the Supreme Court have held that the seriousness of the offence charged was not a justification for admitting evidence if it involved the fairness of the trial. It will also be important whether the evidence obtained as a result of the statement is essential to a conviction. This a double-edged argument; if the evidence is essential to proving the charge, it will only serve to highlight the significance of the s. 7 breach of the right against self-incrimination.

In most cases, excluding the derivative evidence would not affect the repute of justice. In fact, the exclusion of derivative evidence would serve to reinforce the notion that the Force must conduct thorough internal investigations, without relying on transgressions of the right against self-incrimination to provide accountability.

CONCLUSION

Is John Lilburn in Uniform? To the extent that the officer can be ensnared by derivative evidence to prove a criminal charge, the answer is clear. The R.C.M.P. has publicly stated that it relies on ordered statements to obtain independent evidence. The inescapable inference is that the Force can, and does, use internal ordered statements to assist in criminal investigations. Given the right facts, a court would have difficulty in avoiding the constitutional path available under s. 7 to declare ordered statements unconstitutional as a violation of the right to silence and non-incrimination, or, by failing to provide derivative use immunity. The lack of “penal consequences” for a finding of guilt under a Code of Conduct contravention, however, makes the answer less resounding, perhaps because “disciplinary” punishments are not perceived to be as laden with the traditional stigma of the criminal process. Nonetheless, the consequences in the form of a suspension, ordered transfer, or dismissal can be as devastating for the officer.

170 Supra note 167.
There are certain repercussive effects, within the current legislative scheme, that makes one particularly uncomfortable with the unregulated use of ordered statements for R.C.M.P. officers. For instance, there is no funded access to counsel, and, given the nature of the occupation and the need to be accountable, it would seem axiomatic that independent legal advice should be provided to the officer during every internal investigation. Further, if the officer did independently seek and retain legal counsel, the lawyer can be excluded during questioning.

In a more general way, with the current trend in police accountability, the individual officer can quickly become susceptible to abuse by the accountability “system.” Most critics of the police, in assailing the police organization, fail to perceive that the individual officer is not always protected or represented adequately in a process that can easily be abused by complainants, public review, and management, all of which pursue their own vision of justice and accountability. Sometimes, there seems to be an erroneous assumption that individual officers and police management are always responding to the same priorities in an internal investigation.

Police officers, unlike most persons accused of misconduct, may not have enjoyed significant latitude in determining their course of action in a given situation. An executive can decide whether or not to engage in predatory pricing, while the police officer may have to act without time for reflection on the finite legal distinctions that can separate criminal or disciplinary conduct from permissible conduct. The truly deviant officer has nothing to fear; it is the well-intentioned officer who is operating in a world of conflicting and contradictory legal, policy and social demands that is susceptible. Frequently, “[I]law, by its very nature, sometimes creates conditions that require the police to operate in grey areas, with no clearly defined expectations, until such time as the judiciary, legislators or the public provide feedback.”171 Accountability can become a manipulative and amorphous concept for the operational officer who is merely trying to manage a critical situation, particularly when it has become fashionable for the media and public to reach conclusions without knowing the details.

In light of the findings by the Marin Commission, most acts of criminal or internal misconduct by police officers are prosecutable without ordered statements. In the final analysis, there seems to be an inherent contradiction in pursuing internal accountability by assuring the officers that their statements are protected, yet knowing that it permits the unaccountable acquisition of

derivative evidence upon which to further other investigative agendas. The former Commissioner of the R.C.M.P. made it clear that his intent was to use ordered statements to gather "independent evidence" to be used against officers. Even if the R.C.M.P. does not currently employ this philosophy, appearances are as critical as reality, and the continued derivative prejudice that ordered statements can pose to the officer – particularly in relation to criminal charges – must be recognized and addressed.

In this regard, the following suggestions are made with respect to the use of ordered statements. First, there should either be an amendment to the R.C.M.P. Act, or promulgation of a regulation that prohibits legislatively the use of derivative evidence from ordered statements in criminal trials. Second, the use of derivative evidence in domestic proceedings, given their professed "remedial" purpose, should be limited to the most serious instances of misconduct where all other investigative methods have been exhausted. In this fashion, the Force can still require an accountability statement from the officer, but the derivative evidence will not be readily available. This last suggestion is premised on two factors. First, there are few instances when the Force will not be able to conduct a thorough investigation, either internally or statutorily, without a statement from the officer. Any conviction will usually be based on the strength of external proof, such as that provided by independent witnesses and physical evidence. Second, if the ordered statement really is to inform management about "what happened" and not to procure punishment, the inability to use derivative evidence will not be damaging. In the interim, the R.C.M.P. must take steps to rationalize clearly the competing interests of the various investigative mechanisms. This will ensure that participants are provided with a determinable procedure and priority for holding officers accountable throughout an inquiry of alleged misconduct. Ultimately, this will provide an effective and balanced approach to police accountability. It will be both fair to the officer, and protective of the Force's (and public's) interest in maintaining a high standard of police conduct.

If Wigglesworth is considered to be the final word on internal and criminal procedures, an R.C.M.P. officer can be detained, denied counsel, interrogated, charged, and convicted, without Charter intervention. In an attempt to move beyond Wigglesworth, this paper has identified several constitutional issues that still must be addressed in the domestic investigative process, such as self-incrimination, the right to silence, detention, and the right to counsel. In light of Thomson Newspapers, failure to provide derivative use immunity under s. 40(3) could be fatal to the survival of ordered statements under s. 7 of the Charter. Moreover, detaining officers without administering the right to counsel based on broad interrogative powers at the investigative stage, leaves the validity of
ordered statements constitutionally suspect. Therefore, despite the legislative requirement to answer questions under the R.C.M.P. Act, officers would be justified in declining to provide ordered statements until such time as the judiciary has considered these provisions. In the end, for any court to sanction ordered statements by admitting derivative evidence, at least in the context of a criminal trial, would be engaging in a monumental denial of the "full benefit of the Charter's protection." It would merely re-incarnate Lilburn in uniform within a modern Star Chamber investigation.

172 Big M Drug Mart, supra note 92 at 344, Dickson, C.J.C.