A MODERN STAR CHAMBER: AN ANALYSIS OF ORDERED STATEMENTS IN THE ROYAL CANADIAN MOUNTED POLICE

by

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This Ph.D. thesis provides an analysis of "ordered statements" in the Royal Canadian Mounted Police ("R.C.M.P."). Statements can be compelled from R.C.M.P. members who are under "internal" investigation for misconduct. Ordered statements from police officers raise a number of difficult and complex questions that have not been thoroughly examined in Canada.

Accountability in policing consists of a complex web of criminal, internal, administrative, public, and civil mechanisms to review misconduct. In order to properly consider ordered statements four threads of analysis are utilized. First, by way of background, context and comparison, this thesis describes and evaluates internal management, culture and discipline in policing, in particular the R.C.M.P. Second, this thesis examines and evaluates the role of various external mechanisms that regulate police conduct. Third, various models of civilian oversight are compared and contrasted to position the R.C.M.P. regime internationally. Fourth, the working environment of police officers and R.C.M.P. members is explored, demonstrating that it is significantly different from other occupations, calling into question the applicability of traditional management practices. The thesis concludes that the legal and constitutional position of ordered statements is uncertain, adding to morale and organizational problems in the R.C.M.P.

Based on interviews with 107 members, and an examination of other sources, this thesis reveals how ordered statements in the R.C.M.P. work in actual practice, and how this mechanism impacts upon individual members and the organization itself. The results reveal marked disparity between official and member accounts. The material and findings not only challenge basic theoretical premises that inform the employment context of R.C.M.P.
members, they seriously question the function of and need for ordered statements. They also establish that the specific employment and organizational context must be more adequately considered by academics and policy-makers when examining the issue of ordered statements. These findings fill gaps in the literature and hopefully contribute to theory on police accountability. The thesis ends with a number of recommendations to improve the current R.C.M.P. regime.
# TABLE OF CONTENTS

## Abstract

## Table Of Contents

## Table of Cases

## Table of Statutes

## List of Figures

## Acknowledgement

## Dedication

## Chapter 1 INTRODUCTION

1. Introduction .......................................................................................... 1  
2. Accountability Backdrop ................................................................. 1  
3. Ordered Statements ........................................................................... 15  
4. Employment Context .......................................................................... 28  
5. Constitutional Considerations .......................................................... 34  
6. Methodology ....................................................................................... 42  
7. Approach ............................................................................................. 55  

## Chapter 2 MANAGEMENT AND CULTURE

1. Introduction .......................................................................................... 59  
2. Police Management ............................................................................ 61  
3. Police Culture ..................................................................................... 78  
4. Two Cultures of Policing ...................................................................... 87  
5. Observations ....................................................................................... 93  

## Chapter 3 INTERNAL ACCOUNTABILITY AND DISCIPLINE

1. Introduction .......................................................................................... 95  
2. Discipline ............................................................................................ 96  
3. Internal Supervision ........................................................................... 107
Chapter 3 cont.

4. Internal Accountability
   a. Supporting Arguments 112
   b. Making Complaints 117
   c. Investigations 120
   d. Adjudicating Misconduct 128
5. The View From the Bottom 131
6. Observations 150

Chapter 4 EXTERNAL REVIEW MECHANISMS 153

1. Introduction 153
2. Rule of Law and Consent 154
3. Political Accountability 156
4. Police Boards and Commissions 164
5. Consultative Committees 167
6. Media 172
7. Prosecutors 179
8. Judicial Review 184
9. Criminal Charges 194
10. Civil Remedy 205
11. Human Rights Complaints 215
12. Coroner’s Inquest 218
13. Public Inquiries 221
14. Observations 227

Chapter 5 CIVILIAN REVIEW 229

1. Introduction 229
2. Models 230
3. The Benefits 233
4. Police Concerns 235
5. The Results 245
   a. Assumptions 245
   b. Investigations 247
Chapter 5 cont.

c. Resolutions 250
d. Hearings 251
e. Findings 255
6. Observations 262

Chapter 6 THE R.C.M.P. REGIME 266

1. Introduction 266
2. Management and Culture 268
3. Discipline 279
4. Staff Relations Representation 284
5. A New Regime 293
6. Public Complaints Commission 297
7. External Review Committee 317
8. Internal Process 329
9. Observations 355

Chapter 7 ORDERED STATEMENTS 358

1. Introduction 358
2. Rationales 362
   a. Management 362
   b. Public Employees 363
   c. Public Accountability 365
d. Critics 369
e. The Clash 373
3. Notice and Training 377
   a. Theory 377
   b. The Reality 380
4. Representation 387
   a. Overview 387
   b. Criminal 395
   c. Internal 404
d. Other Proceedings 418
Chapter 7 cont.

5. Police Interviews 421
   a. Methods 421
   b. Psychological Considerations 425
   c. Recording 432

6. A Look Inside 436
   a. Investigations 436
   b. Tactics 441
   c. Two Cases 447

7. Validity 460

Chapter 8 LEGAL ANALYSIS 465

1. Introduction 465

2. Scope of the Statutory Protection 471
   a. Interpretations 471
   b. Criminal Disclosure 483
   c. Impeaching Credibility 487
   d. Limits 491

3. The American Approach 493
   a. Garrity Interviews 494
   b. Scope of Protection 502

4. Section 11 of the Charter 505
   a. The Wigglesworth Case 505
   b. Legislative Developments 509

5. Testimonial Protection 514
   a. Common Law 514
   b. Canada Evidence Act 517
   c. Constitutional Provisions 521
   d. Distinctions 524

6. Investigative Protection 526
   a. Considerations 526
   b. Criminal Context 532
   c. Regulatory and Administrative Context 537
      i. Pre-Charter 537
      ii. Post-Charter 541
Chapter 8 cont.

d. *Thomson Newspapers* 542

e. *Spyker* 547

f. *S. (R.J.)* 549

i. Limited Derivative Use Immunity 550

ii. Exceptional Testimonial Compulsion 553

iii. Fundamentally Unfair Conduct 554

iv. Compellability Approach 557

g. *Branch* 560

i. Derivative Use Clarification 561

ii. Compellability Clarification 563

h. *Fitzpatrick* 565

7. Ordered Statements 569

a. Deprivation of Liberty 570

b. Principle Against Self-Incrimination 584

i. Context 584

ii. Derivative Use Immunity 589

iii. Compulsion Exemption 595

8. Section 1 Analysis 597

a. *Oakes* Test 600

i. Legislative Objective 600

ii. Proportionality Test 602

A. Rational Connection 602

B. Minimal Impairment 606

C. Effects and Objective 610

b. Possible Results 611

9. Section 24 Analysis 612

a. Trial Fairness 615

b. Seriousness 619

c. Effect of Exclusion 622

d. The Connection 623

10. Observations 625
Chapter 9  CONCLUSION  

1. Discussion  627  
2. Recommendations  647  

Bibliography  661  

Appendices  710  

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Interview Guide</td>
<td>710</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>R.C.M.P. Training Academy Questions</td>
<td>712</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>Member Representative Unit Questions</td>
<td>715</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>&quot;E&quot; Division Questions</td>
<td>718</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>Appropriate Officer’s Representative Unit Questions</td>
<td>724</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CASES


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| Figure 1 | Diagram 1 of Investigations | 298 |
| Figure 2 | Chart 1 of RCMP Public Complaint Data | 307 |
| Figure 3 | External Review Data | 318 |
| Figure 4 | Chart of Legal Representation | 394-5 |
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DEDICATION

To Joanne and Lindsey

DEEDS SPEAK!
Chapter 1

INTRODUCTION

"My point is not that everything is bad, but that everything is dangerous."
Michel Foucault (1982: 231)

1. Introduction

Demanding statements from police officers accused of misconduct during an investigation is a topic that has not been thoroughly examined in Canada. The extent of any discussion has relied generically on the proposition that a police officer is the same as any other employee when it comes to answering questions from an employer. The author will try to show that the issue of ordered or compelled statements in the policing context raises a number of unique and complex questions that have not been adequately addressed. The purpose of this thesis is to begin to remedy that situation. This thesis will provide an analysis of ordered statements in the Royal Canadian Mounted Police ("R.C.M.P."). To fully understand ordered statements they must be situated in the specific working environment of R.C.M.P. members. That working environment is shaped by history, traditions, employer-employee relations and a myriad of criminal, civil, administrative and other mechanisms that regulate police conduct. The rest of this Chapter will set out briefly some of the underlying issues and context.

2. Accountability Backdrop

One of the central and constant issues in policing is the governance and accountability
of police departments and individual police officers.¹ In most jurisdictions, the backdrop of police accountability consists of a complex web of criminal, internal, administrative, public, and civil mechanisms to review police conduct. In any discussion of the police accountability regime, the four main components to be considered are: administrative (e.g. supervisors and discipline), political (e.g. city council), community (e.g. consultation committees), and legal (e.g. criminal or civil action).² On the surface, the level and complexity of accountability


demanded in policing is not found in any other employment context.\(^3\) For some critics, however, it is accepted dogma that criminal, civil, and internal accountability mechanisms are not only unsatisfactory, but also in most cases fail to hold police officers accountable.\(^4\) The manner in which "public complaints" regarding police misconduct are dealt with is usually a point of dispute among various stakeholders in police accountability.

As Professor Reiner points out, the "accountability debate" over police misconduct allegations usually centres on two issues: first, the independence of the investigation; and second, the independence of the adjudication.\(^5\) At the crux of the debate is whether, and to what extent civilians, rather than the police, should have a role in the investigation,

\(^3\) Royal Canadian Mounted Police External Review Committee, *Disciplinary Dismissal-A Police Perspective* (Discussion Paper 6) (Minister of Supply and Services, 1991) at 9-10; A. Alan Borovoy, "Denial of Civil Liberties by Police in Canada" (1977) 22 *Canadian Labour* 10 at 10-11; Alan Beckley, "Legal Protection Insurance For Police Officers" (1995) LXVIII *The Police Journal* 319 at 319. Duncan Chappell and Linda P. Graham, *Police Use of Deadly Force: Canadian Perspectives* (Univ. of Toronto: Centre of Criminology, 1985) at 106-7 and 110-11, for example, discuss cases involving Canadian police officers charged with offences ranging from murder to manslaughter in the use of force.


\(^5\) *Supra*, note 1 at 484.
adjudication, and disciplining of police misconduct. The police accountability discussion has also been cast as a struggle between the police-conservatives and civil libertarians-liberals. According to Reiner, many academics and politicians, particularly those on the left of the political spectrum, propose complete or significant independence of the investigation and adjudication of complaints against the police, while police associations and rank-and-file officers, at least in more recent times, desire some civilian oversight in the process, leaving it to police management to assert unfettered managerial control free from civilian review.

For the most part, the police assert that the administrative and internal accountability process is effective in holding police officers accountable. Moreover, police officers claim

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that the argument for external control over police accountability would have more legitimacy if it were also imposed and accepted by other professions, some of which are the most vocal critics of the police (e.g. media, lawyers, judges and doctors).\textsuperscript{10} The police also feel that the moment an officer engages in almost any action someone is going to claim police impropriety, even if it is unfounded.\textsuperscript{11} Police advocates also point out that, unlike other occupations, police officers are subject to numerous and far-reaching codes of conduct which apply twenty-four hours-a-day, on and off duty.\textsuperscript{12}

\textsuperscript{10} For example, see Syd Brown, "Comment" in Walter S. Tarnopolsky, ed., \textit{Some Civil Liberties Issues of the Seventies} (York University: Osgoode Hall Law School, 1975) 122 at 127. It is interesting to note that many of the unaccepted police arguments against civilian involvement in reviewing misconduct are acceptable currency in these professions. See, Craig Harper, "LSUC nixes motion to charge public for making complaints" in \textit{The Lawyers Weekly}, 12 July 1996, at 2; Stephen Bindman, "Chief justices reject fines, suspensions for wayward judges" in \textit{The Vancouver Sun}, 26 August 1996 and Stephen Bindman, "Judges reject disciplinary reform" in \textit{The Vancouver Sun}, 23 September 1996, A3, where concerns over the inability of civilians to understand the complexities of the profession, or that civilians will pursue special agendas, are identified as a basis to reject civilian review.


Hudson observes that one of the confounding issues for police accountability discourse is that it is rooted in the juxtaposition of beliefs held by the various parties: police officers, who feel vulnerable and betrayed when operations are scrutinized by outsiders; and citizens, who contend that the solidarity of the police effectively restricts redress. In addition, Kerstetter identifies four dilemmas that bedevil most review processes that deal with misconduct: first, there is an inability to articulate objective standards to measure success and acceptable conduct; second, internal police review has an inherent lack of credibility; third, there are frequent inaccuracies in citizen perceptions regarding the actual fairness of the review process; and fourth, the high costs of external review for substantive fairness. Similarly, a research paper for the Marshall Inquiry that dealt with public complaints about police misconduct also observed that two factors make it very difficult to achieve any consensus on a process for dealing adequately with allegations: first, achieving agreement on what constitutes "success" and "evaluating" based on the conflicting outcomes that are desired (e.g. fairness v. substantiation); and second, the need for detailed and accurate information on the reality of public complaints and their disposition.

To complicate matters further, the debate over police accountability has also been inflammatory and polemical, with both sides resorting to rhetoric over substance. For

13 Supra, note 7 at 538; see also, David Bayley, Patterns of Policing - A Comparative International Analysis (New Brunswick, N.J.: Rutgers University Press, 1985) who notes that civilian review for the police merely confirms the police belief that the public does not respect them.


example, when the issue of civilian review was initially raised in the United States, police associations and executives asserted that, among other emotive matters, civilian review was a communist ploy. On the other hand, as pointed out by Reiner, it is also rather startling how quickly some civil libertarians embrace the deterrence-punishment model as a response to police misconduct, a model they generally reject as a response to other misbehaviour outside of policing, and how the insights of radical criminology fall to the wayside when considering police wrongdoing. Conversely, it is also interesting how, when confronted with police misconduct, police officers sometimes abandon the deterrence-punishment model, which they generally accept as a response to other misbehaviour, and adopt a complexity-causation dialogue for officer wrongdoing. It is also illuminating to see how police associations and rank-and-file officers can become enraptured with due process rights when it comes to dealing with police misconduct, a position they tend to eschew when dealing with individuals in the

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17 Reiner (1992), *ibid.* at 214.

criminal justice system. However, civil liberties groups can also have an equally tenuous grasp on their principles when they object to officers being granted basic due process rights or when they voice their frustration and discontent regarding rights which they claim are the cause of officers "getting off" on "a technicality." As Perez recently observed:

The topic of police review involves stubborn, intractable interest groups. These groups have made the debate one that at times borders on the absurd. Because of the emotionally charged rhetoric involved, discussions about police review systems usually degenerate into arguments that involve several distinctive sides.

Even the explanations for police misconduct have tended to be disparate. For instance, the orthodox police explanation for police misconduct is the "rotten-apple theory" (i.e. only a few bad officers), while the more extreme "fascist-pig theory" (i.e. most officers are bad) is adopted by some police critics. In this thesis, police "misconduct" will be used as a general

19 Perez, supra, note 16 at 7-8. Police management is seldom seen to be a vociferous proponent of due process for officers.

20 Ibid. As noted by Seymour Lipset, "Why Cops Hate Liberals - And Vice Versa" in John J. Bonsignore et al., eds., Before The Law: An Introduction to the Legal Process (Boston: Houghton Mifflin Co., 1974) at 106 "Most liberals are ready to assume that all charges of police brutality are true."

21 Ibid. at 2.

22 Rodney Stark, Police Riots: Collective Violence and Law Enforcement (Belmont, California: Wadsworth Publishing Company, 1968) at 9-10 discusses the fascist pig theory; see also, Charles A. Reich, "Police Questioning of Law Abiding Citizens" in John J. Bonsignore et al., eds., Before the Law: An Introduction to the Legal Process (Boston: Houghton Mifflin Co., 1974) at 92-98 for a fascist perspective. Whitman Knapp (Chairman), New York Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, The Knapp Commission Report On Police Corruption (1972) at 6-7 stated the Rotten-Apple Doctrine has two premises: 1) to save the morale of the department you cannot recognize pervasive corruption; and 2) the public image of the department and general effectiveness requires a denial of systemic problems; Thomas Barker, "Peer Group Support for Police Occupational Deviance" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati: Anderson Publishing Co., 1991) 45-58 at 45-6 also identifies the "functional" explanation of police misconduct which is tied to the notion that misconduct occurs as a function of the occupation (i.e. deviance is a result of crime enforcement). Although Barker's concept is more related to an explanation for corruption
term to refer to actual or alleged police behaviour which violates criminal or quasi-criminal statutes, codes of conduct, or legitimately endorsed practice and procedure.\textsuperscript{23}

In the end, the police sometimes feel accountability expectations continually place them in a no-win situation. For example, there are concerns that frequent changes in policy, rules, regulations, and statutes make it difficult to maintain a knowledge and service level that will avoid complaints from the public.\textsuperscript{24} Further, increased legislation and constitutional demands in policing have made the job of a police officer much more difficult and demanding.\textsuperscript{25} The difficulty for the police is that increased regulation and enforcement generally broadens the groups that may be subject to control and interaction with the police, which can cause more resentment towards the police.\textsuperscript{26} Public demands and expectations that certain laws be enforced can also exacerbate the long-standing socio-economic marginalization of certain misconduct it can be applied to other forms of police misconduct.

\textsuperscript{23} As noted by Perez, \textit{supra}, note 16 at ch. 2, many of the terms or tests for misconduct are not easy to define or clear (e.g. use of force). Albert J. Reiss Jr., \textit{The Police And The Public} (New Haven: Yale University Press, 1971) at 141 categorizes misconduct as being of two kinds: 1) it is using unlawful means in enforcing law; or 2) it is engaging in unlawful conduct by violating laws which apply to everyone. David L. Carter, "Police Disciplinary Procedures: A Review of Selected Police Departments" in Thomas Barker and David L. Carter, eds., \textit{Police Deviance}, 2d ed. (Cincinnati: Anderson Publishing Co., 1991) 351-372 (Ch. 17) at 362 notes that misconduct can be either minor or serious. Herman Goldstein, "Administrative Problems in Controlling [sic] the Exercise of Police Authority" (1967) 58 \textit{Journal of Criminal Law, Criminology and Police Science} 160 at 162-4 distinguishes forms of police misconduct as follows: 1) abuse of police authority in dealing with a citizen; 2) breach of intra-departmental rules; 3) illegal or improper behaviour (i.e. had authority but used it improperly); and 4) individual v. departmental wrongdoing.

\textsuperscript{24} Brown, \textit{supra}, note 10 at 123.

\textsuperscript{25} Beckley, \textit{supra}, note 3 at 319. Not to mention the recent \textit{Charter} (cite, \textit{infra}, note 105) expectations, obligations and standards (which some assert are completely unrealistic) being imposed by the judiciary on the police in Canada.

\textsuperscript{26} Maloney, \textit{supra}, note 4 at 17-19; and the Oppal Commission, \textit{supra}, note 1.
groups, which, along with the enforcement of unpopular laws, can contribute to the complaints about, and isolation of, the police. Further, the police believe that media scrutiny, and an increased awareness of individual rights and redress in society, have contributed to an increase in the number of complaints against them. At a more basic level, the current "conservative" fiscal policies driving most governmental agendas have not only perpetuated, but exacerbated socio-economic cleavages in society making it impossible for the police to avoid conflict. Moreover, it must not be overlooked that much of police conduct is merely a reflection of larger societal goals, dispositions and expectations (e.g. "the war on crime"). In the end, the feeling is that no matter what an officer does, he or she will be criticized.

The striking feature about much of the debate and discussion that surrounds the issues of police accountability and review is that they are frequently based on untested assertions or uninformed opinions. For example, Perez recently reported that "[t]here has been a great deal of theorizing around the issues of civilian review, but precious little studying has actually been done that tells how it works in operation." Perez concluded that many of the arguments for and against civilian review of police conduct is "[l]ittle more than intuitive rhetoric", and the lack of research is almost embarrassing. Much of the discussion over police accountability

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27 Maloney, *ibid*.

28 *Ibid*.

29 Perez, *supra* note 16 at 227-9; *supra* note 1; also, R.S. Ratner and John L. McMullan, eds. *Criminal Justice Politics in Canada* (Vancouver: University of British Columbia Press, 1987).

30 *Ibid*.

31 Perez, *ibid* at 124.

32 *Ibid* at 123 and especially 277.
also falls into the "either-or" fallacy and fails to consider the valid grounds that exist between the poles.\textsuperscript{33} This is particularly so for some civilian review advocates who postulate that only complete external scrutiny will prevent misbehaviour, while police executives cling to the notion that only internal review will prevent misbehaviour.\textsuperscript{34} Perez neatly captures the state of affairs by noting that:

Analysis must necessarily begin by casting aside the silly, irrational, and almost hysterical arguments that each side has brought to the civilian review debate for decades.\textsuperscript{35}

Overall, the astute comment of Marshall regarding the sundry positions before a British Royal Commission into policing is also applicable to the general police accountability debate: "The detail was too scanty and the familiar homely note of grinding axes too pervasive."\textsuperscript{36}

The difficulty, as explained by Baldwin and Kinsey, is that any examination of police work must begin with an analysis of the confusions, simplifications, and misleading assumptions that persist in the debates over policing.\textsuperscript{37} For example, much of the accountability debate seems to operate on the assumption that police organizations are purely mechanistic, and that any accountability issues can be simply addressed by enacting or

\begin{thebibliography}{99}
\bibitem{} A. Alan Borovoy, \textit{When Freedoms Collide: The Case For Our Civil Liberties} (Toronto: Lester & Orpen Dennys, 1988) at 9-10 outlines this fallacy in relation to much of the discussion of issues in law.
\bibitem{} Perez, \textit{supra}, note 16 at 1.
\bibitem{} \textit{Ibid.} at 2.
\end{thebibliography}
modifying rules, policy, statutes, or training which will automatically result in a change at the
street level.\textsuperscript{38} Some civilian review advocates have failed to perceive the inherent paradoxes
that exist with respect to civilian review of police misconduct. In particular, the absolutist
notion of bestowing extensive powers on civilian agencies to tenaciously pursue police
misconduct, thereby creating a climate of deterrence and accounting, is out of step with
research that suggests granting similar broad powers to the police to create the same effect has
not been overly successful in the criminal justice system.\textsuperscript{39} Moreover, if the "blue wall" of
silence exists as is claimed, why would a police officer who refused to reveal information to an
internal police investigator be more inclined to make revelations to a civilian investigator?\textsuperscript{40}
Even more dramatic are recent findings that highlight the apparently mistaken assumption that
the civilian oversight of police misconduct will necessarily lead to an increase in public
satisfaction and higher rates of investigational and adjudicative substantiation of misconduct.\textsuperscript{41}
In Canada, Hann \textit{et al.}, concluded that the literature relevant to police governance and
accountability is "largely theoretical and prescriptive and has not been tested against the reality

\textsuperscript{38} Reiner, \textit{supra}, note 1 at 485.

\textsuperscript{39} Perez, \textit{supra}, note 16 at 6-7.

\textsuperscript{40} \textit{Ibid.} at 6.

\textsuperscript{41} See the recent findings of Landau, \textit{supra}, note 1; Perez, \textit{supra}, note 16; Statistics Canada
(Special Surveys Division), \textit{RCMP Public Complaints Commission Survey Analytical Report} (June,
1995); Susan Furlong, \textit{Survey of Complainants: Municipal Police Departments} (Prepared for The
Commission Of Inquiry Into Policing in British Columbia, 1994); Mike Maguire, "Complaints
Against the Police: The British Experience" in Andrew Goldsmith, ed., \textit{Complaints Against the
and Mike Maguire and Claire Corbett, \textit{A Study of the Police Complaints System} (London:
One of the objectives of this thesis is to identify the “reality” of actual behaviour relating to internal accountability practices in the R.C.M.P. In particular, the author will focus on internal R.C.M.P. practices relating to compelled or ordered statements from “regular members” (i.e. full-time police officers). The author does not accept the assertion of Ferguson and Rusen that an analysis of police discipline and accountability that focuses on methods and procedures is putting the cart before the horse, since time and resources should be spent on strategies for preventing police misconduct. It seems apparent that a detailed understanding of how an R.C.M.P. member is treated officially and unofficially relative to accountability investigations is a fundamental and mandatory exercise for determining the future success of preventative initiatives. It is futile to speak of preventing misconduct without also being certain about the actual process and practices faced by police officers accused of misconduct.

Accountability is usually dealt with as a "legal" problem, which, in Goldsmith’s view, is an inadequate response, primarily because it fails to take into account the organizational milieu, informal rules, culture, and sub-cultures of policing. This does not mean, however, that canvassing the legal response to misconduct is invalid, especially if it assists in revealing actual practices in the accountability process. In fact, in order to validate or criticize the accountability regime and practices in the R.C.M.P. dealing with ordered statements, it will be necessary to draw together several features that have not been previously considered by

42 Supra, note 1 at 76.


commentators. As Ratushny has warned, the law should not be assessed and modified on the basis of speculation, but should be rooted in the reality of practice, as well as principle.

In order to address the issue of compelled/ordered statements in the R.C.M.P. properly, it is necessary to elucidate not only the mechanisms of accountability and organizational culture of policing in general, but those of the R.C.M.P. specifically. It is also important that a better understanding of police management practices be developed, especially as they relate to accountability investigations generally, and the R.C.M.P. in particular. This thesis will contribute to the field of police accountability by providing an analysis not only of the theory, but the actual operation of accountability as it is applied in the R.C.M.P. Although R.C.M.P. members are "police officers," it cannot be assumed that the issues facing R.C.M.P. members in the accountability regime are necessarily the same as those facing other police officers. On the other hand, an examination of the R.C.M.P. accountability process will contribute to a better understanding of general accountability issues, and specific accountability issues in the R.C.M.P. framework. The value of examining ordered statements is that it provides a window through which to examine several of the premises informing the accountability debate (e.g. are members treated fairly?). Any findings with respect to ordered

45 For example, although works such as that of Gabrielle Scorer, The Royal Canadian Mounted Police: Complaints & Discipline (Draft Report Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) and, E.R.C. Discussion Paper 6, supra, note 3 provide a detailed review of the R.C.M.P. regime, neither gets below the surface to examine how the Force deals with requests for legal representation; how supervisors-investigators impact investigations; the education or knowledge of members about their rights and obligations; or the potential ways and means of intimidating members that are under suspicion.


47 See the comments in the "Foreword" of E.R.C. Discussion Paper 1, supra, note 12 (page unnumbered).
statements from R.C.M.P. members may also provide some insights for the general discussions surrounding policing and accountability.

3. **Ordered Statements**

As a preliminary matter, it is important to understand that the conduct of a member of the R.C.M.P. can be the subject of a myriad of investigative and adjudicative "accountability" mechanisms: first, a statutory/criminal investigation and adjudication; second, a "public complaint" investigation and adjudication; third, an "internal" (i.e. *Code of Conduct*) investigation and adjudication; fourth, an "administrative review" and/or "independent officer review" (investigation by a senior commissioned officer from another R.C.M.P. detachment or unit); and fifth an "independent case review" by a retired jurist or other distinguished citizen. To complicate matters further, a member's conduct can also be the subject of a civil action and adjudication process, as well as the investigative and adjudicative processes of other bodies with jurisdiction over an event (e.g. human rights commission, public inquiries, or Coroner's inquest).

The R.C.M.P., under the *Royal Canadian Mounted Police Act*, is statutorily empowered to implement "internal" investigations when it "appears" that one of its "members"

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48 Scorer, *supra*, note 45 at 6-18; *infra*, notes 49-51; see also the R.C.M.P. Admin. Manual ("A.M.") at XII, and R.C.M.P. "E" Division Operations Manual II.6.E.44.g.7., XII.4 and App. XII-4-1.

49 R.S.C. 1985, c. R-10 as am. by R.S.C. 1985, c. 8 (2nd Supp.) ("R.C.M.P. Act"). A "public complaint" investigation is conducted pursuant to Part VII and an "internal investigation" is conducted pursuant to Part IV, respectively, of the *R.C.M.P. Act*. 

has contravened the Code of Conduct.\textsuperscript{50} Further, the R.C.M.P. can require or compel a member to answer questions when conducting an internal investigation (known as "ordered statements").\textsuperscript{51} In other words, if a member refuses to answer questions during an internal investigation, the member can be given a direct "order" from a higher ranking officer (or other member in authority) to answer questions on the basis that a further refusal to respond will constitute a contravention of the Code of Conduct. That contravention, disobeying an order, will certainly lead to discipline, and possibly dismissal. Although required or ordered responses have statutory protection under the R.C.M.P. Act against use or receipt in certain subsequent adjudicative proceedings, the internal investigation is frequently inquiring into the conduct of a member that is also the subject of one or more of the "parallel" investigations and/or adjudications noted above.\textsuperscript{52} Prior to the statutory creation of required statements, the

\textsuperscript{50} Section 40(1) of the R.C.M.P. Act states: "Where it appears to an officer or to a member in command of a detachment that a member...has contravened the Code of Conduct, the officer or member shall make or cause to be made such investigation as the officer or member considers necessary..." (emphasis added). The Code of Conduct sets out the standards of conduct, performance, and duties of members of the R.C.M.P. and is found in Part III of the Royal Canadian Mounted Police Regulations, 1988, S.O.R./88-361 (as am. by S.O.R./89-581, S.O.R./90-182, S.O.R./91-177, S.O.R./91-338 and S.O.R./94-219) comprising the Regulations Respecting The Organization, Training, Conduct, Performance of Duties, Discipline, Administrative Discharge of Members, Efficiency and Administration and Good Government of the Royal Canadian Mounted Police.

\textsuperscript{51} Section 40(2) of the R.C.M.P. Act 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." These statements are also referred to as "duty," "administrative," "required," and "accountability" statements; see Clare Lewis, S. Linden & J. Keene, "Public Complaints Against Police in Metropolitan Toronto--The History and Operation of the Public Complaints Commission" (1986), 29 Criminal Law Quarterly 115.

\textsuperscript{52} Section 40(3) states: "No 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" (emphasis added). The author, as legal counsel to numerous members, has frequently encountered
Commissioner of the R.C.M.P., R.H. Simmonds (now retired), testified before a Legislative Committee that "ordered statements" enable the Force to "go out and get what you might call independent evidence"\(^53\) (\(i.e.\) direct and/or derivative evidence) to use against the member.

The fundamental issue this thesis will endeavour to resolve is whether the R.C.M.P. is operating a modern day Star Chamber in which it can compel its members to answer questions, in private, without a formal charge, on the slightest of suspicion, and then, despite statutory assurances to the contrary, rely on the responses for investigative and/or adjudicative purposes.

Despite the breadth and scope of the debate over police accountability, an area which remains neglected, particularly in Canada, is whether or not police officers should be compellable to provide statements at the investigative stage of an allegation of misconduct.

Unlike the United States, to date there has not been any significant academic or constitutional discussion regarding compelled investigational statements from police officers.\(^54\) Occasional situations in which an allegation has lead to a criminal investigation, internal investigation, public complaint investigation, coroner's inquest, and/or civil suit. There is an ongoing debate whether in fact a member must be ordered or required to provide a statement before subsection (3) applies. The stronger position appears to be that members are inherently required to provide statements and therefore, subsection (3) automatically applies (see Chp. 7).

\(^53\) Canada, House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65, An Act to Amend The Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof, Issue no. 7 (27 November 1985) at 7:16.

reference is made to investigational statements from police officers in the Canadian literature, but there has been no indepth analysis of the necessity for such statements, functionally or constitutionally. Of note, however, is that the Marin Commission, in its 1976 report on management and discipline in the R.C.M.P., concluded that abandoning the practice of ordered statements would not alter the Force's ability to administer the organization. Despite

V. Hess, "Good cop-bad cop: Reassessing the Legal Remedies for Police Misconduct" (1993) 1 Utah Law Review 149; Marvin F. Hill and James A. Wright, "Employee Refusals to Cooperate in Internal Investigations: "Into the Woods" with Employers, Courts, and Labour Arbitrators" (1991) 56 Missouri Law Review 869; Jefferson Keenan, "Nonevidentiary Use Of Compelled Testimony And The Increased Likelihood of Conviction" (1990) 32 Arizona Law Review 173; Bryon L. Warnken, "The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination" (1987) 16 University of Baltimore Law Review 452; Luther G. Jones III, "The Privilege Against Self-Incrimination of the Public Employee in an Investigative Interview" (November, 1985) The Army Lawyer 6; and Paul West, "Investigation and Review of Complaints Against Police Officers: An Overview of Issues and Philosophies" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati: Anderson Publishing Co., 1991) at 373-404. Curiously, as we shall see, in the United States a police officer has more protection against the use of an ordered statement criminally (i.e. constitutional use and derivative-use immunity), while an R.C.M.P. officer has less protection criminally (i.e. statutory use immunity), but perhaps more protection in the civil and administrative context. In the United States the ordered statement and any derivative evidence cannot be used in a criminal proceeding against an officer, while the statement and evidence is available in disciplinary proceedings (Garrity v. New Jersey, 385 U.S. 493 (1967)). In Canada, it is not been conclusively ruled constitutionally whether compelled statements from members have use and derivative-use protection.

55 For example, Grant, supra, note 9; Maloney, supra, note 4. Maeve W. McMahon and Richard V. Ericson, Policing Reform: A Study of the Reform Process and Police Institution in Toronto (Research Report of the Centre of Criminology, University of Toronto, 1984) at 57 reported that the group Citizens' Independent Review of Police Activities (C.I.R.P.A.) complained that statements by police officers could not be used in court because of new legislative restrictions. Previous limited work by the author has now been overtaken by recent case law, see, Craig S. MacMillan, "Lilburn in Uniform?: A Charter Analysis of "Ordered Statements" Under the R.C.M.P. Act" (1993) 2 Dalhousie Journal of Legal Studies 93. More recently, however, as noted by Ferguson and Rusen, supra, note 43 at 200-1, the issue of compelled statements and testimony in police misconduct matters came to the fore in British Columbia during negotiations to institute a new accountability regime for municipal police officers.

56 Canada, Commission of Inquiry Relating to Public Complaints, Internal Discipline, and Grievance Procedures within the Royal Canadian Mounted Police (Ottawa: Information Canada, 1976) (Chair: Rene Marin) at 153 ("Marin Commission"). At the time of the Marin Commission,
this observation, ordered statements became statutorily enshrined. One of the problems with ordered statements from suspect officers is that, like police interviewing practices in general, they are for the most part shrouded in mystery.\textsuperscript{57} This thesis will attempt to remove some of the mystery surrounding ordered statements in the R.C.M.P.

Ferguson and Rusen outline three options to deal with compelled statements from police officers in misconduct investigations: first, that there be no authority to compel answers by the investigator (\textit{e.g.} Nova Scotia); second, provide authority to compel answers, based on the employer's (and/or public's) "right to know," but attempt to protect the statement from being used in civil, criminal, or disciplinary proceedings (\textit{e.g.} R.C.M.P.); and third, an officer is compelled to participate in an investigation and any statement can be used in disciplinary proceedings, but not criminal proceedings (\textit{e.g.} United States).\textsuperscript{58}

The employer's "right to know" is the usual premise upon which the need for ordered statements is asserted.\textsuperscript{59} More generally, however, it is also noted that the police frequently function in isolated or low visibility situations where there is an absence of witnesses which

\begin{itemize}
\item ordered statements were sanctioned under policy, but not legislatively.
\end{itemize}

\textsuperscript{57} Joyce Miller, \textit{The Audio-Visual Taping of Police Interviews With Suspects and Accused Persons by the Halton Regional Police Force} (Summary Evaluation Paper prepared for the Law Reform Commission of Canada) (Ottawa: L.R.C.C., 1988) at 2 notes that what really transpires during police interviews is not widely known. This is certainly the case with ordered statements in the R.C.M.P.

\textsuperscript{58} Supra, note 43 at 200-1.

\textsuperscript{59} Minutes of Proceedings and Evidence, \textit{supra}, note 53, Issue no. 11 (10 December 1985), at 11:114, Commissioner Simmonds asserted that it was not "...unreasonable to expect an accountability statement from a member of the force as to what he had done during his tour of duty."
can make it difficult to reconstruct the interaction. Commentators also refer to a number of additional factors that can make it difficult to control and investigate police misconduct, including: the inherent adversarial nature of police work; the perceived insensitivity of officers that stems from dealing routinely with crises/complaints; the absence of adequate guidelines or policy for officers; questionable, yet accepted police practices; the atmosphere of duplicity, hypocrisy, and ambiguity that pervades society; the fear of liability by officers, departments and governments; the concern of officers regarding the repercussions of an "internal" or public complaint; and, of course, the "blue wall" behind which police officers do not incriminate themselves or each other. The more extreme assertion is that the blue wall hermetically envelops individual officers accused of misconduct, making it virtually impossible to conduct an investigation or hold them accountable. In reality, the situation is much more

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complicated. A bare blue wall assertion demonstrates a fundamental misunderstanding and lack of familiarity with investigations and internal workings of police forces, especially the R.C.M.P. For example, those who represent police officers say that police departments, including the R.C.M.P., can be absolutely ruthless, abusive, vindictive, and uncompromising in their treatment of officers/members, especially those accused of certain misconduct. An examination of the ordered statement process will assist in determining what exactly is occurring internally in the R.C.M.P.

It is rather paradoxical that many police observers and critics readily accept the proposition that the police routinely abuse their authority and engage in improper activities, particularly when questioning civilians, but do not seem to consider impropriety as a remote possibility when the police are permitted to question their own officers, without any, or very little, public scrutiny. On the other hand, some believe that the police should be trusted and

63 See, Joey Thompson, "Heavy-handed RCMP Sting" in The Province, 29 March 1996 at A14-A15 for an outrageous example of the abusive lengths internal R.C.M.P. investigations can be taken. See also, Marin Commission, supra, note 56; and Richard French and Andre Beliveau, The RCMP And The Management Of National Security (Institute for Research on Public Policy, 1979) for samples of managerial disposition. Among lawyers and others who represent members, the R.C.M.P. is often criticized for "eating its own."

left alone to do their jobs, be it internally to deal with misconduct or externally to deal with crime.\textsuperscript{65} This thesis will examine whether the concerns about general police interview practices have even greater application to the interview of suspect officers, especially when it can lead to further criminal, civil and administrative proceedings. This thesis will also consider whether, contrary to the popular perceptions of some, subject officers can not necessarily rely on, or trust, their departments' to treat them fairly and properly during misconduct investigations.

It appears that some commentators have too readily adopted a perspective that is primarily managerial or community oriented and insufficient consideration is truly given to the possibility that police officers are not fully and adequately protected when an allegation of misconduct is filed.\textsuperscript{66} As Maloney found in his inquiry into the practices of the Metropolitan Toronto Police, during the "hue and cry" over an allegation of police misconduct, treating the officer \textit{fairly} is often overlooked; allegations against officers, even if eventually determined to be unfounded, can have a very serious impact on a career (\textit{e.g.} suspensions without pay) and impose intense psychological pressure.\textsuperscript{67} Much of the literature on police misconduct does not

\textit{Accused And The Admissibility Of His Statements} (Study Paper for Law of Evidence Project) (Ottawa, 1973).

\textsuperscript{65} Ratushny, \textit{supra}, note 46 at 42 raises the view that some believe the police do not need to be closely monitored. More generally, see the position of police executives, \textit{supra}, note 1, in particular as it related to the Oppal Commission.

\textsuperscript{66} For example, see Berger, \textit{supra}, note 9.

adequately address the personal, professional and organizational isolation and marginalization a police officer can experience when an allegation of misconduct is made against him or her.

Police organizations are paramilitary, highly status oriented, self-protective and rigidly bureaucratic, and these characteristics are not likely to be sensitive to the individual interests of operational line officers. The fact that centralized disciplinary processes are closely associated with a punishment-oriented bureaucracy makes it important to consider the true role of punishment and the conduct of management in the context of policing generally.68

Goldsmith submits that changes in the police complaints procedure, including, in the author's view, the actual workings of the process, are of interest to police scholars on discrete technical grounds, grounds related to individual liberties, as well as broader socio-political issues of police accountability.69 Because police discipline is justice and punishment based, it is generally agreed that procedures are needed to ensure police officers are adequately protected. As a paper for the R.C.M.P. External Review Committee ("E.R.C.") (the civilian agency with limited jurisdiction to review internal R.C.M.P. matters) notes, much of the dialogue about discipline, inside and outside police agencies, is about the adequacy of these critical stress events. For psychological effects of allegations generally, see Jennifer M. Brown and Elizabeth A. Campbell, *Stress and Policing - Sources and Strategies* (Essex, England: John Wiley & Sons, 1994); Richard M. Ayres and George S. Flanagan, *Preventing Law Enforcement Stress: The Organization's Role* (The National Sheriffs' Association and Bureau of Justice Assistance, 1990); Philip Bonifacio, *The Psychological Effects of Police Work: A Psychodynamic Approach* (New York: Plenum Press, 1991); and A. Daniel Yarmey, *Understanding Police and Police Work: Psychosocial Issues* (New York: New York University Press, 1990). Anyone who lightly dismisses the ramifications of a complaint against an officer, even if it is groundless, have never been the subject of a public complaint.


69 *Supra*, note 44 at 60.
As Ratushny observed in relation to existing practices of the police in the criminal context, there are several inadequacies in permitting unacceptable interrogation when there is ineffective restraint in the current law.

It may be that the legislative and public responsibilities of police departments fundamentally alter the traditional notion of the employer's "right to know." It may also be questionable whether the orthodox employer-employee analysis can be purely applied in the police accountability context given the overlapping and conflicting demands that must be addressed. There is little doubt that the interests of police officers must be balanced against employer and public interests, but as identified by Herzig, constitutionally that balance must tip in favour of officers because our system cannot justify "watered-down" rights merely because misdeeds seem morally more egregious or are committed in a certain occupational category.

The unsettling feature of the discussion on ordered statements in the R.C.M.P., to the extent that there has been any, is that it appears to be mostly one-sided from a managerial perspective. Some comment comes from the R.C.M.P. Public Complaints Commission ("P.C.C.") (the civilian oversight body for public complaints involving the R.C.M.P.). The P.C.C. has moved from a position in which it asserted that R.C.M.P. members should, as a

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70 Discussion Paper 4, supra, note 12 at 6-7; David L. Carter, "Theoretical Dimension in the Abuse of Authority by Police Officers" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati: Anderson Publishing Co., 1991) 197-218 at 209-11 outlines the differential containment strategies that police departments employ to deal with police misconduct: 1) personnel selection; 2) training (recruit and in-service); 3) performance evaluations; 4) open complaint and internal investigation system; 5) public information and evaluation; 6) trouble shooting and preventative programs; and 7) policies, procedures and organizational control.

71 Supra, note 46 at 234.

72 Supra, note 54 at 441.
matter of policy, be required to be available for questioning by the P.C.C., to demanding it as a substantive position.\textsuperscript{73} It has been asserted by the P.C.C. that the failure of members to account for themselves or provide statements in relation to public complaints "brings the police into disrepute."\textsuperscript{74} In fact, the P.C.C. seems to be critical of the fact that ordered statements cannot be utilized against members in internal or other proceedings; a rather surprising position for an entity that purports to be committed to fairness for civilians \textit{and} members.\textsuperscript{75}

Most recently, the (former) Chair of the P.C.C. has shown that he is prepared to make adverse findings against members if they do not speak or give statements to the P.C.C.\textsuperscript{76} It may be that the P.C.C. has not fully considered the implications of a compelled statement for a member or whether it makes a difference to the final result, especially when members are compellable to attend and testify at a P.C.C. hearing. This thesis will set out the operational members perspective on this issue.

Aside from the P.C.C. agenda for ordered statements, there are also concerns over the manner in which such statements are used investigationally by the R.C.M.P. There are issues to be examined over the various uses to which ordered statements can be put, who has access, and what protections exist in practice, not just theory. There are rules prohibiting the use or

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\textsuperscript{73} Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1988-89} (Minister of Supply and Services, 1989) at 89. This position is ironic in that seldom does the P.C.C. itself conduct "investigations" \textit{per se}. Generally, the P.C.C. relies on the R.C.M.P. investigation into the public complaint.

\textsuperscript{74} Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1989-90} (Minister of Supply and Services, 1990) at 87.

\textsuperscript{75} \textit{Ibid.} at 83-4.

\textsuperscript{76} Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1992-93} (Minister of Supply and Services, 1993) at 35-6.
receipt of an ordered statement in proceedings, but as recently pointed out by the British Columbia municipal police chiefs, this protection is really a legal fiction for three reasons: first, disciplinary and criminal investigations are undertaken at the same time; second, in many instances the investigations are conducted by the same investigator or unit; and third, the information garnered from the statement can be relied upon to further the investigation or prosecution, either internally or externally. The purported protection of compelled statements may be illusory.

It may be that the purported protection under s. 40(3) of the R.C.M.P. Act for compelled responses is ineffective because the answers/statements may be directly or derivatively used by investigators to conduct investigations, not to mention the various applications the responses can have in preparing criminal, internal, and public complaint cases or prosecutions. It also appears that compelled statements may be used to question credibility at a hearing despite the non-use protections. The police and prosecution also have relatively new disclosure obligations in criminal cases that may override the purported protection. The fundamental problem for the member is that there is no control over the statement after it is compelled, regardless of any statutory protection.

Ratushny adroitly observed that "the great advantage of custodial interrogation from the police point of view is that it will usually occur before the suspect has had an opportunity to

77 Supra, note 43 at 202.


obtain legal advice." Like most criticism of pre-trial practices and procedures regarding police interviews, it may be that the current R.C.M.P. regime is ineffective in restraining improper investigative or agency misconduct during internal investigations. Aside from the possibility of improper admissions/confessions, the investigator is also placed in an impossible position by having obligations to protect the public, agency, unit, subordinate, member and personal interests, which does little to enhance the integrity of the system. It should also be noted that the pressure to obtain a statement may be the greatest when a member is the most vulnerable organizationally, physically and mentally (e.g. post-shooting).

There are a number of questions surrounding compelled statements that will be canvassed in this dissertation. Do R.C.M.P. members have adequate representation or access to counsel during an investigation or compelled interview? Are members being subjected to investigations and questioning without the benefit of counsel? Are compelled statements adequately monitored to avoid abuse? Are members educated and knowledgable regarding the accountability process? How does the public duty of the police to deal with misconduct relate to its treatment of suspect members? Is there adequate redress for members internally and externally? What use is being made of compelled statements? Is the statutory protection for ordered statements viable? This thesis will provide a vehicle to address many of the above issues and also critically evaluate many of the assumptions that are operating with respect to

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80 Supra, note 46 at 111. For example, at least one member advised the author that after a shooting it was apparent that investigators were deliberately trying to obtain a statement before the member obtained legal counsel. Even more disturbing was a comment to the author of a non-commissioned officer responsible for handling requests for funded counsel (i.e. paid for by the R.C.M.P.) that suspect "members should not be eligible for counsel merely because they are being asked to provide a criminal statement."

81 Ibid. at 254-4 pointed out these shortcomings in relation to criminal police interrogations.
the accountability process as it pertains to compelled statements from R.C.M.P. members. It is important to have answers to these issues because they directly address the question of whether members are treated fairly under the current process as is generally claimed. More importantly, addressing these issues may identify what improvements, if any, are required in the current R.C.M.P. regime. Another feature to be considered that is central to issues of accountability and ordered statements is the employment context of police officers.

4. Employment Context

As noted by Hill and Wright, a recurring fact pattern in any employment situation is the possibility of an employee being interviewed by management in conjunction with an investigation of some form.82 It has also been generally asserted that forcing "public employees" to answer for their conduct under pain of losing their jobs is not essentially different from the problem confronting a private employee in a similar predicament.83 This thesis will consider whether the just-like-any-other-employee approach is fundamentally flawed in the policing context because it fails to consider the complex authority, duty, responsibility and accountability regime that exists within the police public sector. Moreover, does the fact that policing duties place officers in adversarial roles with individuals or groups in society call into question some of the basic employment assumptions?

Policing, as poignantly noted by Reiss, operates in a setting that is unlike any other

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82 Supra, note 54 at 869.

83 Henry J. Friendly, "The Fifth Amendment Tomorrow: The Case For Constitutional Change" (1968) 37 University of Cincinnati Law Review 671 at 707; Borovoy, supra, note 33.
profession:

Patrol work usually begins when a patrol[officer] moves onto a social stage with an unknown cast of characters. The settings, members of the cast, and the plot are never quite the same from one time to the next. Yet the patrol[officer] must be prepared to act in all of them.84

It is probably safe to assert that, due to the nature of police work and the authority exercised by police officers, an individual officer, unlike any other private employee or public servant, is more likely to be thrust into situations that will lead to allegations of misconduct.85 It cannot be ignored that police officers are frequently involved in direct conflict with their "clients" and are called upon to use force as part of their job.

Some authors feel that public employees should be in exactly the same position as private employees, in that statements to a private or public employer should be equally obtainable. Others argue that the particular occupational community (i.e. police/military), and mission of a public agency, supports a much narrower reading of protections for public employees as compared to private employees (i.e. no protection against self-incrimination or right to silence).86 This line of argument is very interesting, especially when it is contrasted

84 Supra, note 23 at 3. As Bouza, supra, note 37 at 5 more dramatically states, "Cops deal with people who are in trouble or disarray and are most comfortable in that role. They are invited not to festivals or happy events, but to brawls. They observe the human animal's dark underside. Cops get called to control nasty instincts and to curb wicked appetites. They are summoned when things get out of hand. They fly from problem to problem, chasing the calls a crackling radio spews out. In order to deal with hurt children, blood, human misery, and anguish..."


86 For the "same position" view, see Akhil Reed Amar and Rennee B. Lettow, "Fifth Amendment First Principles: The Self-Incrimination Clause" (1995) 93 Michigan Law Review 857 at 905-6. Folk, supra, note 54 at 12 notes the narrower rights view for public employees. As a corollary, it is also accepted that the police are more deserving of punishment than others because officers assume a higher level of responsibility to operate within the law by joining a profession
with the repeated assertions that the police have never been recognized in law or tradition as being distinct from the general population.\(^{87}\) The hypocrisy of arguing that police officers are citizens while providing them with less than equal, or adequate, protection in the accountability regime is not lost on the rank-and-file.

It is clear that accountability in public employment involves the clash of several interests: first, the interest of the public employer in receiving information regarding the performance and conduct of an employee; second, the requirement of accountability by the public employer to the public, external review bodies (e.g. Police Board), and ministers (e.g. Attorney General), burdens which a private employer does not have; third, the importance of maintaining employee relations; and fourth, the public employee, like everyone else, has an interest in being treated fairly and protected against self-incrimination.\(^{88}\) As Herzig points out, the main concern for the police department is the ability to conduct an internal investigation and exercise managerial control, while maintaining the integrity of the department.\(^{89}\) For members that are involved in a serious incident, even when they have acted properly, their main concern is self-preservation in the face of what can become an accountability onslaught.

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\(^{87}\) Reiner (1978), *supra*, note 16 referring to the comment of the British Royal Commission on the Police, 1929, also quoted in the British Royal Commission on the Police, 1960 Report at 10. Of course, in 1829, it was one of Peel’s Principles that "the police are the public and the public are the police." This is also part of the Community-Based Policing approach; see, Herman Goldstein, *Problem-Oriented Policing* (Philadelphia: Temple University Press, 1990); and David Bayley, *Police For The Future* (New York: Oxford University Press, 1994).

\(^{88}\) Jones III, *supra*, note 54 at 10 identifies some of these issues.

\(^{89}\) *Ibid.* at 440.
As noted by Hill and Wright, although public employees may have every right to protect themselves from criminal charges by not providing statements, they should not expect job tenure when they refuse to cooperate in their employers' legitimate investigations.\textsuperscript{90} The concern is that a government agency should not have to rely on the investigation of an outside authority when the agency's credibility and accountability to the public is at stake.\textsuperscript{91} The question is whether a police employee should have reduced, equal or greater protection. As Griswold points out: "It is easy to make the glib assertion that no one has a constitutional right to a public job. But that does not approach the real issue."\textsuperscript{92}

Based on the multifarious accountability investigations and adjudications that can arise, this thesis will examine whether the consequences for a police employee when an allegation of misconduct is made are markedly different and more far reaching than for a private employee, which demands a more sophisticated response than has been generally found in the literature and theory on police or employee accountability. This is especially so when the complexity of most accountability regimes for police misconduct and the police employment context are taken into account.

It has been argued that public employees accept the duties and encumbrances of being a public servant when they accept employment. This view was directly asserted in relation to R.C.M.P. members when the Supreme Court of Canada held in \textit{R. and Archer v. White} that a

\textsuperscript{90} \textit{Ibid.} at 925.

\textsuperscript{91} \textit{Ibid.} at 887-88; Further, in their view, at least in the American context, refusing to answer questions after being ordered to do so and advised of use-immunity is a serious breach of duty and should not be tolerated by management.

\textsuperscript{92} Erwin N. Griswold, "The Right to be Let Alone" (1960-61) 55 Northwestern University Law Review 216 at 225.
member has, by "voluntarily" joining the Force, entered into special conditions and submitted to certain restrictions in matters of discipline.\textsuperscript{93} Further affirmation of the voluntary acceptance argument is found in \textit{Re Trumbley & Fleming}, where the Ontario Court of Appeal found that:

The police officer has voluntarily accepted a vocation entailing duties which are peculiar to it and essential to its proper performance, duties to which ordinary citizens are not subject.\textsuperscript{94}

The question is whether the foregoing assertions are valid. First, the voluntary acceptance analysis fails to acknowledge that the public employer, particularly in policing, can unilaterally amend or change the "conditions of employment" by amending legislation pertaining to codes of conduct and how officers will be held accountable. For example, a police department may have no requirement for compelled statements when the officer is engaged, but the government could subsequently enact legislation to provide for compelled investigative statements. It can be argued that in 1986, the enactment of new legislation dealing with complaints and investigations in the R.C.M.P. fundamentally altered the conditions of employment for members. Is it realistic to assert that a member accepted these new terms of employment? Alternatively, is it practical, perhaps after investing years in a career, to assert the member can either accept the changes or resign? While any private (e.g. constructive dismissal) or public employees can potentially face unilateral changes in


employment by an employer, such changes do not usually deal with complex and multiple layers of imposed accountability. While changes to employment conditions and their voluntary acceptance may not be unique in policing, the form and nature of the changes in policing may be. It is also assumed that the rank-and-file have an effective say in changes to the employment and accountability regime. In relation to the R.C.M.P. this assumption may be suspect.\footnote{For example, the Commissioner of the R.C.M.P. has recently enacted new \textit{Commissioner's Standing Orders} which authorize the suspension of members without pay if they lose certain qualifications for employment (\textit{e.g.} drivers licence, weapons prohibition or access restrictions). A member receiving a six month licence suspension, even if it arose from a duty related activity, could suffer a loss of $25,000.00 in income. Penalties in excess of $100,000.00 or more are possible. See R.C.M.P. "E" Division, \textit{The Informer} (96/2) March 1996 at 3; R.C.M.P., \textit{Special Report}, November 1995 at 1-2.}

Second, there is an assumption that the police employee, when "voluntarily" joining the department, is fully apprized of, and knows, the rights that will be forsaken and obligations undertaken when employment is accepted. The general theory in employment law is that employers have a central role in advising employees of their responsibilities, duties, and codes of conduct before they accept a job.\footnote{See, James R. Redeker, \textit{Discipline: Policies And Procedures} (The Bureau of National Affairs, 1983) at 6-7. More generally, see Innis Christie, Geoffrey England and Brent Cotter, \textit{Employment Law in Canada}, 2d ed. (Toronto: Butterworths, 1993); and Norman Grossman, \textit{Federal Employment Law in Canada} (Toronto: Carswell, 1990).} Employees must have adequate notice of the employer's expectations prior to disciplining to ensure due process and acceptance.\footnote{Redeker, \textit{ibid.} at 6-8.} Obviously a police department has a duty to ensure prospective officers are informed of the conditions of employment prior to "voluntarily" joining. The question is whether this is in fact done. This thesis will determine whether, at least in relation to the R.C.M.P., these basic theoretical
premises, which have not been questioned in the literature, are valid. It may be patently false to assume that members are knowledgeable of the accountability regime even after they are employed.

There are a number of issues surrounding the employment context of R.C.M.P. members that will be examined in this thesis. Are prospective recruits informed of their employment obligations in relation to accountability and discipline during the application process? Are recruits informed of their obligations and rights under the accountability framework at the time of engagement? Are members provided with in-service training regarding the accountability framework? What form of employee representation do members have? Is the form of employee representation effective in dealing with discipline matters? Do members have greater, the same or fewer rights than other employees when under investigation? Given the employment context, what protection should members have when giving statements?

5. Constitutional Considerations

As alluded to above, compelled statements from police officers also raise fundamental constitutional issues regarding self-incrimination, silence, the right to counsel, and the role that a public employee should play in establishing a case for the state, be it criminal, internal, or public. Unfortunately, the limited judicial and administrative interpretations of the statutory protection provided for compelled statements under the R.C.M.P. Act have been divergent,

98 Ratushny, supra, note 46 at 1 points out that self-incrimination in general brings up broad issues of suspect-participant involvement, cooperation, detained questioning and admissibility of statements.
contradictory and less than clear.99

Hill and Wright observed that in the United States the courts have distinguished between the "liberty" interest in the criminal context and the "property" interest in the public employment context.100 It has been asserted that a police officer's claim of protection against incrimination for compelled statements is frivolous since it only protects against compulsion and use of such statements by the government in criminal cases, not administrative cases or civil cases by private citizens.101 Procedurally, it has also been claimed that providing protection against self-incrimination would place too great a burden on disciplinary and administrative proceedings; as well as fundamentally disabling the ability to examine low visibility decisions and interactions between the police and public.102 Such observations, however, do not seem to consider the context or repercussions for the police employee adequately.

The development of protection against self-incrimination has been of interest to lawyers and historians alike.103 In fact, protection against incrimination has been conceptualized in a


100 Supra, note 54 at 896.

101 Michael Avery and David Rudovsky, Police Misconduct: Law and Litigation (New York: Clark Boardman Co., 1980) at 6-14.1 are speaking of the Fifth Amendment under the American Bill of Rights. However, this analysis is also generally applicable in Canada in the wake of Wigglesworth, infra.

102 Folk, supra, note 54 at 5; Perez, supra, note 16; supra notes 41 and 61.

number of ways. There are historical and etiological debates on whether self-incrimination is a privilege, principle, right, rule, cliche, fiction, or myth. According to Professor Ratushny, prior to the *Canadian Charter of Rights and Freedoms* it was clearly established that protection against self-incrimination was not functionally operative at the pre-trial or investigative stage in the sense that it did not operate to produce a result in a particular case. Although it was judicially acknowledged that an accused could not be compelled to testify at a criminal trial, it had become generally permissible to compel evidence from an accused through other proceedings, which prompted Ratushny to observe that "The incriminating consequences to an accused...are obvious, even if the testimony cannot be used at the criminal trial." With a few exceptions, it was accepted that "witnesses" were generally compellable

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106 Supra, note 46 at 65-66.

to testify at non-criminal proceedings, even if criminal matters were outstanding.

The issue of compellability and statements was rejuvenated recently by Supreme Court of Canada decisions under s. 7 of the Charter regarding incrimination, silence, and evidential immunity. The Supreme Court of Canada held in R. v. Wigglesworth that proceedings of an administrative nature (i.e. discipline) instituted for the protection of the public were not the type of "offence" proceedings to which s. 11 of the Charter applied.\(^{108}\) The Supreme Court indicated two circumstances in which someone can invoke the protections under s. 11: first, where the proceeding by "its very nature...is a criminal proceeding"; or second, in a situation where a finding of guilt "may lead to a true penal consequence."\(^{109}\) 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."\(^{110}\) It appeared the door was constitutionally opened for the use of compelled statements in disciplinary investigations and proceeding, however, Wilson, J. declared that s. 7 may provide constitutional protection where s. 11 is not available.\(^{111}\)

\(^{108}\) [1987] 2 S.C.R. 541 at 560; M. Eberts, "Section 7 of the Charter Plus Natural Justice Section 11," in N.R. Finkelstein and B.M. Rogers, eds., Administrative Tribunals and the Charter (Toronto: Carswell, 1990); B.M. Rogers, "Charter Limits on Administrative Investigative Powers," in N. Finkelstein and B.M. Rogers, eds., Administrative Tribunals and the Charter (Toronto: Carswell, 1990); and Tim Quigley & Eric Colvin, "Developments in Criminal Law and Procedure: The 1989-90 Term" (1991) 2 Supreme Court Law Review 187. Section 11(c) of the Charter, for example, states that "Any person charged with an offence has the right...not to be compelled as a witness in proceedings against the person."

\(^{109}\) S.C.R., ibid. at 559.

\(^{110}\) Ibid. at 561.

\(^{111}\) Ibid., at 562. Section 7 of the Charter states that "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
In *Thomson Newspapers Ltd. v. Canada (Dir. of Investigations and Research)* the Supreme Court, although deeply divided, did manage in several disparate sets of reasons, to indicate that compulsory testimony or questioning in the regulatory context by the state does require some form of use, derivative-use, or discretionary-use immunity under s. 7 of the *Charter*.  

Recently, in *British Columbia (Securities Commission) v. Branch*, the Supreme Court appeared to settle on a derivative-use immunity where an individual is compelled to testify or otherwise investigatively conscripted to produce evidence.  

Derivative-use immunity supplements use-immunity (*i.e.* cannot use statement/testimony) by preventing the use of evidence derived from a statement/testimony (*i.e.* evidence that could not have been located or appreciated but for the statement/testimony) to establish a case/prosecution. In addition, the Supreme Court also recognized an immunity from testimonial compulsion in certain limited circumstances. Other aspects of fundamental protections such as the right to silence, right to counsel, and disclosure have also been the subject of *Charter* decisions that may have application to compelled statements.  

This thesis will also explore the implications of fundamental justice."


these constitutional developments will have for police accountability, internal investigations, and compelled statements.

Constitutionally, there are a number of concerns regarding compelled statements, parallel processes, and subsequent proceedings as they pertain to R.C.M.P. members. As already alluded to, there are numerous advantages and non-evidentiary uses to which compelled statements can be applied by the department. For example, compelled statements can provide backdoor access to material that would otherwise be unavailable in the criminal, disciplinary, administrative, and civil processes; it enables investigators to direct their inquiries and tactics; it can assist other government and non-government bodies by providing names, evidence, or strategies (e.g. tactically enables prosecutors to prepare cases); it may provide a means to respond inappropriately to public pressure or provide considerable publicity; it could be abused by management; or merely permit fishing expeditions. Moreover, as noted above, parallel proceedings usually do not identify the person formally as an accused, but as witness, which eliminates some of the protections provided to those called to testify criminally. In fact, it may be that the burden of proof and presumption of innocence are being effectively undermined by coercing employees to answer questions. Although

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115 See Kristine Strachan, "Self-Incrimination, Immunity, and Watergate" (1978) 56 Texas Law Review 791 at 807-9; and Herzig, supra note 54 at 428.

116 Ratushny, supra, note 46 at 349-50 points out some of these criticisms in relation to the limitations under the Canada Evidence Act provisions permitting questioning of "witnesses."

117 Ibid. at 348.

118 Hill and Wright, supra, note 54 at 890-4 note that arbitrators are more concerned about the validity of statements than self-incrimination (Fifth Amendment) issues, but it has been held that a refusal to answer is justified because the company is trying to shift the burden of proof. Arbitrators in the U.S. now seem to accept that the Fifth Amendment does not apply to internal processes.
internally compelled statements may not be functionally occurring in the "criminal" or "judicial" context, such statements are an officially sanctioned state process, and members should not be denied significant constitutional and judicial protections.

This thesis will examine whether the use of compelled internal statements from R.C.M.P. members can constitute a violation of the basic tenets of constitutional law in Canada. Reaching beyond the facade of the employer-employee and criminal-true penal consequence rationalizations, it is clear that compelled statements inherently raise theoretical, legal and policy questions about the ability of the state to invade protections against incrimination and the right to silence of members.\(^\text{119}\) The author will explore whether, in accordance with Branch, compelled investigational statements in the R.C.M.P. will be accorded not only use, but also derivative-use immunity. It will be necessary to determine, therefore, whether compelled statements, for the purposes of s. 7, involve liberty interests, derivative evidence, and expose members to sanctions. Even more interesting is the prospect that members, in certain circumstances, may now be constitutionally exempt from the compulsion to provide answers based on the real "predominant purpose" for compelled statements under the \textit{R.C.M.P. Act}.

If compelled statements are to be sustained, use and derivative-use immunity, whether statutorily (\textit{i.e. R.C.M.P. Act}) or constitutionally based, must mean that the state is no better off, and the member/accused no worse off, strategically, by the compelled statement.\(^\text{120}\) In other words, use-immunities, to be effective, must extend beyond preventing the formal

\(^{119}\) \textit{Ibid.}, Herzig at 402 argues that the U.S. courts should equate testimony arising from the coercive techniques of an internal affairs unit with a judicial order to compel testimony.

\(^{120}\) \textit{Ibid.}, this concept comes from Herzig at 438 in footnote 168.
introduction of evidence into a proceeding to include the non-evidential uses to which statements can be applied. If, as has been suggested by some, no statements or questioning should be permitted by the police in the criminal context, because of the potential for impropriety by agents of the state, why should it be allowed in the internal police accountability context by the same state agents who are responsible for the criminal investigation?\textsuperscript{121} While the author does not endorse eliminating interviews by the police, it may be that the concerns that motivate arguments for circumscribing police interviews generally also apply to internal interviews. The fact that in some instances the express object of the investigative stage criminally, which may equally applicable to internal cases, is to "isolate the suspect and gather evidence against him [or her] sufficient to support a successful prosecution."\textsuperscript{122} Further, it is not unfair to assert that police investigations depend upon, to some degree, a misapprehension by the individual, even a police officer, of his or her legal position.\textsuperscript{123} In other words, an investigator will usually not be forthcoming with all the evidence, before or during an interview, in the hope that the suspect will say something that can be used adversely before counsel makes an appearance. The critical factor to remember is that the police are typically result-oriented, whether it is a criminal, internal, or public complaint investigation. These contextual and functional considerations will be taken into

\textsuperscript{121} Francis C. Muldoon (Chair of Man.L.R.C.), "Comment on the Law Reform Commission of Canada's Law of Evidence Project Paper on Compellability Of The Accused And The Admissibility Of His Statement" (1974) 39 Manitoba Bar News 172 at 185 felt the difficulties with police interviews (i.e. lack of monitoring) meant there should be no interrogative statements taken by the police.

\textsuperscript{122} Supra, note 46 at 24. Given the inextricable connection between an internal, public, and criminal investigation, the criminal object naturally flows in the internal investigation.

\textsuperscript{123} Ibid. at 25.
account in the constitutional aspect of this thesis. The arguments for and against ordered statements will be analyzed in some detail.

6. Methodology

Like many areas of scholarly interest, conducting research on policing poses some unique and challenging issues. As alluded to earlier, despite the extensive literature on police accountability, there has been relatively little research in the area of ordered statements, a research situation this thesis will begin to address.

There are several reasons research in the area of police misconduct can be difficult. First, obtaining access to police departments, individual officers, or police records can be extremely difficult. In addition, as Goldstein notes, in the past, some researchers have not engendered a trust relationship, as some police perceive that the researcher is only interested in personal and research welfare. Goldstein points out, and the author of this thesis has personally observed, that researchers sometimes hold police officers in contempt, display


125 Reiner, ibid. at 484.

126 David Brown, "Complaints Against The Police: Some Problems of Research In A Difficult Area" (1986) 21 Research Bulletin: Home Office Research and Planning Unit 26 at 26. Bouza, supra, note 37 at 18 feels that "because the anti-intellectual world of policing is notably hostile to research, experimentation, or analysis" the police have been prevented from securing data and insight from scholars.

127 Supra, note 60 at 300-302.
condescension, and treat officers insultingly as if they are of low intelligence.\textsuperscript{128} In some instances, researchers have made promises that were never delivered on, or failed to provide feedback to the officers or department.\textsuperscript{129} It is also extremely difficult to know how police organizations operate internally without having personal insight or spending considerable time learning the intricacies of the organization. On the other hand, contrary to the experience of some, Bayley has reported that the police are not necessarily super-secret and reception to research can be good.\textsuperscript{130} As noted by Reuss-Ianni, however, it is often personal vouching by other officers for the researcher, or the trust that the researcher has developed with officers, and much to the surprise of some researchers, not credentials that permits \textit{real access} to departments, officers, data, and issues.\textsuperscript{131} There is little question though that police officers are suspicious by nature and will usually not speak freely unless the researcher is known and trusted.\textsuperscript{132}

A recurring issue for researchers, and this is particularly so for this author, is what to do with controversial or critical research findings. Some researchers have been circumspect in

\textsuperscript{128} \textit{Ibid.} Many of today's police officers, particularly in Canada, have considerable post-secondary education. When the author completed training in 1986, 22 of 27 members in the "Troop" had degrees. Today, there are numerous members in the R.C.M.P. who have M.A., M.B.A., LL.B. and LL.M. degrees. An undergraduate degree is common place.

\textsuperscript{129} \textit{Ibid.}

\textsuperscript{130} \textit{Supra, note 87.}

\textsuperscript{131} Elizabeth Reuss-Ianni, \textit{Two Cultures of Policing: Street Cops and Management Cops} (New Brunswick, New Jersey: Transaction Books, 1983).

their dealings with controversial police issues because of their desire to retain access to departments and individuals for further research. In other instances, some researchers have conducted inquiries surreptitiously, without the consent of senior officials, to obtain unfiltered research access. In Jefferson's view, however, there is no point in doing research if the researcher is not prepared to deal with controversial issues in policing. While Jefferson acknowledges that it is understandable for researchers to want to maintain access, it is his view that it is self-defeating to circumscribe research because of access repercussions since it is inevitably the controversial issues that are of concern. Further, as pointed out by Alderson, a former high ranking police official, the police have a duty to themselves and the public to enter into debates surrounding policing and policy issues.

In order to secure information and cooperation, researchers frequently provide officers and other parties with assurances of anonymity. As has been pointed out, publishing research findings without anonymity could damage an officer's reputation, lead to an officer's dismissal, or result in organizational acts of retaliation against the officer in the form of

133 Stark, supra, note 22 at iv notes this dilemma.


136 Ibid.

137 Supra, note 8 at 1-2.

departmental reviews, transfers, or formal and informal sanctions.\textsuperscript{139} In addition, complainants and officers involved in the accountability process usually provide information with some expectation of confidence and do not expect researchers to approach them about their complaints/files.\textsuperscript{140} Further, researchers must also be conscious of being perceived as connected to the police in general, management, rank-and-file, civilians or any other interest group.\textsuperscript{141} Although such perceptual difficulties can exist, for the author, as a police officer and representative of police officers, it would not hinder communication with the primary individuals to be interviewed; the rank-and-file. It has also been observed that referring purely to official records does not give a true indication of the actual experiences of the parties.\textsuperscript{142} The challenge then is not only to be able to access information, but also to ensure the information provides a meaningful context within which to make research observations.

In light of the foregoing observations, the author utilized several sources of information to consider the functional and legal validity of compelled statements. First, the author conducted a general review of the literature on policing, which was followed by a more detailed review of the specific literature regarding police accountability and the various internal and external mechanisms of review. Second, the author's own experience as a participant in the accountability process as a police officer, a former civilian investigator of public complaints against police, a lawyer defending and prosecuting police officers, and a student of

\textsuperscript{139} Supra, note 135 at 123. Research disclosures could also disrupt investigations or make the subject of a misconduct inquiry go underground.

\textsuperscript{140} Supra, note 126 at 26.

\textsuperscript{141} Ibid.

\textsuperscript{142} Ibid.
policing, has provided a foundation upon which to access, approach and consider many of the issues that will be addressed by this thesis. Although Goldsmith notes that police accountability research issues can be legitimately approached from a "pure" academic or "applied" perspective, the author, without necessarily accepting this distinction, is in the fortunate position of being able to merge both perspectives. The author's exposure to accountability from several different vantage points has given him an appreciation for and understanding of the organization, management, discipline, and cultures of policing that few authors have experienced. Further, in the tradition of the "Realists," Baker and Carter found that as former police officers they could more effectively relate to, and conduct, police research because they have known the frustrations of policing and experienced first hand the wrath of internal investigations. The author adopts this position, but would add that participant experience can also assist a researcher in knowing the right questions to ask and whether the information being provided is valid or merely representational. This is particularly so when, as Jefferson indicates, rarely does the relationship between the top and bottom in the police organization come under scrutiny, unless of course there is an almost

143 Supra, note 44 at 60.

144 Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati: Anderson Publishing Co., 1991) at 427; not to mention that as former police officers they are, from a practical research perspective, aware of the worst that humanity has to offer, as well as experiencing first hand the prejudices that can creep into one's perspectives. Most important, they have a much better perspective from which to consider accountability than persons not experienced in the process.

145 As we know from Peter K. Manning, Police Work: The Social Organization of Policing (Cambridge, Mass.: The M.I.T. Press, 1977) and Richard V. Ericson, Reproducing Order: A Study of Police Patrol Work (Toronto: University of Toronto Press, 1982), the police are fairly adept at representational strategies. A researcher can be easily duped by the police, either out of malice, deliberate deception, or just to "mess" with the researcher.
catastrophic incident. Although many authors have contributed greatly to our knowledge of police organizations and culture through studies and research, this author has lived within, investigated, studied, and intensively interacted with the paradigm under scrutiny, and can hopefully contribute some insights on issues that have not been considered or dealt with completely in previous work. This thesis will most certainly put the relations between the top and bottom in the R.C.M.P. under scrutiny.

Initially, the author intended to implement a detailed data collection process through formal structured interviews and surveys. However, in conducting pilot inquiries with members it became readily apparent that members became less open, more uncomfortable, and tended to self-edit responses, which significantly reduced the information flow. Repercussions from management were a constant concern for members. As a result, the third source of information for this study was obtained from a series of "informal" or semi-structured interviews developed as a qualitative method to obtain information from the various parties, primarily members, involved in the R.C.M.P. accountability regime. The purpose behind conducting less formalized qualitative interviews was threefold: first, to obtain important contextual information regarding policing and the actual conduct of internal investigations through the "lived experiences" of members; second, to reach past police administration

146 Supra, note 135 at 62.

"rhetoric" and general representational understandings of commentators and researchers regarding the accountability process and examine the sharp edge of application; and third, to get on record some of the real practices and procedures of accountability investigations in the R.C.M.P. which have not, to date, been adequately addressed in the literature. These interviews also provided a further means to interpret the literature.

Between September, 1995 and February, 1997, the author interviewed 107 members of the R.C.M.P. regarding the accountability, discipline and compelled statement process. The interview process was conducted in several forms. First, a number of members were interviewed generally in informal, work and other professional settings to obtain their experience and views regarding the accountability regime. These members were selected on the basis that they were individuals that the author came into contact with as a member or through other professional or informal contact. The author utilized a semi-structured interview format by soliciting answers from members as to their length of service, previous postings, experiences in the Force, whether or not they had been the subject of an accountability investigation, what training they had received regarding the process, and how knowledgeable they felt about the process. During these interviews the author also asked questions to assess certain basic knowledge levels of the member about the accountability regime in the R.C.M.P. (e.g. names/types of investigations, authority to obtain a statement, member rights/obligations during investigations, protection given to statements/comments during informal resolution of public complaints) (see Appendix A - Interview Guide). Based on these preliminary inquiries, the rest of the interview was guided by prompting members to discuss their experiences. For example, members were prompted to elaborate on personal experiences with the accountability

148 Ibid.
process and to discuss general or specific issues, matters, or cases that caused them concern or which they found positive with the accountability process. The interviews were not tape recorded, and although notes or key responses were taken during some interviews, in most instances more detailed notes were completed after the interview. The author found that trying to take detailed notes during interviews was distracting to both the author and member, and prevented the author from "actively" listening to the member. It also affected the quality and quantity of information from the member.

The author interviewed a total of 88 members under this informal or semi-structured interview format. The members in this sample ranged in experience from 34 years to recruits still on field training. In fact, one member, when interviewed, had just finished his second shift after graduating from the R.C.M.P. Training Academy. The members interviewed occupied the following ranks: constables (71), corporals (7), sergeants (4), staff sergeants (3), and inspectors (3). The length of service for constables ranged from just graduating from the Training Academy to 20 years, with a mean length of service of 6.6 years. Twelve of the constables interviewed were female (17%) and the remaining 59 (83%) were male. No females were interviewed above the rank of constable. The corporals ranged in service from 16 to 20 years service, with a mean length of service of 18 years. It should be noted that several fairly "junior" constables were promoted after they were interviewed, but the rank at the time of interview determined the member's category. Although a new promotion program in the R.C.M.P. came into effect during the interview process, with the result that more junior members of seven to ten years were being promoted to corporal, it did not impact on the interviews, except to the extent that several of the female constables who were interviewed were promoted after their interview which would have reflected in the number of females
interviewed at the corporal rank. Sergeants ranged in service from 19 years to 24 years, with a mean length of service of just under 21 years. Staff Sergeants ranged in service from 19 years to 34 years, with a mean length of service of 24 years. Inspectors ranged in service from 20 years to 32 years with the mean length of service being 24 years. Of the members interviewed, 98.5% were posted to an operational position including general duty, traffic, freeway patrol, specialized surveillance, or plainclothes investigation units. In fact, 84% of the members interviewed were working in uniform positions. Six of the members interviewed were charged criminally or internally and under suspension or involved in performance, medical or dismissal proceedings. Although the majority of members interviewed were caucasian, 15 (17%) of the 88 members interviewed were First Nations, Indo-Canadian, African-Canadian, Asian-Canadian or other persons of colour.

A second more purposive interview process was also employed which involved a more detailed examination of a number of various members who had direct involvement in matters that pertained to the research issues. Two groups were represented in this purposive sample: first, certain members were specifically identified and interviewed because of their direct involvement in the discipline and accountability process; and a second group of members were interviewed because they were currently posted in a position that was relevant to the research project (e.g. recruiting or training). The author completed notes during these interviews, which were done over the phone or in person, and included canvassing the experiences of these members, confirming or obtaining insights into the actual process, as well as revealing further problems or positive attributes regarding the accountability process. The author also asked specific questions about the process of taking, handling and use of compelled statements from members. In some cases these interviews were preceded by more in-depth written
correspondence (see Appendixes B-E) that set out specific points of inquiry or subsequent phone interviews that were conducted after responses were received to the author's written inquiry. A total of 15 members from the rank of corporal (1), sergeant (3), staff sergeant (7), inspector (2), and civilian (2) were interviewed who are directly involved in the accountability and discipline process. A total of four members from the rank of constable (1), sergeant (2) and inspector (1) were interviewed regarding recruiting and training aspects in the R.C.M.P. that have a bearing on issues in this thesis.

A third source of information and feedback arose out of professional and personal contacts, discussions, comments and observations from colleagues, police officers from other departments, academics, recruit trainers, academy instructors and researchers interested in policing issues, civilian officials responsible for dealing with allegations of police misconduct, and other professionals, including lawyers, judges, counsellors, and police psychologists regarding the accountability process in general, and the R.C.M.P. in particular.

This qualitative approach to obtaining interview data enabled the author to test and evaluate the literature, the author's own experience and the experiences of members. Moreover, the interviews also assisted in guiding the author through the literature on accountability and prompted further evolution in the author's views on accountability. Considerable ideational generation also occurred from the interviews and discussions that occurred. The interviews proved particularly valuable in identifying trends, issues and themes with respect to discipline in the R.C.M.P., as well as confirming or highlighting differences within the literature. The interviews also reinforced and enriched the author's understanding of the literature and the accountability process. Specific practices in the R.C.M.P. accountability process were also identified, confirmed or highlighted.
The author is mindful of Gudjonsson's caution that interviewer bias is always present, even when the researcher is cognizant of this problem. However, the interview process can also mitigate against research bias by substantiating or displacing a perspective. The difficulty, of course, is that anecdotal evidence is susceptible to exaggeration, modification, biases, distortions, and vagaries of memory. However, for the purposes of this thesis, it was felt that probing members in the most trusting and comfortable format possible was a valid way to obtain an accurate sense from members about the accountability process instead of relying on a formal questionnaire. Interviews also provided much more flexibility to explore some of the unknown truths about how members have been treated during the accountability process, and to get at the actual practices, both positive and negative, that may occur outside formal statutory and policy statements.

The author notes that when conducting research in relation to sensitive information, and internal investigations are an extremely sensitive issue, a single researcher is more likely to have success, especially if the researcher is known to have experience in the field, which will contribute to the accuracy and veracity of the information. The author's experience and background provided a complementary basis to obtain access to information regarding accountability in the R.C.M.P. However, because of this unique position, and more importantly the trust placed in the author by members, interviews were conducted in strict

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151 *Supra*, note 138 at 81-2.
confidence. Unless the author obtained express permission to refer to an interview source, or it was clear that the request for information was for research purposes (e.g. request to the R.C.M.P. for data), all information was to remain anonymous. Unlike researchers that had to prove or earn a trusted status and dispel suspicions, the author did not have to deal with these concerns. In the author's experience, members have valid concerns about revealing in-house aspects that management or specific managers would prefer not be known, and if the researcher is really trusted, members are willing to provide the "other" or unofficial stories about discipline and investigations. Nevertheless, the author found that some of the comments were so case specific, and the possibility of an adverse managerial response against the source so realistic, that it precluded the ability to provide direct quotes in some instances. In some cases the author has been able to rely on court transcripts, reasons for judgement, case reports or other research to provide examples of the issues being discussed regarding the R.C.M.P. accountability process.

The author must acknowledge, however, that the possibility existed that some members were wary and disinclined to provide information precisely because of the author's background, experience and knowledge. It may be that some members did not disclose certain information to the author because of their concerns about its use and any potential repercussions. In only one case did a member decline the invitation to be interviewed. In this particular case, the author was led to believe that the member had recently had a very disturbing experience with the internal discipline process as a witness. On the whole, however, the author did not find any other members reluctant to discuss this topic once the ground rules were established. There is also the fact that certain confidential internal

152 O'Bireck, supra, note 132 at 372.
information that came to the attention of the author *qua* member and not *qua* researcher could not be utilized because it would have been improper. To some degree then, the author could not document certain "controversial" material.

A fourth source of information came from existing or solicited empirical data from public sources (*e.g.* P.C.C.) and the R.C.M.P. on relevant aspects of the organization, internal investigations and compelled statements (*e.g.* frequency of compelling statements).\(^{153}\) The author also reviewed policy, rules, and decisions (administrative and judicial), as well as internal and external material that relate to accountability. Of course, detailed consideration was also given to recent *Charter* jurisprudence.

For the most part, the author focused his research and observations on "E" Division of the R.C.M.P. (British Columbia). It is the largest division of the R.C.M.P. numerically with the broadest spectrum of work including provincial, federal, rural, urban, uniform, plainclothes and specialized policing. "E" Division is also where the most activity occurs in relation to allegations of misconduct for the R.C.M.P. For example, the P.C.C. reports that 40% of its work-load and activity is in British Columbia.\(^{154}\) The author also has a fairly broad knowledge of "E" Division policies, practices, and operations. As already noted, the author, over the years, has developed contacts with individuals who have considerable knowledge and experience in the accountability process, and can provide some useful insights and information. Some of the focused interviews with individuals directly involved in the discipline process were conducted with members who were not posted to "E" Division.


\(^{154}\) *Supra*, note 74 at 8.
7. **Approach**

To date, there is very little reported research into how compelled/ordered statements are being handled and whether the purported "rights" of individual officers regarding compelled statements are properly protected. Based on the author's research and experience, it is clear that many aspects of police misconduct, especially in the R.C.M.P., continue to be dealt with behind "closed doors." It is apparent that the door needs to be opened on the accountability process in the R.C.M.P., particularly in relation to compelled statements. In the author's view, an examination of compelled statements will provide two important contributions to policing. First, compelled statements provide a vehicle upon which to examine and improve our understanding and operation of the police accountability regime. Second, compelled statements provide a window to determine exactly what is happening on the ground. Examining the issue of compelled statements will also expose and test some of the fundamental theoretical tenets of the current regime (e.g. are members treated fairly and reasonably?). It is important to critically examine whether the abstract notions surrounding compelled statements from employees fit every employment context. It may be that compelled statements have a different impact in the R.C.M.P. than in other employment contexts.

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155 For example, the P.C.C. frequently criticizes the current regime because the R.C.M.P. does not advise the complainant, and in some cases the P.C.C., of the discipline imposed on a member. Derek Humphry, "The Complaints System" in Peter Hain, Derek Humphry and Brian Rose-Smith, eds., *Policing The Police* (London, Eng.: John Calder Publishers Ltd., 1979) 41-100 at 48, also notes that in the Metropolitan Police Department serving the London area over 100 officers a year were leaving in response to allegations of misconduct, but no one knows whether the officers were guilty, or even if they went meekly or willingly since everything went on behind closed doors, and only the participants know the truth. The author did not find any research on how the police, and the R.C.M.P. in particular, go about using resignations as a tool to deal with misconduct. The author does know, however, that resignation is a tool that is implemented by the R.C.M.P. to deal with some misconduct situations, particularly where embarrassment to the Force is a real possibility.
The review of compelled statements from R.C.M.P. members will incorporate several threads. To set the context, the author will begin with an outline of police culture and management in Chapter 2. Chapter 3 will examine the various internal and discipline mechanisms that relate to police misconduct. Chapter 4 will deal with the more prominent external mechanisms that form part of the accountability framework. Chapter 5 will explore in some detail the question of civilian review of police misconduct. It is important to consider these issues because they inform the broader accountability debate and context. In the case of ordered statements, the broad context in which they operate is crucial to effectively understanding their impact and content. It is not possible to isolate the narrower issue of ordered statements without a complete understanding of the context provided in Chapters 2-5. Failure to consider the broader context would significantly diminish any analysis of ordered statements. The backdrop provided by Chapters 2-5 will also provide a sound stage on which to evaluate accountability and ultimately ordered statements in the R.C.M.P. The author will then go onto a detailed consideration of the framework for accountability in the R.C.M.P. in Chapter 6. Chapter 7 will provide an indepth analysis of ordered statements based on the research and data collected within the R.C.M.P. regime. Finally, Chapter 8 will examine the legal and constitutional position of ordered statements. Chapter 9 will briefly outline any conclusions and recommendations to improve the accountability and ordered statement process within the R.C.M.P.

The author will examine whether the inability to access or force compelled answers from police officers will necessarily result in a decline in substantiating allegations or a
compromise of the "need to know." A critical evaluation of the internal investigation process will assist in determining whether the "rights" of members are being accorded the fundamental protections valued in Canadian society. It is necessary to determine whether non-evidentiary use of compelled statements, disclosure (criminally and internally), legal representation, police management/culture, and investigational practices are permitting ordered statements to become a vehicle to circumvent basic rights and statutory protections (e.g. right against self-incrimination and/or silence) of members. The author will consider whether a more rigorous and prospective approach is necessary to ensure compelled statements from members are not improperly used to conduct investigations and undermine individual rights, but at the same time ensuring public integrity is maintained. Understanding how the ordered statement process works against the backdrop of police culture, management, discipline and

156 In Canada, the Report of the Canadian Committee On Corrections - Toward Unity: Criminal Justice and Corrections Ottawa: Queen's Printer, 1969) ("Ouimet Commission") at 153 pointed out that the evidence did not indicate that a decline in the criminal confession rates necessarily results in a decline in the criminal conviction rate; supra, note 46, Ratushny at 286 also reports this finding. More recently, numerous studies have shown in the criminal context that the removal of confessions does not really affect substantiation rates. For example, see supra, note 138, Irving; Roger Leng, The Right to Silence in Police Interrogation - A Study of Some of the Issues Underlying the Debate (The Royal Commission on Criminal Justice Research Study No. 10) (London: H.M.S.O., 1993); Michael McConville and Jacqueline Hodgson, Custodial Legal Advice and the Right to Silence (The Royal Commission on Criminal Justice Research Study No. 16) (London: H.M.S.O., 1993); and John Baldwin, "The Role of Legal Representatives at the Police Station" in The Conduct of Police Investigations: Records of Interview, The Defence Lawyer's Role and Standards of Supervision (The Royal Commission on Criminal Justice Research Studies No. 2, 3 and 4) (London: H.M.S.O., 1992). If this is the case criminally, where the burden to prove a case is much higher, it certainly mitigates against any argument for compelled statements internally, which has a lower threshold of proof.

157 Herzig, supra, note 54 at 436 made similar observations about the use of the Grand Jury in the United States to subpoena internal statements as a method to circumvent the right against self-incrimination of suspect police officers.

158 Ibid., proposes the use of the "projected privilege" to accomplish this goal.
other external accountability mechanisms will enrich our understanding of policing and accountability. It will also assist in understanding why certain discipline processes and practices continue to exist despite purported commitments to operational and administrative change in policing.

If this thesis uncovers inconsistency in investigations, lack of fairness, poor representation, ill-informed members, and lack of supervision of the compelled statement process, it will hopefully lead to positive changes in the current R.C.M.P. regime that will ensure or restore a proper balance between the interests of the member, the R.C.M.P. and the public.¹⁵⁹ A balanced accountability regime cannot be achieved through a mechanism that is either unfair or perceived to be unfair. As will become apparent, it may be that the arena of police discipline and accountability has become so complex that a reasonable person/member can no longer be expected to comprehend or understand the process.¹⁶⁰

¹⁵⁹ L.R.C.C. (1973), supra, note 64 at 12 found that inconsistencies in practice, lack of fairness, and inefficiencies were grounds to recommend criminal questioning of suspects be altered to provide for the presence and supervision of a judicial officer for interviews.

¹⁶⁰ E.R.C. Discussion Paper 6, supra, note 3 at 44-45 notes that this is desperately needed in the accountability process.
Chapter 2

MANAGEMENT AND CULTURE

"Power tends to corrupt and absolute power corrupts absolutely."
Lord Acton

1. Introduction

In order to understand and appreciate policing it is necessary to become familiar with its organization, management and culture. It is this knowledge that will provide a foundation to understand the power relations that exist between the two cultures in policing (i.e. commissioned officers/management versus rank-and-file/operational) and the impact this has on personnel. Understanding the nature of police occupational culture and management will also provide a base upon which to assess and examine the matter of compelled statements. Although there is variation between police organizations, the purpose of the following discussion is to illuminate some of the commonalities that are central to understanding police management. This Chapter will also highlight the inherent clashes that exist in police management and culture that have a tremendous impact on officers. Chapters 2-5 will provide a broader examination of some of the internal and external issues that inform the accountability debate. It is this backdrop that will permit a more informed examination of the Royal Canadian Mounted Police ("R.C.M.P.") accountability regime and ordered statements in Chapters 6-8. An interesting feature that has arisen from the literature is the consistency of themes that arise regarding policing in different forces and countries.

Foucault postulates that power can be based on two strategies: first, spectacles of punishment, the more brutal forms of which are receding (e.g. public execution); and
second, pervasive discipline and surveillance strategies (e.g. time accounting). Police organizations, particularly the R.C.M.P., provide quintessential examples of the Foucaultian paradigm of power and representation. The police organization, analogous to the findings of Shearing and Stenning in their trip to Disneyland, are perfect examples of power and control being embedded in the entire process and climate that envelopes the individual. Activities of rank-and-file police officers are represented to be subject to pervasive control and review. The weakness of much of the research on police accountability is that it generally depicts police as an homogenous occupational group with the same interests at all levels, yet somehow it is also seen as different from most other groups (i.e. occupational stereotyping). The following discussion will deal with some of the elements that are central to understanding police management.

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2 Ibid.


2. Police Management

Although there have been many proposed normative models of management for policing over the years (e.g. democratic), the "classic" model of police organization and management that prevails is defined by a highly centralized and bureaucratic paramilitary hierarchy. Das recently concluded that police forces, despite diversity all over the world, share one common characteristic: the military structure. It can be accurately stated, even today, that police organizations and management are generally rigid, conservative, defensive, secretive, suspicious, and self-protective. The result is that most police organizations are characterized by strict subordination, a rigid chain of command, and little or no formal consultation between ranks.

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Angell provides a helpful outline of the six classic (Weberian) bureaucratic elements of the police organizational structure: first, a police organization is a highly formal and centralized bureaucracy; second, labour is divided into various specialities (e.g. uniform, detectives, traffic, identification); third, standard operating procedures of some form are evident; fourth, there are specific and rigid career paths; fifth, management is autocratic; and sixth, status in the organization is based on rank\(^9\) (in other words, authority is based on rank, \textit{not} ability\(^{10}\)). While such features may be common to many non-police bureaucracies, paramilitary thinking, command and control strategies and the multiple layers of accountability can combine to create uncommon rigidity unique to police structures.

There are several criticisms of the classic bureaucratic model that are equally relevant to the policing model: first, the theory and concepts of the model and organization are culturally based (which can prevent responsiveness); second, the prevailing organizational attitude is one that is inconsistent with humanistic values (\textit{i.e.} police officers are mere cogs); third, overall the organization demands and supports only those employees who demonstrate what are really immature personality traits (\textit{e.g.} success means never questioning superiors and doing as you are told; whereas a more mature employee would ask questions, but such action would only lead to ostracism and punishment); and fourth, the organization and employees cannot generally cope with environmental changes very successfully.\(^{11}\) Although this last point is applicable to police bureaucracies, they have in some instances been very

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\begin{itemize}
\item Wiley & Sons, 1967) at 48; Sandler and Mintz, \textit{supra}, note 5 at 458.
\item \textit{Supra}, note 5 at 186-7.
\item Angell, \textit{supra}, note 5 at 187-8; Bennett and Mintz, \textit{supra}, note 5.
\end{itemize}
successful at surviving change.

In a bureaucracy, the prevailing view is that decisions, control, and management of the organization emanate from the top and are implemented by the bottom. A bureaucratic approach is also based on the management principle of rationality and efficiency. One of the primary reasons for adopting the paramilitary approach in policing is that it provides a strict system of command, control, and discipline for police organizations. Military discipline and control did not always exist as a central precept in policing. In fact, it was not until the later 1800's and early 1900's that military discipline and rank structure became part of police organizations in the United States. It was

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believed that introducing military discipline (e.g. drill) and rank structure (e.g. obedience) into policing would create a disciplined force that, given limited supervision, would follow the law and legitimate practices. The paramilitary and professional developments in the United States, which were paralleled in Canada, were also a reform response to political control and corruption of the police.

In relation to accountability, the practical question is how effective are command and control mechanisms in a police bureaucracy? One of the first problems is that police action is situationally justified, in that police officers and organizations are dealing with isolated and diverse situations, which does not accord with bureaucratic mobilization and paramilitary control theory. In fact, command and control theory can be neutralized by the fact that a considerable amount of police action is initiated on-site by one or two officers. Moreover, the police management system tries to regulate the minutiae when police work requires instant and complex decisions in unpredictable circumstances. In reality, it appears that the police are bureaucratically unique because de facto the greatest discretion

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17 Supra, note 14; also, Gerry Ferguson and Marli Rusen, Discipline of Municipal Police In British Columbia (Report To The Commission Of Inquiry Into Policing in British Columbia, 1993) at 57.


exists at the lowest level of the organization (i.e. at the individual officer level).  
Individual officers frequently work alone or in pairs with little supervision and are subject to limited objective review because not every decision is necessarily accessible by supervisors, management, or the public. Moreover, it is also asserted that police officers are not effectively supervised because they are widely spread out in the field. In fact, inaction by operational personnel may be harder to control and regulate than action.

These limitations on supervision have led some to conclude that police organizations do not really control police officers, and at best, there is only the appearance of control. As a result, the organization turns a "blind eye" to rank-and-file activities as long as there are no complaints. In response, many police organizations attempt to utilize detailed rules and

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23 *Ibid.*; Werner Petterson, "Police Accountability and Civilian Oversight of Policing: An American Perspective" in Andrew Goldsmith, ed., *Complaints Against the Police: The Trend to External Review* (New York: Oxford University Press, 1991) at 259-290; generally, Herman Goldstein, *Problem-Oriented Policing* (Philadelphia: Temple University Press, 1990). One of the interesting paradoxes in policing is that leadership is emphasized for police executives yet they are frequently directly responsible for only two or three subordinates and have very limited authority in some respects. The officer on the street, however, has considerably more discretion and should be paid more, and executive officers less, based on responsibility.

24 Bayley (1994), *supra*, note 7 at 63-65; Drummond, note 10 at 16; Ericson, note 21 at Chp. 3.
regulations to reduce the flexibility/discretion of officers.\textsuperscript{25} Such micro-management strategies, however, may also inculcate in operational officers a lack of initiative to respond or adapt to changing social or physical conditions.\textsuperscript{26} Subordinates recognize that they possess considerable discretionary power and can make some momentous decisions. Management is perceived by subordinates as hesitant to delegate formal authority or responsibility to the rank-and-file which makes subordinates even more hesitant to accept formal responsibility when it is offered. Further, when poor decisions are made by those in the organization, managers are prepared to reach down to the lowest level to determine individual responsibility. It is paradoxical that the status of police officers is inversely proportional to their responsibilities in policing and relative to other actors in the criminal justice system.\textsuperscript{27}

Communication is another feature of police organizations and management that must be considered.\textsuperscript{28} First, communication in most police organizations is primarily one-way: 


\textsuperscript{26} Bayley (1994), \textit{supra}, note 7 at 64-66.

\textsuperscript{27} Bayley, \textit{ibid}. It is clear that officers can possess more discretion than even judges and lawyers. It is interesting to note that despite the importance of their function, even uniformed officers denigrate their role, but management can be even more contemptuous in their view of the rank-and-file; Egon Bittner, "The Broken Badge: Reuss-Ianni and the Culture of Policing" in Egon Bittner, ed., \textit{Aspects of Police Work} (Boston: Northeastern University Press, 1990) at 367-376.

\textsuperscript{28} V.N. MacDonald, M.A. Martin and A.J. Richardson, "Physical and Verbal Excesses in Policing" (1985) \textit{9 Canadian Police College Journal} 295 at 313; Raymond S. Adamson, "Police
from the top to the bottom.\(^{29}\) Second, all valued formal communication is based on rank and flows primarily downward through the chain of command.\(^{30}\) Subordinates are isolated from senior officers, and this isolation is exacerbated by the difficulty of communicating up the chain. Every subsequent superior rank, fearing criticism, feels compelled to comment on or endorse real or perceived messages in communications.\(^{31}\) In fact, because of mistrust that can exist in police organizations between management and operational officers, real messages or issues are frequently never addressed as each group tries to look for and interpret hidden messages.\(^{32}\) Third, because there is little personal interaction with the rank-and-file, most communications emanate from an executive entity that is invisible and insular.\(^{33}\) Considerable communication in policing is also negative and denigrative in content.\(^{34}\) Fourth, written downward communication in a police department can frequently

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\(^{29}\) Adamson, *ibid.* at 266-68.

\(^{30}\) *Ibid.*

\(^{31}\) *Supra*, note 28. This is an important feature that must not be under-rated. Many supervisors act like radars by constantly scanning messages or comments for any explicit or implicit criticism of them, the unit, other supervisors or the department.

\(^{32}\) Adamson, Reuss-Ianni, *supra*, note 28; Bouza, note 19 at 48 notes that officers translate organizational messages by waiting to see what gets done and how it is accomplished before taking any definitive action.

\(^{33}\) Adamson, *supra*, note 28 at 246 and MacDonald *et al.* at 313.

\(^{34}\) MacDonald *et al.*, *ibid.*
be characterized as a "paper blizzard" (now E-mail blizzard) for the rank-and-file.\textsuperscript{35} There are usually so many memoranda, policy statements and other written communications that the rank-and-file officer soon feels inundated with messages that can no longer be evaluated because of information overload. Fifth, it is not the norm in policing to solicit or encourage communication from subordinates, but, if approached, officers soon learn that it is better if feedback accords with what the managers want to hear. Yarmey found that police officers operate in an environment marked by a lack of specific policy, inconsistent policies, unclear objectives, and poor internal communication which necessitates certain survival techniques.\textsuperscript{36} Even today, with the purported changes in police management philosophy through community-based policing and empowerment, it cannot be assumed that decision-making in policing is truly participatory or collegial across ranks.\textsuperscript{37}

It is a rule of survival that an officer should not question or "rock the boat", never express an opinion (unless absolutely certain about the audience and its expectations), and never show too much initiative, since it is only those who obey that are rewarded.\textsuperscript{38} For example, Brown and Campbell discuss the phrase "to do your legs," which refers to the British precept that a police officer should not criticize or step out of line by questioning existing practices. Loyalty is sacred, and it is taboo to question superiors, criticize

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\textsuperscript{35} Adamson, \textit{supra}, note 28 at 245.
\textsuperscript{36} Yarmey, \textit{supra}, note 28 at 61; Goldstein, note 7 at Chp. 5.
\textsuperscript{37} Oppal Commission, \textit{supra}, note 5 at xvii-xix; Adamson, note 28; Goldstein, note 7 at Chp. 10.
\textsuperscript{38} Oppal Commission, \textit{supra}, note 5 at xix, Goldstein, note 7 at 231 and 260-1.
\end{flushright}
superiors, or "blow the whistle" on superiors. Finally, communication problems are exacerbated because of size and specialization within police departments which creates conflict and selective communication in the best interests of various sub-groups (e.g. detectives, traffic). Examples are still sometimes made of those who dare to speak out in policing, even today.

Promotional practices are another central element in police management. It has been argued that the rigid rank structure in policing not only duplicates and attenuates supervision and communication, but also hinders the promotion of the most capable individuals. This is so because advancement is usually based on length of service. It is the step-by-step formalistic internal promotion process, based on the passage of time, that also engenders mistrustful attitudes towards change in general, especially those changes coming from the outside. Police promotion practices have also been criticized as producing mediocrity that only serves the needs of senior management. As identified by Grant, promoting solely within the department means there can be little effective internal criticism because anyone promoted is not likely to criticize the system that so adeptly identified such talented

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41 Oppal Commission, *supra*, note 5 at xix and E-2 to E-3; Drummond, note 10 at 20; Goldstein, note 7 at 231-238.


43 Oppal Commission, *ibid*. Police organizations are known for promoting someone on the basis that he or she can be trained to do the job, and yet will overlook a person who holds all the qualifications for the job. It is assumed that all officers can be trained to do any job.
leadership.\textsuperscript{44}

Stark found it "inconceivable" that the practice in policing is to generally hire recruits and promote them years later to senior management positions without effective training.\textsuperscript{45} In response he proposed recruiting practices similar to the military for the operational and executive levels because educated and experienced personnel will not wait years for promotion.\textsuperscript{46} The attitude towards advanced post-secondary education is mixed in policing. Although Drummond reported that education is held in high regard, the Oppal Commission found advanced education was criticized as "too theoretical" and not applicable to the real world.\textsuperscript{47} Moreover, Goldstein reports that the notion that educated police officers are more tolerant and sensitive has not been conclusively proven, and in fact, reports indicate that educated officers may lose their tolerance more quickly.\textsuperscript{48} Conversely, the Oppal

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\textsuperscript{44} Alan Grant, \textit{The Police--A Policy Paper} (A Study Paper prepared for the Law Reform Commission of Canada) (Min. of Supply and Services, 1980) at 53.

\textsuperscript{45} Rodney Stark, \textit{Police Riots: Collective Violence and Law Enforcement} (Belmont, California: Wadsworth Publishing Company, 1968) at 226-231; Goldstein, supra, note 7 at 283-306 in his work found that few are interested in a police career where potential for advancement and challenge is limited, which is part of the reason, at least in the United States, the education level of officers has not risen dramatically. Bouza, note 19 at 41 found that, for the most part, police organizations are led by individuals who have spent their entire adult life in one agency and they have not been broadened by experience nor deepened by scholarship.

\textsuperscript{46} Stark, \textit{ibid.}.

\textsuperscript{47} Drummond, supra, note 10; Oppal Commission, note 5 at E-26; It probably depends on the persons experience, but the author can report one senior staffing officer stating during a recruit interview in 1986 that "M.A.s are a dime a dozen." The R.C.M.P. still gives no formal credit for education during the promotion process. In recent reviews and proposals outlining a new promotion system in the R.C.M.P. there was little discussion and no plans to recognize education in the process.

\textsuperscript{48} Goldstein, supra, note 7 at 288; Samuel Walker, "Conclusion: Path to Police Reform--Reflection on 24 Years of Change" in Dennis J. Kenney, ed., \textit{Police and Policing: Contemporary Issues} (New York: Praeger Publishers, 1989) at 271-84 reports that there may be no reportable difference in conduct between educated and less educated officers.
Commission recently reported that research shows that educated officers are less authoritarian, dogmatic, ethnocentric and prejudiced.\footnote{49} 

The problem is that often police organizations are reluctant to value education. Further, the benefits of an education must be substantially forfeited in order to conform to the stale bureaucratic model in place. In many instances, despite representational strategies soliciting input and feedback, there is no actual interest in or support for new ideas, which leads to frustration and cynicism among educated police officers.\footnote{50} The unfortunate result is that many educated police candidates are not interested in policing because of the limits of a "career" in policing and because the organization seems to make the work unnecessarily difficult.\footnote{51} It is even more unfortunate for those educated police officers who join a department without knowing that being educated can work against them.

There are several features of the police management structure that fundamentally affect the disposition of police employees. In particular, police employees feel they are powerless to initiate change or even arrest the current motion of organizational practices.\footnote{52} Moreover, police personnel are keenly aware that policing is riddled with contradictions, %

\footnote{49} Supra, note 5 at E-26 to E-27.

\footnote{50} Chris Eskridge, "College and the Police: A Review of the Issues" in Dennis J. Kenney, ed., Police and Policing: Contemporary Issues (New York: Praeger Publishers, 1989) at 17-25; Goldstein, supra, note 7 at 283-303. As of 1997, the R.C.M.P. gives no recognition to post-secondary education in its "new" promotional process. In discussions with highly educated and talented R.C.M.P. members it became clear that expressing views or ideas that do not accord with the position of executive officers, with a few exceptions, is a dangerous venture.


\footnote{52} Angell, supra, note 5 at 187.
duplicity, and hypocrisy:

This situation makes for some rather unusual working conditions. Specifically, police officers are often required to ignore their oath of office; to ignore much of what is taught in formal training; to bluff or lie, not necessarily out of malevolence, but often out of a desire to be helpful in the face of irreconcilable demands upon them; to subject themselves to disciplinary actions and civil suits for ignoring the law while following the instructions of their superiors; and to work under a style of supervision that is often more concerned with protecting the organization and supervisory personnel against allegations of wrongdoing than with providing positive guidance to prevent improper behaviour in the first place.\(^{53}\)

For example, aggressive and proactive patrol is often demanded by managers and the public, with the exhortation not to offend anyone or damage public relations.\(^ {54}\) Another example is the repeated public commitment by management to law enforcement and crime prevention programs when, in reality, these activities form only a small part of the demands in policing.\(^ {55}\)

The result is that the classic organizational model of police management appears to

\(^{53}\) Goldstein, \textit{supra}, note 7 at 10, also see 163-4; generally, Ericson, note 21 at 61-65; Bouza, note 19 at 20 puts the matter more bluntly when discussing the contradictory demands of the "overclass":

This is one of the unspoken assignments that breeds cynicism in cops. They are pressured to keep the drunks, psychos, street peddlers, musicians, and other who contribute to what is described, by cops, as "street conditions" under wraps, while surrounded by rhetoric about "brutality" and "rights." When the poor scream in outrage, the overclass doesn’t confess its complicity but piously calls for punishments [for officers] or maintains an imperious silence.

\(^{54}\) Douglas W. Perez, \textit{Common Sense About Police Review} (Philadelphia: Temple University Press, 1994) at 214 notes the paradox in the "war" on crime and "war" on drugs which means the police are to get aggressive and tough, yet that is what leads to difficulties and complaints. Bouza, \textit{ibid.}, at 21 notes that the "societal hypocrisy" placed on the police to "do something" without providing the proper tools or support leads to deep cynicism among officers and invites the police to engage in extra-legal measures to meet societal demands.

\(^{55}\) Bittner, \textit{supra}, note 5; Ericson, note 21.
support a perpetually low state of morale.\textsuperscript{56} In addition, there is considerable stress generated by the policing environment.\textsuperscript{57} For example, a common managerial technique used in policing to marginalize an officer is to label him or her as having an "attitude problem."\textsuperscript{58} Research has revealed that the stressors operating in police work are organizationally generated,\textsuperscript{59} operationally generated,\textsuperscript{60} and personally generated.\textsuperscript{61} As

\textsuperscript{56} Angell, \textit{supra}, note 5 at 191-2.


\textsuperscript{58} Bruce D. Sealey, "Issues of Racism" in Brian K. Cryderman and Chris N. O'Toole, eds., \textit{Police, Race and Ethnicity: A Guide for Law Enforcement Officers} (Toronto: Butterworths, 1986) at 11 found that the "attitude problem" response is a common strategy used by professionals against colleagues and co-workers when there is a disagreement or difficulty.

\textsuperscript{59} Ayres and Flanagan, \textit{supra}, note 57 in chp. II at 11-15 list the following organizational policing stressors: 1) autocratic and quasi-military model which is authoritarian and punishment based with no respect for individual problems and human factors; 2) hierarchical structure; 3) poor supervision; 4) lack of employee input into policy and decision-making; 5) excessive paperwork; 6) lack of administrative support; 7) role conflict and ambiguity; 8) inadequate pay and resources; 9) adverse work schedules; 10) boredom; and 11) unfair discipline, performance evaluations and promotion practices; see also, R.S. Ratner, John L. McMullan and Brian E. Burtle, "The Problem of Relative Autonomy and Criminal Justice in the Canadian State" in R.S. Ratner and John L. McMullan, eds., \textit{Criminal Justice Politics in Canada} (Vancouver: University of British Columbia Press, 1987) at 116.

\textsuperscript{60} Ayres and Flanagan, \textit{ibid.}, report that critical incident reactions such as post-traumatic stress disorder will be experienced by 87% of all emergency service workers.

\textsuperscript{61} The personal psyche of an officer may lead to different reactions to stress. Ayres and Flanagan, \textit{ibid.} at 4-5; Brown and Campbell, note 39 at 167 also suggest that organizational stressors increase the higher the person is in rank and operational stressors are experienced more by rank-and-file. Based on the author's experience, stressors may be more related to function and proximity.
noted by Brown:

The centrality of coercion to the police role and the uncertainty of police work—the ambiguities over the clientele of the police, the presence of danger, the inadequacy of information on which to base decisions, the difficulty of obtaining compliance, and the necessity of reconciling contradictory moral and political imperatives—generate enormous anxiety and emotional stress for patrol[officers].

Ayres and Flanagan were alarmed by findings which suggested that officers are bothered less by operational field situations and more by working conditions, role conflicts, ambiguities, and the administrative milieu. It was also determined that the impact of the stressors intensified proportionately with the rise in the level of officer education. The result is that the more educated the officer, the greater the stress experienced. Complaints of misconduct and discipline, even when unsubstantiated or unfounded, are also reported as very traumatic for officers.

An interesting development that is sometimes overlooked in discussions of policing is the impact of police associations (i.e. unions) on management and policing in general. Hann et al. assert that the literature on police unions is generally conservative and alarmist in nature. In the early 1950's and 1960's police associations in the United States were not

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62 Supra, note 14 at 80.

63 Supra, note 57 at 2. The problem is many executives refuse to consider themselves or the organization as sources of some of the stress-related problems in policing.

64 Ibid. at 17.

65 MacDonald et al., supra, note 28 at 313; Sewell, note 57 at 113-14 located complaints and discipline very high on the police Critical Life Events stress scale.

permitted to unionize. The more resourceful rank-and-file leaders started out offering free legal aid, low cost life insurance, and challenged breaches of constitutional liberties of their members to obtain support. The police reformers in the 1960's were against grievance procedures because they would reduce the power of the chief, even though other public employees had union dues check-off and grievance procedures. It was not until the early 1970's that the reformers in policing abandoned the struggle against police associations in the United States. Historically, the situation was not much different in Canada. Professor Grant notes:

But unionization came comparatively late to policing and many police officers who are currently serving have bitter personal experience of that unhappy lot of the unprotected and unorganized police constable of former times who were no match for senior officers wielding complete authority. (emphasis added)


68 Fogelson (1977), ibid. at 206.

69 Ibid. at 210-218. For example, the New York City Police Commissioner entered an agreement with the Patrolmen's Benevolent Association ("PBA") whereby the PBA was forbidden to affiliate with unions and required to renounce the right to strike, for which NYPD recognized the PBA as the bargaining agent; see also, Margaret Levi, "And the Beat Goes On: Patrolmen's Unionism in NYC" in Richard C. Larson, ed., Police Accountability: Performance Measures and Unionism (Lexington, Mass.: Lexington Books, 1978) at 129-166.

70 Supra, note 44 at 30. The struggle was not easy: Bryan M. Downie and Richard L. Jackson, eds., Conflict and Cooperation in Police Labour Relations (Ottawa: Minister of Supply and Services, 1980); Keith R. Hamilton and Gil D. McKinnon, Provincial Governance Of Policing In British Columbia (Research Paper Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) at 23 suggest that British Columbia went to the R.C.M.P. for provincial policing service for several reasons, including the concern about ever-increasing costs of policing and equipment and "the movement within the Provincial Police Force to organize a union." H.W. Arthurs, "And Who Will Watch The Watchman?" (1966-67) 9 Criminal Law Quarterly 122 at 123 reported in the late 1960's that a police commission objected to an association providing counsel for officers involved in disciplinary proceedings.
Although some have asserted that unions are often intransigent and not subject to
control by management, others note that there have been positive aspects related to the
unionization of policing.\textsuperscript{71} For example, as alluded to by Grant above, Hann \textit{et al.} found
that associations have rendered some previously unchallengeable management practices more
publicly accountable.\textsuperscript{72} Police unions have also been credited with improving personnel
administration, human relations, and reducing the authoritarian approach of management.\textsuperscript{73}
Reiner also notes that the Police Federation in Britain has acted as a check against potential
corruption in senior ranks by preventing the rampant use of their power to further their own,
rather than the public's interest.\textsuperscript{74} Moreover, contrary to their position in the early days of
civilian review, some associations are now actually active in supporting civilian review, or at
least have been a passive non-opponent.\textsuperscript{75}

\textsuperscript{71} Perez, \textit{supra}, note 54 at 195-200; Stark, note 45 at 203-7; Robert Kliesmet, "Police
Unions and the Rejuvenation of American Policing" in Dennis J. Kenney, ed., \textit{Police and

\textsuperscript{72} \textit{Supra}, note 66 at 73; also, Dennis Latten, "Goals of Police Associations" in Bryan M.
Downie, and Richard L. Jackson, eds., \textit{Conflict and Cooperation in Police Labour Relations}
(Ottawa: Minister of Supply and Services, 1980) at 181-2; Richard Jackson, "Police Labour
Relations in Canada: A Current Perspective" in Bryan M. Downie and Richard L. Jackson, eds.,
\textit{Conflict and Cooperation in Police Labour Relations} (Ottawa: Minister of Supply and Services,
1980) at 7-33.

\textsuperscript{73} Hann \textit{et al. ibid.} at 75; Grant, \textit{supra}, note 44; Nova Scotia, Royal Commission on the
Richard Apostle and Philip Stenning (1989) at 13; Syd Brown, "Comment" in Walter S.
Tarnopolsky, ed., \textit{Some Civil Liberties Issues of the Seventies} (York University: Osgoode Hall
Law School, 1975) at 122.

\textsuperscript{74} Robert Reiner, \textit{The Blue-Coated Worker: A Sociological Study of Police Unionism}

\textsuperscript{75} Samuel Walker and Vic W. Bumphus, "The Effectiveness of Civilian Review:
Observations on Recent Trends and New Issues Regarding the Civilian Review of the Police"
(Paper presented at American Society of Criminologists, 1992) (unpublished) at 10; Sharon
Like most issues in policing, the classic model of police management has come under intense scrutiny. Recently, it has been concluded that:

Clearly, the authoritarian management styles of the past will need to be discarded in order for police organizations to present a modern and flexible force that can compete for budgetary allocations, and function effectively on its share of the tax dollar.\(^7\)

The principles of community-based policing purportedly provide an answer to this problem by changing from the "brown" or classic organizational model (i.e. paramilitary/hierarchy) to the "blue model" which is premised on Charter, criminal law, common-law, and community principles.\(^7\) It is felt that community-based policing will liberate the police from the dogmatics of the paramilitary and professionalization era.\(^7\) The problem though is that the police organization does not truly value initiative, problem-solving, or service to the public, only what the organization deems valuable, even if unproven or trivial.\(^7\) Frequently, the result is that most police organizations have not truly adopted new functions. The new function is frequently adapted and moulded to suit the relatively unchanging organization.\(^8\)

It is also questionable whether senior officers who have been inculcated with the values of

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\(^7\) Royal Canadian Mounted Police External Review Committee, *Disciplinary Dismissal-A Police Perspective* (Discussion Paper 6) (Minister of Supply and Services, 1991) at 51.


\(^7\) Goldstein, *supra*, note 23; Bayley (1994), note 7; Bittner, note 51.


\(^8\) Bayley (1994), *ibid.* This may be less so in smaller departments.
the classic and professional model for over 30 years can be expected to convert, despite verbal and written commitments to this new-found way. Only time will tell if community-based policing and the new-found managerial styles will result in substantial or merely rhetorical change in policing. The interviews conducted for this thesis will provide some valuable insight into the depth of philosophical management changes in relation to discipline.

3. Police Culture

It is hard to categorize the cultural features or occupational ethos of policing, because there are so many, and they are inextricably linked to management and discipline practices. Although there are cultural features that generally apply in policing, a feature that is central to this thesis is that the occupational culture, especially in the R.C.M.P., is comprised of the gap between rank-and-file culture and the commissioned officer culture.

Researchers sometimes overlook the fact that both dominant cultures can be further subdivided on the basis of rank level and/or specialization (e.g. constable, corporal, sergeant;

81 Frederick J. Desroches, "The Occupational Subculture of the Police" in Brian K. Cryderman and Chris N. O'Toole, eds., Police, Race and Ethnicity: A Guide for Law Enforcement Officers (Toronto: Butterworths, 1986) at 39-48 provides an excellent overview of police occupational culture; also Brown, supra, note 14 at 76-87. Brown and Campbell, supra, note 39 at 148-55 identify several of the cultural features of the police occupation: 1) social isolation; 2) secrecy; 3) resistance to change; 4) informal practices; 5) professionalism; 6) cult of masculinity; 7) sexism; and 8) racism. The author would also add actual or perceived vulnerability to management, discipline and public complaints as a general feature.


83 Robert Reiner, The Politics of the Police, 2d ed. (Toronto: University of Toronto Press, 1992) at 465; see also, Ericson, supra, note 21 and Bayley (1994), note 7. For example, specialization in drug sections, surveillance units, uniform duties, and intelligence units are all marked by particular sub-cultural traits. This is also the case between ranks, since constables, non-commissioned officers and various commissioned ranks are limited by their rank status.
plainclothes, uniform, patrol, traffic). As will become apparent, it is critical to acknowledge
the sub-cultural divergence between management and operational police officers in the form
of vertical and horizontal situational norms. This clash of norms results in tension and
misunderstanding between management and "street cop" culture. Relations between
management and street cops are also based on structures of socialization, authority-power,
cross-group culture, and peer group pressures.

There are some occupational values that exist across all ranks in policing to varying
degrees. For example, there is a general sense of isolation from the public and superiors.
Further, many officers become cynical and non-trusting because of their constant exposure to
the dark-side of life and humanity. Concurrently, because the police are under constant
pressure to solve crime and charge perpetrators, it is believed that there is little room for
approaching investigative or occupational matters in a non-partisan, judicious or ministerial
manner. In other words, police officers approach their occupation in a partisan and
competitive manner to ensure success. Because of considerable pressure to "do
something" in many incidents ("and it better be right") many police officers and managers

socially and formally; see, Clifford Shearing, "Introduction" in Clifford Shearing, ed.,
Organizational Police Deviance: Its Structure and Control (Toronto: Butterworths, 1981) at 1-8
and Ratner, McMullan and Burch, note 59 at 115-17 for examples of ways to look at the sub-
components in policing, including the categorization of police officers depending on their
approach to the work: 1) good cop; 2) real cop; 3) wise cop; or 4) cautious cop.

84 Manning, supra, note 19 at Chp. 6; Reuss-lanni, note 28 at Chps. 1 and 7; Yarmey, note 28 at Chp. 3.

85 Ibid.

86 Ibid.; Lustgarten, supra, note 21 at Chp. 1; Reiner, note 83 at 115.

87 Brown and Campbell, supra, note 39 at 32-39; Bittner, note 14 generally; Yarmey, note 28 at 86-96.

88 Lustgarten, supra, note 21 at 9.
have a feeling of being compromised before anything is undertaken. As a result of the many contradictions and complexities of policing, inadequate resources, training, or alternatives, officers are forced to improvise in many threatening and general policing situations. Because police organizations have feelings of being under constant attack, or at least not supported, an "us vs. them" attitude develops which can increase group solidarity. It soon becomes a working belief of police officers that everything is arbitrary and the amount of public or operational support is tied to other agendas. Despite portrayals to the contrary, research indicates that police officers are no more authoritarian than the typical citizen, and in fact, can fall lower on the authoritarian scale than students, teachers, and middle class citizens.

There is little question that a neophyte recruit entering policing is in the grasp of an organization that is seeking to perpetuate itself. Police organizational culture is rooted in an applicant, entry, and training process which utilizes various techniques of assimilation, de-personalization, identity stripping, indoctrination, and personality dismantling in order to

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90 Goldstein, supra, note 7 at 1-21.

91 Drummond, supra, note 10 at 25.

92 Manning, supra, note 19 at 117-122 and 139-178 and Niederhoffer.


95 Drummond, supra, note 10 at 8-19.
ensure a prospective applicant/recruit is acceptable to the police culture.\textsuperscript{96} Occupational socialization begins the moment a person applies to be a police officer (\textit{e.g.} fill out a form properly), but it becomes intense at the training academy where it is repeatedly underscored that the chain of command and deference to authority and rank are more important than knowledge.\textsuperscript{97} The recruit is intensively and unrelentingly exposed to the attitudes and ideology of the organization (\textit{e.g.} words, actions, images, stories).\textsuperscript{98} As found by McNamara, immediately upon joining (and even during recruiting) the individual is presented with information that unambiguously supports the ascendancy of the organization over the individual.\textsuperscript{99} As noted by Downs, bureaucratically:

\begin{quote}
Indoctrination is an attempt to make a permanent alteration in a person's non-superficial goal structure by systematically exposing him [or her] to information or ideas selected for that purpose.\textsuperscript{100}
\end{quote}

Uniform dress, deportment, barracks, similar haircuts, marching, saluting, forms of address (\textit{e.g.} "Yes sir" or "Yes Corporal"), discipline, and punishment are all part of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{97} \textit{Ibid.}; Oppal Commission, \textit{supra}, note 5 at E-36.
\item \textsuperscript{98} MacDonald \textit{et al.}, \textit{supra}, note 28 at 311-12; Goldstein, note 7 at 260-1. The point of application by the recruit is asserted to be the place to start imbuing the "correct ideology" (\textit{e.g.} conduct codes and expected behaviour).
\item \textsuperscript{99} \textit{Supra}, note 96 at 230.
\item \textsuperscript{100} \textit{Supra}, note 12 at 233-4.
\end{itemize}
\end{footnotesize}
conformity, consensus, and control exercises. The recruit who fails the deference, rank, status, or knowledge exercise is quickly identified as having an "attitude problem." In training, recruits are quickly introduced to, and constantly reminded of, the harsh and often arbitrary discipline of the organization. Discipline and punishment is ever-present in the training regime, either formally or informally, and a recruit is certain to understand this message, which is further reinforced in the field. It is crystal clear to a recruit that one must abide by the norms and that speaking out or constructive criticism is not tolerated very well. During training, the recruit collective soon becomes an active participant in the discipline regime by administering formal and informal discipline to other more junior recruits or those whose actions have caused the collective to suffer at the hands of instructors (e.g. recruit is late and the entire class is punished). While less authoritarian training models are being adopted (e.g. syndicate groups, self-directed learning), the fundamental surveillance techniques remain unaltered (e.g. drill, deportment, ranks, discipline).

Once in the field, a further re-orientation is required by the recruit to obtain operational acceptance, which is tied to conformity and the need to prove oneself. Once the recruit is "on the road" the field trainer teaches the officer what he or she really needs to

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101 Ericson, supra, note 21 at 25-27 notes dress and deportment are part of the apparatus creating the appearance of administrative consensus and control in policing.

102 Van Maanen, supra, note 4 at 410.

103 For example, at the R.C.M.P. Training Academy, there is an historical practice of having Right Markers appointed in Troops to impose discipline, and Troops often discipline other recruits that are not making the grade, especially when it results in punishment being imposed on the Troop as a whole. Eventually, more senior Troops are utilized for morning inspections, and are expected to distribute punishment.

104 Drummond, supra, note 10 at 15-19.
know. It is here that further folklore, myths, legends, war stories and personal observation are committed to the recruit regarding the ascendancy of organization and its treatment of officers. In particular, the recruit is advised, which is confirmed by observing departmental responses, that management and "officers" cannot be trusted to support the recruit. This ensures an understanding by new police officers of their vulnerability to management.

There is a dramatic change that occurs with recruits after several years experience. Butler found that nine out of ten recruits believed that: first, "individual initiative was rewarded in policing;" and second, "senior officers were in touch with the needs of police officers on the ground." Conversely, after five or more years service, Butler found less than 20% felt that individual initiative was rewarded; and only 14% believed officers/managers were in touch with the needs of front line officers. The field recruit quickly learns how the orientation of management and the organization generally treats officers. Repeated executive commitments to fairness and equitable treatment are seen as meaningless by personnel when it is not incorporated into actual practices, particularly in the case of discipline.

The operational reality then is that absolute loyalty and deference (to the department, commissioned officers, and supervisors) is demanded and rewarded in policing.

105 Van Maanen, supra, note 4 at 412-13.
106 Ibid.
108 Ibid.
109 Brown, supra, note 14 at 76-87 and 266; also Bayley (1994) at 66-73, note 7; Skolnick and Fyfe, note 22 at 117-125; Bouza, note 19 at 44 puts the matter more starkly stating that "No
Bonifacio puts it aptly, observing that:

The department makes it clear to the cop that he [or she] is on the bottom, which means that he [or she] is expected to follow orders without hesitation and to keep his [or her] ideas and opinions to him[/her]self.\textsuperscript{110}

Police organizations do not regard officers as individuals with particular personal attributes, but as virtually clones identical to all other officers of that rank.\textsuperscript{111}

There are also, from the perspective of police officers at the bottom of the organization, some contradictory demands on them, particularly from "reformers." For example, the community/reformers want something done now about crime, but they do not want civil liberties infringed; not to mention the frequent call to enforce unpopular laws which results in an alienated public. As Fogelson points out, such contradictions can validly lead to occupational paranoia.\textsuperscript{112} Moreover, the police are frequently exhorted and portrayed as soldiers engaged in a war, but they are not supposed to use force or be aggressive.\textsuperscript{113} The contradictory and conflicting demands and expectations placed on operational officers by management, the public, media, courts, interest groups, and politicians further instill in officers that they can be vulnerable to a forever changing landscape.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{111} \textit{Ibid.}
\item \textsuperscript{112} \textit{Supra}, note 16 at 114-15.
\item \textsuperscript{113} Skolnick and Fyfe, \textit{supra}, note 22, Chp. 6, "Cops as Soldiers."
\end{itemize}
\end{footnotesize}
As a result of these various organizational and societal conflicts, individualism or survivalism has become a dominant trait of operational police culture. As noted by Bittner, the bureaucratic and professional approaches in policing may have actually strengthened the tendencies of occupational individualism and defensive fraternalism rather than opposed them. In policing, an officer’s "...self-concept is intimately connected to his [or her] membership in the police fraternity, the worst emotional experience a cop can have is to be ostracized by brother [or sister] officers." Ericson found in larger more specialized departments that officers are forced to rely on immediate colleagues more than superiors or management for cooperation. Part of the working personality that an officer develops is based on the authority and danger of the occupation which creates an ethos of reliance on co-workers. Aside from cohorts, subordinates are most likely to be loyal to an immediate supervisor because they can have the most impact on the subordinate. Because of the erratic hours, shift work, and orientation of the occupation, police officers end up associating together during their days off. As a result, some assert that the

114 Brown, supra, note 14 at 76-87. In other words, operational officers adopt individual tactics to protect their interest’s over anything else. Survival techniques can include pretending not to receive radio dispatches to attend violent calls, always showing up as the second or third car at a call to avoid taking responsibility for the file or making decisions, avoiding arrests and paperwork at all costs, and actually leaving the scene (which may include abandoning other members) when it appears trouble is about to erupt or force will be required.


116 Bonifacio, supra, note 110 at 63.

117 Supra, note 21 at 55-64.

118 Ibid.; Drummond, supra, note 10 at 24-6.

119 Downs, supra, note 12 at 72.

120 Drummond, supra, note 10 at 25; Reuss-Ianni, note 28.
subculture of policing creates a climate where it is unacceptable to cooperate or testify against other officers.\textsuperscript{121} In the author’s experience, as will become evident, this is putting the matter too simply.

One of the assumptions of employment equity is that hiring on a more representative basis will breach the police subculture, and will prevent (or repair) community alienation from, and antagonism towards, the police.\textsuperscript{122} However, Walker asserts that equity hiring is based on a false assumption because it is the working environment and not background that is the controlling variable in police culture.\textsuperscript{123} Further, there is some evidence that black officers do not behave much differently from white officers in the policing environment.\textsuperscript{124} The Oppal Commission also found data suggesting that some members of a minority community, even when dealing with a minority officer, only see a cop and not someone that

\begin{itemize}
\item \textsuperscript{121} Albert J. Reiss Jr., \textit{The Police And The Public} (New Haven: Yale University Press, 1971) at 213.
\item \textsuperscript{122} Goldstein, \textit{supra}, note 7 at 269-70; Oppal Commission, \textit{supra}, note 5 at E-13 to E-18.
\item \textsuperscript{123} \textit{Supra}, note 48 at 275-6. It may also be that economic station governs or contributes to the operational values of officers, regardless of colour or ethnic background. For example, members of colour that come from a middle class or upper class background may be more inclined to act in accordance with class-based socio-economic factors than cultural. Prof. Bryden, Faculty of Law, Univ. of British Columbia adeptly pointed out to the author that Vancouver, British Columbia may have avoided some of the more widespread race relations conflicts between police and minority groups in other Canadian cities (\textit{e.g.} Toronto and Montreal) and the United States because of the generally higher economic and social status of many minority groups. The conflict pattern would be present between First Nations and police officers of colour because there is traditionally a socio-economic gap. It is not possible to examine this issue in detail, however, it is an issue that may be worth further examination. In the author’s view it is probably a combination of police culture and socio-economic values that lead to fairly consistent views by police officers regardless of their ethnic background. This does not mean that all police officers see every issue the same culturally, but it certainly leads to some commonalities in views of police officers.
\item \textsuperscript{124} Walker, \textit{supra}, note 48 at 275-6.
\end{itemize}
is bridging a societal gap.\textsuperscript{125} Even more unsettling were the findings of Reuss-Ianni that many minority officers wanted to be transferred out of the minority community to which they had been representatively posted because it was an undesirable place to work. In fact, many minority officers reportedly resented policing their own race, or spoke unkindly of their race.\textsuperscript{126} Reuss-Ianni did not find any evidence of inter-ethnic or racial tensions between officers, noting that work schedules determined social relations, not race.\textsuperscript{127} The author has observed, and found during interviews, that minority officers do tend to display or hold many of the occupational norms that exist in operational policing. This is especially so in relation to internal investigations and public complaints.

4. Two Cultures of Policing

There are several factors that contribute to the division between management and operational officers, which can also be characterized as a conflict between administrative process and operational pragmatism.\textsuperscript{128} First, there are competing and conflicting

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\item Oppal Commission, \textit{supra}, note 5; also Reuss-Ianni, note 28 at 55-60.
\item Reuss-Ianni, \textit{ibid.} at 59-60. While working with First Nations police officers the author has observed two interesting developments. First, some native officers are completely ostracized by the community and leaders. One native officer with whom the author worked had to take a shotgun home at night because of reprisals that had been exacted on him and his family, including trying to burn down his home. Second, on occasion native officers are part of, or become part of, the power struggles in the community. The native officer may be related to one family that is in control of the political base or informal power systems. In some instances these native officers came to regret being placed as police officers in their own community. On the other hand, other native officers were able to effectively balance the demands on them. Others appeared to succumb to blatant self, family or political interests. The author has also heard minority officers express unkind views of their group.
\item \textit{Ibid.} at 55-60.
\item \textit{Ibid.} at 1-3; Sandler and Mintz, \textit{supra}, note 5 at 458-9.
\end{itemize}
perspectives on procedure, practice, priorities, and purpose, which Manning found contributed to the understandable and realistic paranoia and uncertainty of operational officers. As already discussed, management is reliant on formal codes and practice, and public relations, while operations, by necessity, is usually response and situationally oriented, which creates pressures and false fronts between each group. Reuss-lanni found there was considerable stress generated from the real or perceived lack of support by management, the politics of the department, and the refusal by management to make decisions based on operational requirements. It is frustrating for an operational officer when little attention is given by management to the actual practice, or practical limits, when designing new processes or responses. Most commentators conclude that individuals in administrative organizations, particularly managers, exercise their powers of discretion to their own advantage and to seek to avoid choices that have disadvantages.

A second factor is that management officers are frequently beset by "group think" which reduces individuals to the lowest common denominator. They often treat operational officers like children, expecting (or continually developing ways to get) operational officers to ask permission for any action, no matter how inconsequential. Management has also been known to engage in the shifting of operational personnel in order to impress upon them

129 Manning, supra, note 19 at 193-201; Yarmey, note 28 at 43-75; Fogelson, note 16 at 114-15.

130 Ibid.


132 Ibid. at 5-7.

133 Brown, supra, note 14 at 246. In the author's experience as an operational officer, this form of decision-making by management is known as "action through inaction."

134 Drummond, supra, note 10 at 18-26; Bittner, note 14.
that they are interchangeable and have no special value as employees.\textsuperscript{135} In fact, management is quite fond of the notion that officers will pretty much do anything, particularly in mid to late-career, because of the desire to make it to pension.\textsuperscript{136} As observed by Reiner, "So the man [or woman officer] is trapped by a combination of lack of outside alternatives with equal security, and the lure of retiring with a pension."\textsuperscript{137} Lateral mobility between departments is particularly limited, which can considerably reduce ambition, creativity, and more importantly taking chances.\textsuperscript{138} Lack of occupational mobility is an important feature in policing relied upon by management to control officers and it also tends to seriously limit the amount an officer will speak out.\textsuperscript{139} Unfortunately, the impression too frequently created by management, despite current presentational corporate and management philosophies, is that operational officers are little more than objects of concern, and are certainly not valued.\textsuperscript{140}

Third, negative attitudes that can be held by operational officers towards the department and management also have to do with the arbitrary and punitive manner in which management treats operational officers.\textsuperscript{141} As Brown found, patrol officers usually lead a schizophrenic existence: they must cope not only with the terror of an often volatile and unpredictable citizenry, but also with a hostile, not infrequently tyrannical, and unpredictable

\begin{footnotes}
\footnotetext[135]{Goldstein, supra, note 7 at 260-61.}
\footnotetext[136]{Reuss-Ianni, supra, note 28; ibid.}
\footnotetext[137]{Supra, note 74 at 180.}
\footnotetext[138]{Goldstein, supra, note 7 at 236-8.}
\footnotetext[139]{Ibid.}
\footnotetext[140]{Yarmey, supra, note 28 at 90.}
\footnotetext[141]{Bonifacio, supra, note 110 at 55.}
\end{footnotes}
police bureaucracy. In fact, it is a cultural tenet of line officers that there is often a lack of administrative support when an allegation is filed, especially when it involves a serious incident. Perhaps Ayres and Flanagan put it best:

Any time law enforcement officers make independent decisions, they can be second-guessed by their superiors. Unfortunately, this second-guessing is highlighted in situations—often widely publicized and controversial—requiring the use of deadly force. Faced with this type of situation, the officer needs to know where his [or her] superiors stand. Will they support and back him [or her], or will they abandon him [or her] to the wolves? … many line officers believe that they will be abandoned by their superiors and made scapegoats in the interest of public relations. When an incident occurs where an officer does not receive that administrator's backing, the feeling of helplessness and lack of support spreads to others in the department. As a result, a general feeling of mistrust of the administration develops among the rank and file.

Although there is a difference between abandoning the troops and following normal internal investigation process, failure to educate officers about the difference only leads to greater mistrust and alienation. Arthurs observed that an air of martial law can pervade the relationship between police administrators and their employees. For the operational officer then, management is often seen as oppressive, quixotic, if not pathological, because it manages by exception (and self-interest) and not by objectives. There is no question that individual officers operate in a state of dependent uncertainty. Every officer knows, and is

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142 Brown, supra, note 14 at 9.

143 Supra, note 57 at 13; also, Ericson, supra, note 21 at 61; Bouza, note 19 at 7 discusses the "frantic searches, by high ranking officials, for scapegoats, following some public disorder or series of crimes...."

144 Ibid. They speculate that aside from job alienation it also can ultimately lead to unionism.

145 Supra, note 70 at 122. He carried on by observing that "[a]t a time when, throughout industry, fair dealing and due process are becoming accepted as matters of right, rather than charity, the administration of the Toronto police force has remained strongly indifferent to prevailing social values" by consistently displaying callousness towards and showing contempt for civil liberties for police officers.
constantly reminded, that the department can "get the officer" for almost anything, and that anything, no matter how trivial, can cause a fall from grace. That operational officers are vulnerable is a factor that surrounds them formally and informally at all times.

Every operational officer will, at some point, suffer from role strain and conflict because public and internal expectations are ill-defined. The model of correct performance is vague with constantly changing boundaries, pervasive contradictions and disagreements persist over goals and values in policing (and/or society), as well as a chronic re-arrangement of priorities. In many instances, as found by O'Bireck, the actions of management lead to feelings of disempowerment, alienation, and lack of self-confidence in officers, which leads to disassociation, disinvolvment, and lack of commitment or dedication to the department or its objectives. In the more extreme cases, as noted by Yarmey, officers can begin to suffer from learned helplessness from the frequent failure to accomplish objectives, which can lead to aversive behaviour.

In order to deal with life at the bottom, operational officers will engage in easing tactics to deal with the mixed messages and obligations on them, as well as liberating the officer from controls. As officers become more alienated they increasingly emphasize

146 Ericson, supra, note 21 at 61-63; Bouza, note 19 at 133 simply refers to the fact that "Police agencies are mainly controlled through terror..." There is also an adage that a member is only as good as his or her last case or arrest.

147 Yarmey, supra, note 28 at 61-69; O'Bireck, note 96.

148 Supra, note 96; Yarmey, ibid., felt such a work environment is extremely threatening to self-esteem and could even lead to stress disorders.

149 Ibid.

150 Ericson, supra, note 21 at 63-72; Reuss-Ianni, note 28 at 6-16.
personal goals over those of the organization.\textsuperscript{151} For example, operational officers, if not consulted or given meaningful involvement in policy or other practices, will have little or no commitment/desire to see them succeed.\textsuperscript{152} As a result, an operational officer can limit the impact of new policy by evading or ignoring its application.\textsuperscript{153} In other cases, operational officers develop informal codes of practice, "recipes" or working rules to negotiate and mediate organizational and other expectations, as well as protect themselves from management and the public.\textsuperscript{154} The mistrust of the organization and the public are also manifested, as found by Ericson, in the various forms of ritualized talk engaged in by operational officers.\textsuperscript{155}

The result is often a force of cynical, withdrawn, and mistrustful operational police officers who are largely unmotivated because, from their perspective, doing little is what is rewarded, or at least not punished, and is much less likely to lead to conflict with the

\textsuperscript{151} Ibid.

\textsuperscript{152} Goldstein, supra, note 7. The real danger for community-based policing is that many operational officers see the rhetoric of internal consultation, but when management does not hear or get what it wants it resorts to the same old heavy-handed tactics against operational officers. For example, the Burnaby, British Columbia, R.C.M.P. Detachment recently moved to community-based policing and management stated that members would decide on the operational hours for uniform. When, however, the uniform members opted to retain 12 hours shifts after considerable "consultation", management became upset and began threatening to change the shifts unilaterally. The hypocrisy was evident and widely discussed by the uniform members. It had a devastating affect on support from the ranks.

\textsuperscript{153} Petterson, supra, note 23.

\textsuperscript{154} Reuss-Ianni, supra, note 28; Ericson, note 21 at Chp. 3.

\textsuperscript{155} Ericson, \textit{ibid.} at 63-66. For example, using derogatory language to describe decisions by management and policies.
organization or public. In more extreme cases of disjunction between management and personnel, it leads to increased militancy over rights and personnel protection (even unionism, as history shows, where treatment is particularly bad).

5. Observations

One of the critical themes that can be taken from this overview is that any discussion and analysis of compelled statements must take into account the divergent cultural values between management and operational police officers. One of the recurring features encountered in the literature and in interviews is that operational police officers consider themselves extremely vulnerable. It is evident that police recruitment, training and management practices are in many respects oriented towards engendering and maintaining the vulnerability aura surrounding operational police officers. Another aspect of management and operational relations is the apparently unceasing struggle over control and surveillance of operational personnel through the various strategies and structures of hierarchy, supervision, status, policies and discipline.

This Chapter highlights the substantial degree of consistency with respect to management and cultural practices in policing over the last 30 years in the United States, Britain and Canada. This raises two points. First, although the dominant organizational and management structures that exists in policing are apparently dysfunctional they remain widespread and persistent. Even in the face of pervasive criticism of police management

\[156\] Ibid.; Manning, supra, note 19 at 193-201. Examples of this are found in "skating" and the current acronym FIDO (i.e. "F... it, drive on"), which refer to tactics used to avoid work, or at least work that tends to implicate officers in allegations of wrongdoing.

\[157\] Goldstein, supra, note 7 at 311-313; notes 66, 69-71.
practices, the classic paramilitary approach has shown considerable resiliency. While the "old guard" may be somewhat responsible for this state of affairs, it must not be overlooked that the traditional command and control model provided a ready framework for placing responsibility. In relation to public complaints, the fact is that complainants are very much driven by their desire to go over a officer's head to a supervisor or the chief. A clear chain-of-command provides a framework for role responsibility and response to issues. This is appealing to managers, rank-and-file, politicians and the public. On the other hand, the move towards delegated authority, elimination of ranks, empowerment and consensus decision-making will most certainly raise challenges to these traditionally held expectations.

Second, if the traditional management styles and culture is as pervasive as it appears, it will not be easily displaced. The traditional policing bureaucracy seems particularly rigid and any changes to the discipline process may have to take this into account.

In the author's view, one of the keys to determining the extent of change in any organization is to examine how it treats its own employees. One of the windows to employee treatment is discipline. Based on the background of management and culture outlined in this Chapter, it is possible to examine in more detail the internal accountability and discipline process in policing. As will be discussed in the following chapters, disciplinary spectacles and mechanisms are still central to maintaining the twin pillars of vulnerability and control over operational personnel in policing.
INTERNAL ACCOUNTABILITY AND DISCIPLINE

"...we can hardly expect policemen to treat citizens with dignity and propriety if they live under an administrative regime which disregards their own basic rights."


1. Introduction

This Chapter will examine internal accountability and discipline as they pertain to the control of police misconduct. As noted by Brown, it is clear that there are two distinct systems of internal control operating in policing. The first is bureaucratic control in which discipline and the hierarchical structure are used to regulate the police organization and misconduct. The second, which was considered in Chapter 2, is the system of police culture. This Chapter will consider in more detail the notion of internal bureaucratic control and discipline over police misconduct and then conduct an analysis of the issues related to the police having jurisdiction over complaints of misconduct. It will be evident that vulnerability and control continue to be systemic themes in internal accountability and discipline in policing. In addition, other themes will also begin to emerge that inform the issue of ordered statements from police officers. The complexity of accountability issues in policing will begin to take shape. This Chapter will continue the process of identifying and discussing some of the broader issues in policing that generally inform the accountability debate. While the following observations may not be applicable to every police organization, they are consistently encountered as points of contention when considering accountability in policing.

2. Discipline

It is fair to say that in policing "discipline" plays a more pervasive role than in almost any other employment situation. Discipline in policing has two identifiable features: first, there is the paramilitary based training that relies on marching, uniforms, salutes, ranks, forms of address, hair cuts, and values; and second, there is the system for administering punishment for misconduct. In general, there are two approaches to discipline. One approach is negative (i.e. punishment) and the other is positive (i.e. corrective or remedial). The traditional approach to disciplinary matters in policing has been negative, in that it is first and foremost, punishment based.

Recent discussions in the police community have declared a commitment to principles...
of affirmative, corrective, or remedial discipline, and a rejection of the purely punishment-oriented discipline approach.\textsuperscript{6} Affirmative discipline is premised on the fact that an employer spends considerable time ensuring the employee knows and understands the rules governing employment conduct, why they are necessary, and the value of such rules.\textsuperscript{7} One of the keys is to ensure the employee is given a copy of the rules, signs a commitment to observe the rules, and signs a receipt for a copy of the rules before employment is commenced.\textsuperscript{8} By engaging in such a formal and solemn exercise the employer accomplishes several objectives. First, the employee receives an impression that this employment is different from others. Second, general notice is given to the new employee of all rules and specific notice of important rules. Third, the employee receives specific notice of the employer’s expectations beyond those mentioned in the individual rules. Fourth, this process documents the employee’s advance notice of rules which makes any subsequent denial of knowledge of the rule impossible.\textsuperscript{9}


\textsuperscript{7} Redeker, \textit{ibid.} at 35; Ferguson and Rusen, at 53-4; Discussion Paper 8, \textit{supra}, note 4 at 7.


\textsuperscript{9} Redeker, \textit{ibid.} At 24 Redeker observes that under progressive discipline arbitrators have found specific publication of standards of conduct is acceptable where: 1) employee admits
Observers have noted that the traditional military or quasi-military style of police management and discipline (e.g. drill, blame, punishment) has been under attack inside and outside policing for some time. The critiques usually come in two forms. First, the legally inspired critique which attacks the nature of the sanctions and procedures as being unfair, unjust, and oppressive. Second, a critique of the value of blame and punishment as a regulative strategy/philosophy in that the punishment approach is less effective as a management tool than the positive approach.¹⁰

The Royal Canadian Mounted Police ("R.C.M.P.") External Review Committee ("E.R.C.") identified three elements to the attack by contemporary critics of the paramilitary police discipline model. First, punishment is viewed generally as retribution and not correction. Second, it is questionable whether punishment is a valid basis for modifying behaviour in an organization. Third, there is a tendency for punishment to draw attention to the individual rather than structural or organizational problems that may have contributed to, or caused, the misconduct.¹¹

It is important to understand that traditionally the underlying rationale of police discipline is the free-will philosophy of human conduct.¹² In other words, individual

¹⁰ Discussion Paper 12, supra, note 3 at 1; Ferguson and Rusen, note 6 at 58.

¹¹ Discussion Paper 12, ibid., Chp. IV at 20.

choices are personal and freely made and a person is strictly responsible for his or her individual acts/choices. Police disciplinarians tend to be very moralistic in their view of misconduct. The difficulty with the free-will approach is that it does not adequately consider human failings, individual weaknesses, structural-organizational features, sanctioned practices or other power imbalances in relation to misconduct. In police discipline, this translates into the belief that non-conformity arises from wilful disobedience, choice, or negligence, and not from mistakes, an inability to conform, or an error of judgement. It is not unfair to observe that the presumption of individual responsibility and accountability is used by police departments, imbued by a strong moralistic quality in superior and subordinate relations.

As noted by Reiss, anyone familiar with police organizations soon becomes aware that official means of sanctioning behaviour is dominated by punishment more than rewards.

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14 Ibid.

15 Albert J. Reiss Jr., The Police And The Public (New Haven: Yale University Press, 1971) at 212; V.N. MacDonald, M.A. Martin and A.J. Richardson, "Physical and Verbal Excesses in Policing (1985) 9 Canadian Police College Journal 295 at 307; Raymond S. Adamson, "Police Force Communication: Member Perceptions" (1987) 11 Canadian Police College Journal 233 at 262 also reported in his study that the perception was that management was more disposed to punish bad behaviour than reward the good. Rewards in policing are at best uncertain.
As noted by the E.R.C., police management has tended to operate disciplinary systems that emphasize punishment over non-punitive strategies and individualistic over structurally focused strategies.\textsuperscript{16} In fact, the traditional or progressive approach to discipline is a system of ever-increasing penalties, and as Redeker observes, this is based on the illogical premise that "if an employer treats its employees progressively worse, they will be progressively better."\textsuperscript{17}

Unfortunately, as the E.R.C. notes, despite the apparent consensus on the remedial or preventative approach to discipline, \textit{punishment} remains an essential part of police management in Canada and elsewhere, creating a gap between rhetoric, practice and theory.\textsuperscript{18} There is little doubt that police organizations and managers remain committed, for the most part, to procedures and practices that are essentially discipline-punishment strategies.\textsuperscript{19} Although reformers may have muffled the "old guard" of punishment based strategies, the practice has not stopped.\textsuperscript{20} As the E.R.C. put it:

While discussion about policing is now very much dominated by the remedial agenda...the reality is quite different. The practice of police management continues to rely heavily on punishment. Rhetoric and practice are poles apart...the face of

\textsuperscript{16} Discussion Paper 4, \textit{supra}, note 6 at 5.

\textsuperscript{17} \textit{Supra}, note 4 at 33. Of course, as pointed out by Prof. Bryden, another way to look at progressive discipline is that it de-legitimizes the use by employers in the first instance of an ultimate sanction that otherwise would have been appropriate were it not for the employer's duty to sensitize employees to the consequences of continued misconduct through the implementation of lower level sanctions for first instance misbehaviour. An employer that does not take disciplinary action in relation to subsequent misconduct risks an argument that the behaviour was condoned. Thus, a progressive approach to accountability/discipline does not necessarily have to be inconsistent with a corrective program.

\textsuperscript{18} Discussion Paper 12, \textit{supra}, note 3 at 2-3.

\textsuperscript{19} Discussion Paper 4, \textit{supra}, note 6 at 9.

\textsuperscript{20} Discussion Paper 12, \textit{supra}, note 3 at 3-4.
discipline within the police institution has changed remarkably little. Discipline still tends to mean punishment in just the way it did in the 1970s when the Marin Commission was developing its remedial critique.\(^{21}\)

As Scott found, although rehabilitation principles for an offending officer may be acknowledged, "it universally appears that the real purpose of discipline is to achieve an example for the accused's [i.e. officer's] contemporaries and to respond to vaguely defined public expectations."\(^{22}\) The problem, as reported by MacDonald \textit{et al.}, is the managerial view that any operational officer who sullies the good name of the department, or who does not show the necessary respect for the public, will be disciplined, which creates the operational officer's perspective that management is constantly focused on discipline.\(^{23}\) The rank-and-file are acutely aware of management's predisposition. Further, based on the literature and the author's discussions with police personnel, it is clear that much of the talk surrounding corrective or remedial discipline practices in policing is seen as rhetoric.

It is also important to consider the direct and indirect messages that disciplinary measures can have for police officers. For example, when a police manager transfers an officer back to patrol/uniform as a disciplinary measure, the \textit{intent} may be to punish the

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\(^{21}\) \textit{Ibid.} at 31.


\(^{23}\) \textit{Supra}, note 15 at 307.
individual behaviour, but the message is that uniform work is of low value.  

Ayres and Flanagan found that:

One of the most common stress factors in a law enforcement organization relates to the internal discipline structure. Officers often perceive themselves as second-class citizens, who do not have even the same rights as the common criminal. Officers are aware that they are not only liable criminally and civilly for an offence, but they can also face punishment from within the organization. [emphasis original] Therefore, frustration with the internal disciplinary process is commonly expressed by officers, who often complain of favouritism, overemphasis on negative discipline, excessive time between violation and corrective actions, discipline based on external pressure, lack of criteria or guidelines for disciplinary action, inconsistency and arbitrariness, the "where there’s smoke there’s fire" syndrome, "nitpicking" when major violations cannot be substantiated, vindictiveness and lack of due process. The usual reaction by most officers to the disciplinary process is an antagonistic stance, with the expectation of unfair treatment. (emphasis added)

Although the "institutional approach" to police problems requires management to set an example, arbitrary and unfair conduct by management does little to impress the operational officer.  

The key to avoiding discipline may be to establish and maintain positive employer-employee relations by being versed in the basics of human resource management, but this is certainly not the current rule in policing. As Ferguson and Rusen point out, management also needs to work on raising the collective self-esteem of operational officers, which current practice does little to address. Unfortunately, police managers seem to easily lose sight of the fact that misconduct is sometimes a matter of educating the

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24 Adamson, supra, note 15 at 268.


27 Ferguson and Rusen, supra, note 6 at 37.

28 Ibid. at 33.
officer instead of punishment.  

Disciplinary measures are not limited to formal strategies. The reader must be familiar with the "informal systems" of discipline that exist in police organizations. Carter found it to be a common practice in serious cases of misconduct to give the officer an "option" to resign instead of going through a formal disciplinary process. The benefit to the department is that it saves time, expense, and the reputation of the department by avoiding the discharge process. Although resignation may have advantages for an officer, it can be questionable whether such an offer is truly an option when officers are placed under intense pressure, often without qualified legal advice, to make such a decision.

Another informal process adopted in discipline is a form of plea-bargaining in which the suspect officer agrees to some form of discipline, which may or may not be permitted under the legislative regime, and the officer agrees not to challenge it when imposed. The department can easily extract such agreements, especially if there is no effective representation for the officer who finds her or himself in a very intimidating situation. Whether there is discretion for the department to act outside the regime is also a matter of

29 Reiss, supra, note 15 at 203-4.

30 Supra, note 5 at 361; Whitman Knapp (Chairman), New York Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, The Knapp Commission Report On Police Corruption (1972) at 26-7 reported the practice in New York of permitting officers suspected of misconduct to retire by submitting a resignation before charges were brought against them.


32 For example, the officer agrees to a 15 day suspension without pay when the statute only permits a maximum 5 day suspension; see, Carter, supra, note 5 at 361.
debate.\textsuperscript{33}

Scott reported evidence of an internal police management strategy in misconduct cases of assigning the suspect officer to more disagreeable tasks.\textsuperscript{34} Reiss also reported that, in day-to-day operations, superiors can dominate the rank-and-file through the imposition of informal punishment by assignments to dirty-work or less desirable locations, or even more perniciously, securing a transfer to another area completely.\textsuperscript{35} The benefit to the supervisor and department in using informal mechanisms is that the officer is frequently left with no redress; because the action is not part of the "formal" discipline process, the action may not be subject to grievance, and it is difficult to prove motivation.\textsuperscript{36} Moreover, from management's perspective, "outplacement" strategies for employees who are not functioning properly are often easier than taking formal remedial or disciplinary action.

Departments and supervisors often construct other forms of unofficial sanctions so they will have the most impact on an officer's particular circumstance, including: assigning vacation or other days off with no consultation (\textit{e.g.} subordinate reports for shift only to be told that he or she has been scheduled off), not approving the days off requested, cancelling days off at the last minute,\textsuperscript{37} no in-service training courses, no high profile or interesting cases, assigning only undesirable investigations, intensive and unnecessary supervision (\textit{e.g.}

\begin{itemize}
  \item \textsuperscript{33} Paul Ceyssens, \textit{Legal Aspects of Policing} (Scarborough: Thomson Canada Ltd., 1994) at 5-2.
  \item \textsuperscript{34} \textit{Supra}, note 22 at 162.
  \item \textsuperscript{35} \textit{Supra}, note 15 at 212; also, McNamara, note 13 at 179.
  \item \textsuperscript{36} Scott, \textit{supra}, note 22 at 162.
  \item \textsuperscript{37} McNamara, \textit{supra}, note 13 at 179.
\end{itemize}
report to supervisor every hour or reject every file for some petty reason), no recommendation for overtime assignments, degrading the officer in private or before co-workers, assignment of dilapidated vehicles or equipment, not supporting transfer requests, denying leave to attend university courses, writing negative comments on files, not providing operational support, denying permission to return to the office, take lunch or coffee breaks, and reducing or eliminating on-duty fitness training. Such informal sanctions can be carefully moulded to have the greatest impact on the affected officer.

In fairness to police departments, aside from some of the Draconian views and actions of some police managers and disciplinarians, not all the problems with discipline are attributable to management. For example, recently, Ferguson and Rusen identified several problems with the legislative regime and disciplinary provisions governing municipal police forces in British Columbia. It was found that the legislative disciplinary process itself was based on outdated philosophy. The legislation was criticized because it contained no statement of the aims or purposes for the sanction process and it set out a list of "punishments" for officers, which creates the impression the process is not to be remedial. There is no guidance for dealing with or identifying aggravating and mitigating factors when imposing a sanction and there is no guidance on sanctioning. In the current British Columbia scheme there is no direction on the use of previous discipline cases or incidents and there are few or no true remedial options to deal with misconduct such as counselling, training or

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38 The author once observed a supervisor reject a file from a subordinate, just to be difficult, because there was one too many letters in the details box on the report form.

39 Supra, note 6 at 8-10 and 63-4.
treatment. Proposed amendments to the British Columbia legislative regime will provide more remedial options and will identify mitigating and aggravating factors to be taken into account when dealing with disciplinary matters.

Critics sometimes fail to note that disciplinary sanctions can still be quite severe. For example, in Saskatchewan a major service offence can result in dismissal, 60 days suspension, or $1,000.00 fine; while fines for minor offences cannot exceed $200. Even more noteworthy is the fact that railway police officers can still be sentenced to hard labour. Demotion is also considered to be a significant sanction because of the attendant loss of earnings (immediate and pensionable), loss of status (formal and informal), and the

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40 These same criticisms can apply to sentencing in criminal law as well. Ferguson and Rusen, ibid. at 8-10 identify other problems with the British Columbia discipline provisions including: 1) complexity; 2) technical and legalistic; 3) inefficient and formalized; 4) ambiguous/overlap between internal and public process; 5) inadequate procedures (e.g. not public, lack of disclosure, limits on counsel); 6) levels of review and appeal; 7) application to probationary officers; 8) non-culpable dismissal; 9) apprehension of bias (e.g. public over police role and officer over prior knowledge of chief); and 10) off-duty conduct application. The author has been advised that the British Columbia Civil Liberties Association ("BCCLA") was critical of the "punishment" model because it made it hard to resolve minor complaints. It was hard for officers to acknowledge the complainant's perception of an incident because it also made the officer vulnerable to discipline on the basis that her or his conduct was culpable. The officer's position was often understandable under these circumstances, but frequently the result was an inability by the officer and complainant to reach a reconciliation. This left the officer vulnerable and unhappy and the citizen angrier at the process than he or she had been over the original incident. Many of these should be rectified by the proposed regime and amendments in Bill 16, Police Amendment Act, 1997.

41 See, s. 58 of the Police Act, S.S. 1990-91, c. P-15.01 (as amended); (unknown author) Police Discipline and Complaints in Saskatchewan (publisher unknown, 1991) at 11.

42 Section 418(1) of the Railway Act, R.S.C. 1985, c. R-3 provides summary conviction punishment for neglect or breach of duty not exceeding eighty dollars or imprisonment for a term not exceeding two months, with or without hard labour. While this provision shows the severity of punishment for some police misconduct, it also highlights the punitive approach to police discipline that has not been rethought.
restrictions on subsequent career/promotional opportunities.\textsuperscript{43} It is interesting to consider how general criminal principles of sentencing also pervade the disciplinary process. For instance, Folk, in an interesting analysis in the military context, noted that a discharge is based on deterrent principles, which in effect makes it analogous to a quasi-criminal sanction.\textsuperscript{44} He also referred to discharges as "stigmatizing discharges" where they are imposed as punishment for misconduct.\textsuperscript{45}

Although discipline in policing is reputed to be corrective and remedial, the reality continues to be much different. This has important implications for any suggestion that officers should not consider police discipline matters as an adversarial or interest-based exercise. Moreover, any assertion that officers should provide statements in such a context may be unrealistic. The occupational and labour environments that govern in each police organization must be carefully contemplated when discussing police statements.

3. Internal Supervision

Internal accountability and organizational theory suggests that operational supervisors will provide an effective means to limit potential or actual misconduct of subordinates. Whether or not a police supervisor is effective in this role seems to depend in part on the type of approach adopted by the supervisor. Brown found that police field supervisors generally fall into one of three categories: first, the "colleague," who maintains a close

\textsuperscript{43} Supra, note 5 at 363.

\textsuperscript{44} Thomas R. Folk, "Use of Compelled Testimony in Military Administrative Proceedings" (August, 1983) The Army Lawyer 1 at 11-12.

\textsuperscript{45} Ibid. at 3. While it is true in the general employment context that one proven incident of theft can justify dismissal, based on the "loss of trust" argument, it would be naive to believe that deterrence is not an element.
relationship with subordinates; second, the "bureaucrat," who is more likely to be formalistic and rigid in disposition and less closely associated with subordinates; and third, the "buffer" or middle manager, who acts as an intermediary between the organization and subordinates. In practice, however, researchers find some decisions by police officers are not necessarily subject to effective supervisory review because they are not public and frequently involve low profile or "low visibility" activity that is not easily subject to monitoring. As noted by Bayley, the organization may in some instances be engaged in creating the appearance of control while not actually exercising control.

The dilemma for police supervisors is that they must maintain the loyalty and confidence of their subordinates to be operationally effective, yet they must also enforce rules of conduct, policy, and discipline to be administratively effective from management's perspective. Subordinates can manipulate supervisors to some degree through various techniques. For example, Brown found that police subordinates can "betray" a supervisor,

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46 Supra, note 1 at 102-3.

47 Richard V. Ericson, Reproducing Order: A Study of Police Patrol Work (Toronto: University of Toronto Press, 1982) at 55-63; more generally, Richard V. Ericson, "Rules For Police Deviance" in Clifford Shearing, ed., Organizational Police Deviance: Its Structure and Control (Toronto: Butterworths, 1981) at 83-110; A.J.P. Butler, Police Management (Aldershot England: Gower Publishing, 1984) at 108; Laurence Lustgarten, The Governance of Police (London: Sweet and Maxwell Ltd., 1986) at 10; Goldstein (1967), infra, note 204; Bouza, supra, note 22 at 6, 13 and 152 comments on how cops function individually without much direct supervision and that the members in "the trenches retain the power to work her or his will in countless ways." The response is usually to produce more rules and procedures whenever there is an actual or perceived failure, which only succeeds in further alienating subordinates.


49 Supra, note 1 at 107-8; Douglas W. Perez, Common Sense About Police Review (Philadelphia: Temple University Press, 1994) at 97 found that there can be disparity between the discipline actions recommended by the Chief and a supervisor, in that immediate supervisors are closer to the street and tend to identify with and protect the accused employee.
 overtly or covertly, to management or other officers; a subordinate can "bait" a supervisor into making mistakes or imprudent decisions; or the subordinate can even go so far as to "deny assistance" to the supervisor in an emergency situation.\(^{50}\)

In some cases, supervisors claim to have limited control over subordinates because they cannot influence what a subordinate is paid, rewards are often limited to pats on the back, and at best the supervisor can only coerce or harass an officer into compliance.\(^{51}\)

Complicated rules, regulations, and policies usually place limits on the actual authority of supervisors to discipline subordinates.\(^{52}\) Subordinates may also possess information or evidence of previous misconduct by the supervisor, which mitigates against the likelihood of the supervisor taking any action against subordinate misconduct.\(^{53}\) Even more benignly, if a supervisor has been negligent in supervision, it will be in the best interests of the supervisor not to highlight his or her own shortcomings.\(^{54}\) Alternatively, even if the supervisor has not engaged in, and does not condone misconduct, subordinates can direct the activities and interests of supervisors based on the organizational exchange requirement of the supervisor to

\(^{50}\) Supra, note 1 at 108-9; Brown also indicates that subordinates may be able to manipulate who is transferred to what positions or the ties that are maintained.


\(^{53}\) Ibid. at 123-4.

be seen as effective.\textsuperscript{55}

In the author's experience, however, some researchers have underestimated the authority of supervisors over the everyday working environment of a subordinate. Although supervisors have considerable responsibility to ensure that they respond to citizen complaints, they must also actively intervene with officers who are causing difficulties, ignoring enforcement priorities for improper reasons, or who are not meeting performance expectations. As already identified, among a supervisor's repertoire of responses is the ability to negatively impact a subordinate's working environment by influencing time-off, lunch and coffee breaks, work assignments, equipment availability, training and perceptions of an officer (\textit{i.e.} isolate and marginalize from other members). In particular, supervisors have the ability to threaten a subordinate with a transfer to an undesirable position within the immediate control of the supervisor or more generally within the organization.\textsuperscript{56} This view is supported by Beral and Sisk who found police supervisors retain a great deal of power over subordinates, even outside of the complaints system, because of promotional input and assignment changes.\textsuperscript{57} In some cases subordinates are also required to adapt to the fairly whimsical traits of different supervisors\textsuperscript{58} (\textit{e.g.} different coloured pens for different forms).

As Brown notes, supervisors possess fairly extensive powers to maintain control of

\textsuperscript{55} Ericson, \textit{supra}, note 47 at 58-61. The supervisor requires the support of subordinates, generally, to remain effective, otherwise the subordinates can administratively and operationally "frag" the supervisor. In other instances, such complications can lead supervisors to rely on extensive informal actions to regulate an employee or ultimately drive them out of the organization without formally acknowledging the reasons.

\textsuperscript{56} \textit{Supra}, note 52 at 123.

\textsuperscript{57} Harold Beral and Marcus Sisk, "The Administration of Complaints By Civilians Against the Police" (1963-64) \textit{77 Harvard Law Review} 499 at 518.

\textsuperscript{58} \textit{Supra}, note 1 at 127.
subordinates, including the authority to direct or order a subordinate, use of evaluation
reports that can significantly impact on a career, as well as generally having the edge in
experience and knowledge on the job.\textsuperscript{59} The problem is that informal and formal
mechanisms which may otherwise be valid tools can become illegitimate supervisory devices
when the supervisor loses his or her professional objectivity and engages in a campaign of
intimidation and harassment. Subordinates can quickly become marginalized and powerless
to protect themselves during such campaigns.

In addition, most supervisors have the initial responsibility for inter-personnel or
public complaints, and can influence whether or not a complaint becomes formalized or
informally resolved.\textsuperscript{60} The informal relationship between a supervisor and subordinate also
has important implications in a bureaucracy.\textsuperscript{61} If a subordinate has a good working
relationship with a supervisor, the subordinate is probably going to want the supervisor to
handle the initial complaint because the supervisor may be more sympathetic.\textsuperscript{62} On the
other hand, if the subordinate does not have a good working relationship with the supervisor,
the subordinate is not going to want that supervisor to be involved. It is not unfair to say
that an officer's working existence can become a nightmare if the officer becomes the
unfortunate target of a supervisor, for whatever reason.

\textsuperscript{59} \textit{Ibid.} at 109.

\textsuperscript{60} \textit{Ibid.}

\textsuperscript{61} Anthony Downs, \textit{Inside Bureaucracy} (Boston: Little, Brown and Company, 1967) at 62
notes that reactive informal relationships occur in bureaucracies to countervail the emphasis of
institutional goals and permit individual distinctions to arise in the role.

\textsuperscript{62} \textit{Supra}, note 1 at 109.
4. Internal Accountability

a. Supporting Arguments

There are several arguments that are advanced generally for making the police responsible for investigating and adjudicating allegations of misconduct. The police usually maintain that existing remedies and procedures for dealing with misconduct are adequate or merely need minor reform. Concurrently, the police also assert that because there are few complaints relative to the amount of work being done, the accountability process is working. From management's perspective, if alterations are to be made to the accountability structure, they should be based on changes that make internal control more effective.

The police are also inclined to argue that, like any other profession (e.g. doctors, lawyers), they should be able to discipline themselves. The reasons for taking this position may not always be the same. For example, it is more likely that managers will


64 John Ackroyd, "Comment" in Walter S. Tarnopolsky, ed., Some Civil Liberties Issues of the Seventies (York University: Osgoode Hall Law School, 1975) at 111 the Chief (rtd.) of the Metropolitan Toronto Police noted that, in the 1970's, his department was having 9,000 contacts with the public a day, which are often based on conflicting citizen-police goals, and less than one complaint a day is registered. The R.C.M.P., infra, Chapter 6, in British Columbia generate approximately 1,000,000 files annually and only receive around 1,000 public complaints.

65 Stark, supra, note 12 at 236, for example, in the U.S., suggests that separating patrol officers from detectives by assigning detectives to work directly for district attorneys, along with different training regimes, would give more internal accountability because the two groups would watch each other.

66 James R. Hudson, "Police Review Boards and Police Accountability" (1971) 36 Law and Contemporary Problems 515 at 518-19; also, James R. Hudson, "Organizational Aspects of Internal and External Review of the Police" (1972) 63 Journal of Criminal Law, Criminology and Police Science 427; Perez, supra, note 49 at 3 notes the argument that to nurture professionalism in policing requires the police to take responsibility for themselves.
assert that to remain above the political fray, and to protect against political and corrupt influence, the police must retain authority over allegations.\textsuperscript{67} However, it would not be unheard of for a police employee organization to adopt this argument as well. A further tenet advanced by management supporting internal review of police misconduct is that police supervisors and managers must have authority commensurate with their responsibility for the organization.\textsuperscript{68} Rank-and-file police personnel are more likely to advance arguments in favour of self-regulation on the basis that policing is a profession and ought to be regulated as such. Management is usually less enthusiastic about this argument because it usually means sharing control with the rank-and-file or civilians in the form of a review board of some sort.

Both police management and employee organizations claim that, as a practical matter, they are more thorough in investigations, have the ability and resources to do extensive investigations, are generally the most competent to conduct investigations, internal or otherwise, and that they are the best equipped to discover the "truth."\textsuperscript{69} In addition, the police traditionally assert that they are the only ones who have first hand experience with the difficulties and problems that confront police officers, and therefore, are the only ones who

\textsuperscript{67} Perez, \textit{ibid}.

\textsuperscript{68} \textit{Ibid}.

\textsuperscript{69} \textit{Ibid}, at 3 and 102 notes that internal review, if properly structured, can be more tenacious than most, if not all, civilian review models; see also, David Bayley, \textit{Patterns of Policing - A Comparative International Analysis} (New Brunswick, N.J.: Rutgers University Press, 1985) at 177-8; British Columbia, Policing in British Columbia Commission of Inquiry, \textit{Closing the Gap: Policing and the Community} (1994) (Commissioner: Wallace T. Oppal) ("Oppal Commission") at I-23 to I-25.
can really evaluate the conduct of officers.\textsuperscript{70} The police also claim that they are, or have the capability to be, more knowledgeable and better informed about the organization, its officers, and the local police milieu; not to mention that they have better access, formally and informally, to records, personnel, practices and values.\textsuperscript{71} Internal affairs units have also undergone considerable training and professionalization to give them more credibility with the community and with operational officers.\textsuperscript{72}

The police claim that they are prepared to rely on, request, or have actually used assistance from another agency when there is a conflict or inability to conduct a valid investigation into misconduct.\textsuperscript{73} Grant notes that most police officers, which has also been

\textsuperscript{70} Perez, \textit{ibid.} at 3 and 106-7; Wayne A. Kerstetter, "Who Disciplines the Police? Who Should?" in William A. Geller, ed., \textit{Police Leadership in America: Crises and Opportunity} (New York: Praeger, 1985) at 150. The public response is still that the pressure to protect their own and not embarrass the agency impedes even-handed review of allegations.

\textsuperscript{71} Bayley, \textit{supra}, note 69 at 177-8; Perez, note 49 at 118 confirms that internal review is better at learning about errant officers, either formally or informally. Further, he cautions critics at 106-7 not to underestimate the street experience and ability of the police to understand situations, \textit{readily access information}, breach internal politics, understand the geography, and influence practices and values.

\textsuperscript{72} Paul West, "Investigation and Review of Complaints Against Police Officers: An Overview of Issues and Philosophies" in Thomas Barker and David L. Carter, eds., \textit{Police Deviance}, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 384-6 outlines the initiatives in the U.S.; Arthur Maloney, \textit{The Metropolitan Toronto Review Of Citizen-Police Complaint Procedures} (Report To The Metropolitan Toronto Board Of Commissioners Of Police, 1975) at 62 notes that the Toronto police took three steps to improve the credibility of internal affairs: 1) give informal training to rank-and-file on role of internal branch; 2) provide interim transfers for officers to the section; and 3) provide training at the academy on role and need for process; Perez, \textit{ibid.} at 257 still believes that more and better training on internal procedures and complaints is required.

\textsuperscript{73} Matthew G. Yeager and William P. Brown, "Police Professionalism and Corruption Control" (1978) 6 \textit{Journal of Police Science and Administration} 273 at 278 found 93\% of a police sample endorse the use of, or expressed a willingness to request, assistance from another law enforcement agency concerning corruption within one's own police department. In the last two years, the Vancouver Police Department utilized an R.C.M.P. member to investigate allegations against its Chief Constable.
the author’s experience, are not prepared to sacrifice their career to protect an officer from being held accountable. In British Columbia, the prosecution service, in an apparent show of confidence, recently recommended to the Oppal Commission that criminal investigations against police officers be conducted by independent and impartial investigators from the department or another department with no real or apparent relationship with the suspect officer. This approach has been adopted under proposed amendments to the British Columbia legislative regime, except that certain complaints must be investigated by another department where it is necessary to preserve public confidence or it is ordered by the civilian complaints commissioner.

The McDonald Commission, surprisingly given the fact it was investigating accusations of specific and systemic misconduct and management failure in the R.C.M.P., was able to identify several reasons why the police should be permitted to investigate allegations of misconduct. First, a significant proportion of complaints are resolved informally, which provides a substantial cost saving that introducing an external body would not. Second, outside investigations would undermine the sense of responsibility within the police for uncovering and preventing misconduct. Third, the level of cooperation from subject officers is higher with internal than external investigators. Of particular interest to

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76 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, vol. 2, Second Report: Freedom and Security under the Law (Minister of Supply and Services, 1981) ("McDonald Commission") at 977-8. However, the Force’s priority to investigate was subject to two instances: 1) where public confidence would be undermined,
this study, are the findings of Baldwin and Kinsey that police investigators conducting internal investigations usually get a statement from subject officers, and subject officers do not generally stand on their rights.\textsuperscript{77}

Most studies show that internal police investigations into misconduct are generally adequate.\textsuperscript{78} The police will also note that many complainants have reported positive experiences with a police internal investigator.\textsuperscript{79} In response to queries about low substantiation rates, Walker and Bumphus report that the explanation for the high number of

\textsuperscript{77} Robert Baldwin and Richard Kinsey, \textit{Police Powers and Politics} (London: Quartet Books, 1982) at 140. The inference being that outside or external investigators will find that subject officers stand on their rights. Perez, \textit{supra}, note 49 at 118 notes that with external review even minor complaints result in defensive officers that resort to lawyers.

\textsuperscript{78} Perez, \textit{ibid.}; also see, Hudson (1971), \textit{supra}, note 66 at 518-19; Oppal Commission, note 69 at I-24; David Brown, \textit{The Police Complaints Procedure: A Survey of Complainants’ Views} (Home Office Research and Planning Unit, Study No. 93) (H.M.S.O., 1987); David Brown, "Civilian Review of Complaints Against the Police: A Survey of the United States Literature" in Kevin Heal, Roger Tarling & John Burrows, eds., \textit{Policing Today} (London: H.M.S.O., 1985). In particular, the BCCLA has not found internal police investigations to be a major problem in the British Columbia accountability system. Prof. Bryden advises that the BCCLA did not feel it could justify a requirement of external investigation in every instances based on the performance it experienced with the internal investigation system to date.

complaint failures is the subsequent lack of cooperation from the complainant.\textsuperscript{80} However, Walker and Bumphus also wondered whether the lack of cooperation could be because internal affairs passively failed to make the necessary effort to locate the complainant.\textsuperscript{81} It has been observed that a possible explanation for any decline in discipline can be attributed to discipline codes and procedures that increased chances of fairer proceedings for the officer.\textsuperscript{82}

\section*{b. Making Complaints}

On an abstract level, Downs points out that officials in any bureaucracy use ideology to influence outsiders/critics to support the organization, or at least refrain from attacking the organization.\textsuperscript{83} On a more practical level, however, there are several concerns that have been identified about a member of the public having to make a complaint about police misconduct to the police. There is often the requirement that the complainant must often attend the police office to make the complaint.\textsuperscript{84} It is asserted that citizens in general are

\begin{itemize}
\item \textsuperscript{81} Ibid.; see also, Maloney, supra, note 72. Whatever the reason, a high incidence of complainant failure to cooperate would not be surprising, even with diligent follow-up, given the general experience of the public with the criminal justice process.
\item \textsuperscript{83} Supra, note 61 at 238; Kerstetter, note 70 at 155 notes that some sociologists see the police as being involved in a "face game" in which power and masculinity are central to dealing with problems.
\end{itemize}
reluctant to complain about agencies that hold power over them and could respond with punitive action.\textsuperscript{85} For example, it is reported that visible minorities are often concerned that making a complaint to a police bureaucrat will result in police organizational or officer-based retaliation.\textsuperscript{86} In addition, the complaints process itself, in some jurisdictions, may not be instituted unless a formal complaint is made.\textsuperscript{87} In other instances, the complainant may not understand the complaints process and little information or help may be forthcoming from the police office.\textsuperscript{88}

Several tactics used by the police, including internal investigation units, have been identified by critics which discredit the notion of making a complaint to the police. The police may attempt to dissuade the complainant from making a complaint; there may in fact be patent reticence towards the complainant; or a general reluctance to be helpful.\textsuperscript{89}

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\textsuperscript{85} Reiss, \textit{supra}, note 15 at 190. This same logic would apply to officers making complaints about their supervisors or departments.


\textsuperscript{87} Lustgarten, \textit{supra}, note 47 at 146-59; Barton, note 63 at 454-5 notes that complaints may have to be written, signed, and in some instances sworn under oath. It was his conclusion that formality was a significant barrier to making complaints.

\textsuperscript{88} Brown (1987), \textit{supra}, note 78.

\textsuperscript{89} Goldsmith, \textit{supra}, note 84.
Maloney, in a study of an internal police investigation branch found that investigators had a
tendency to make complaints seem less serious, and sometimes tried to dissuade individuals
from making formal complaints.\textsuperscript{90} Alternatively, some complainants have felt unfair
pressure by the police to withdraw or resolve their complaint.\textsuperscript{91} The difficulty, of course,
is that the investigating officer may be legitimately trying to resolve the complaint, but the
activity is misconstrued by the parties.\textsuperscript{92}

Other actions by the police that impact on the viability of taking a complaint to them
are that complainants may be: threatened with criminal charges for making a "false"
complaint; required to take polygraph tests; or charged with offences to prevent a complaint
against the officer or after a complaint is lodged.\textsuperscript{93} In the past, the situation has also been
aggravated by protective tactics by employee associations or threats to sue complainants.\textsuperscript{94}

Even more difficult is the problem that many complainants are also engaged in
questionable activity, or they may be the subject of an on-going investigation which can

\textsuperscript{90} Supra, note 72 at 94-5.

\textsuperscript{91} Brown (1987), supra, note 78; Oppal Commission, note 69 at I-11.

\textsuperscript{92} Andrew Goldsmith, "Re-Cognizing Difference in Civilian Review: The Limits of Mono-
Logical Thinking in a Polyphonic World" (paper prepared for the International Association of
Civilian Oversight of Law Enforcement 1994 World Conference, Orlando, Florida, U.S.A.,
unpublished).

\textsuperscript{93} West, supra, note 72 at 374; Barton, note 63 at 454-5; Arthur Niederhoffer, Behind the
Shield: The Police in Urban Society (Anchor Books, 1967) at 284; Paul Chevigny, Police Power:
Police Abuses In New York City (New York: Pantheon Books, 1969) at 26-7 and 146.

\textsuperscript{94} Herman Goldstein, Policing A Free Society (Cambridge, Mass.: Ballinger Publishing
Company, 1977) at 311-16. A police association in the Maritimes was alleged to have threatened
a complainant with a law suit for making a complaint against an officer. The facts were
somewhat unusual, and it certainly was not a common practice. Law suits against complainants
in Canada are rare.
make them reluctant to complain.95 Avery and Rudovsky were also critical of the police getting the "first crack" at a complainant and witnesses when a complaint is registered or during the subsequent investigation because they felt statements could be carefully moulded to suit needs other than the complainant’s.96

c. Investigations

The general criticism of internal police accountability mechanisms is that internal, institutional, and personal pressures arise to protect the organization, careers, investigators or subject officers.97

In 1964 Beral and Sisk identified the three basic types of internal investigative mechanisms that exist to deal with police misconduct, and the typology is equally valid today, although now there may be a component of civilian oversight at some stage.98 The first model is to have the immediate or local unit/supervisor investigate the allegation or the local unit investigation is supervised by management. It is felt that using the local supervisor

95 McDonald Commission, supra, note 76 at 971. Prof. Bryden indicates that the BCCLA certainly had experience with serious complaints coming from people who were "known to the police."

96 Michael Avery and David Rudovsky, Police Misconduct: Law and Litigation (New York: Clark Boardman Co., 1980) at 4-1. While this observation may be valid in some jurisdictions, the author is hard pressed to see how the matter could proceed without some form of detailed statement from the complainant. As a civilian investigator of police misconduct the author made it his practice to speak to the complainant before contacting the police. Many complainant’s expressed surprise and pleasure at being spoken to before the police officers were contacted.

97 Kerstetter, supra, note 70 at 159-60; Downs, note 61 at 2 posits that regardless of the particular goals of a bureaucracy, every official is also motivated by his or her own self-interests, even when acting in a purely official capacity; Perez, note 49 at 98 found the most important indictment of internal systems versus external systems is that tenacity is personalized, and not systemic, through the attention paid to this issue by the chief executive.

98 Supra, note 57 at 503-4; West, note 72 at 375-6.
will heighten the awareness of what is transpiring with subordinates. Of course, a common criticism is that the local supervisor will be more inclined to cover-up the actions of the officer, particularly if the suspect officer is a friend. In addition, there may be the desire to uphold the reputation of the local unit, officer, or department, which may be compounded by the need of the unit or supervisor to conceal their failings. Brown found in his research that using local units/supervisors to conduct investigations caused problems because the supervisor has other operational duties and functions to attend to, and inevitably the complaint investigation may not get the attention required. Career requirements and convenience may also prompt a less than thorough review of an allegation, not to mention the fact that the supervisor may not possess the traits to be a suitable "internal" investigator. Most middle managers are usually not that keen on investigating their subordinates in any event.

The second model is to have the local or immediate supervisor's investigational role supplemented by a specific unit within the police department, such as "Internal Affairs." The advantages here are that the specialized unit provides more resources and trained personnel to deal with complicated allegations, provides a second layer/tier to review the

99 Ibid.
100 Beral and Sisk, ibid.; Chevigny, supra, note 93 at 268 endorsed the need for greater independence within departments for reviewing complaints (i.e. less immediate supervisors).
102 Ibid. at 41-2.
103 Grant, supra, note 74 at 408.
104 Beral and Sisk, supra, note 57 at 504-5; West, note 72 at 375-6.
supervisor's actions/investigation, and performs an audit function.\textsuperscript{105} 

The third model is to have misconduct allegations exclusively investigated by a specific internal affairs unit within the department.\textsuperscript{106} The assertion is that a separate unit will be more objective, possess more experience, have expertise, and provide serious attention to misconduct allegations.\textsuperscript{107} Brown questioned, however, whether the most suitable personnel were being identified or assigned to such specialized units.\textsuperscript{108} It was found in Britain that the move to specialized units also resulted in a perception from officers that the process was too remote and bureaucratic because investigators only came to the station from headquarters when there was a problem.\textsuperscript{109}

Some observers feel that as long as the department is investigating its own officers there will be suspicions of a cover-up.\textsuperscript{110} This is particularly so if an immediate supervisor is conducting the investigation, since he or she, as a supervisor, must be seen as part of the

\textsuperscript{105} \textit{Ibid.}

\textsuperscript{106} Barton, \textit{supra}, note 63 at 455 notes that the failure to have a specific unit to deal with misconduct complaints is viewed as a deficiency of the internal review system.

\textsuperscript{107} Beral and Sisk, \textit{supra}, note 57 at 504-5; West, note 72 at 375-6.

\textsuperscript{108} Brown (1987), \textit{supra}, note 78 at 41-2. Some departments require that officers have experience in an internal affairs unit, but this is self-defeating if it is done just for promotions, if investigator is transferred to the section and does not want to be there, or has an aptitude for other work.

\textsuperscript{109} Maguire and Corbett, \textit{supra}, note 79 at 7.

\textsuperscript{110} Andrew Herzig, "To Serve And Yet To Be Protected: The Unconstitutional Use of Coerced Statements in Subsequent Criminal Proceedings Against Law Enforcement Officers" (1993-94) 35 \textit{William & Mary Law Review} 401 at 441; A. Alan Borovoy, \textit{When Freedoms Collide: The Case For Our Civil Liberties} (Toronto: Lester & Orpen Dennys, 1988) at 108; Maloney, \textit{supra}, note 72 at 94 referred to a number of briefs submitted saying police cannot impartially investigate themselves and/or be seen as impartial; Discussion Paper 4, note 6 at 17 and 20 also noted there is in many quarters an assumption of managerial cover-up with complainants of misconduct.
team, supportive of subordinates, and a leader. Conversely, loyalty is demanded by supervisors because they are frequently in danger of being embarrassed by revelations of illegal acts, failures, incidents of losing control over their subordinates, or sheer incompetence. Others assert that because of the detailed procedures that have arisen to deal with misconduct, supervisors may not take any action for fear of making a reversible mistake. It is also believed that the police in general are motivated by loyalty to the department and its reputation, and as a result investigations are poorly done, and there is a general reluctance to investigate to avoid affecting moral. The proof, it is said, is glaringly reflected in the low substantiation rates for internal police investigations. The author is not particularly troubled by low substantiation rates for police misconduct because on the whole, if the police apparatus is working properly, most of the time the police should not be engaged in serious misconduct. However, it cannot be ignored that the major focal point upon which the police accountability debate turns for many critics is the level of

111 MacDonald et al., supra, note 15 at 301-4; Bouza, note 22 at 4 and 122 believes that supervisors are generally reluctant to report subordinate misconduct.

112 Downs, supra, note 61 at 71.

113 Rynecki and Morse, supra, note 2 at 28.

114 Goldsmith, supra, note 84 at 24-8; West, note 72 at 374.

115 Hudson (1971), supra, note 66 at 518; West, ibid.; Maloney, note 72 at 53-7 in a review of statistics from 1973 of the Metropolitan Toronto Complaints Bureau found that only 8.4% of "serious" allegations of misconduct were substantiated, and only 2.5% of "miscellaneous" complaints were substantiated. At 27-28 he noted that of the "serious complaints": 1) 18% substantiated; 2) 52% unsubstantiated; 3) 10% unfounded (did not happen); and 4) 17% exonerated (happened, but not the officer's fault). In British Columbia the BCCLA's more serious concerns about policing and the complaints process were not whether individual officers did things they should not have (e.g. used excessive force), but whether the way officers were taught to behave (e.g. when/how to use force) gave sufficient consideration to the impact on citizens of the use of those tactics, especially in the context of mistaken identity.
investigational and adjudicative substantiation rates for police misconduct.

The general indictment then, is that the police are not impartial or neutral and lack credibility when it comes to investigating allegations of misconduct from the public. The public also perceives an aura of secrecy, low visibility, and lack of information or communication from the police in relation to misconduct allegations. In many instances, internal review mechanisms are seen as dubious because of the inaccessibility by complainants to reports and statements. Another concern is that in some jurisdictions the complainant is not even advised of the specific sanction imposed on an officer when a complaint is substantiated. It is also difficult to be optimistic about police integrity in some jurisdictions when the practice of "testilying" by officers in criminal cases was recently acknowledged.

At a more general level, Schwartz concludes that internal investigations are biased and inadequate for three reasons: first, the tension between the need to observe constitutional protection and the need to catch criminals and keep order will lead a department to place more value on being able to deal with crime; second, administrators (and in some instances a large segment of the population) frequently fail to see many of the constitutional violations

116 Hudson, ibid.; Goldsmith, supra, note 84; McDonald Commission, note 76 at 971.

117 Goldsmith, ibid. at 24-28; Oppal Commission, supra, note 69 at 1-18 to 1-23.

118 Barton, supra, note 63 at 455.

119 The Marin Commission, supra, note 6 at 61 felt that complainants need not be advised of the specific punishment imposed on an officer. Similarly, the McDonald Commission, note 76 at 984 did not support telling complainants specific punishments imposed on members, only that disciplinary action was taken. This is still the current position of the R.C.M.P.

120 Law Enforcement News (Nov. 15, 1995) at 15 where NYPD Commissioner W.F. Bratton publicly admitted officers have been falsely testifying in court (i.e. testilying) and measures were being taken to prevent such conduct.
that officers engage in as abuses or misconduct; and third, it is difficult to discipline an officer that has taken heroic action or is a hard worker, but has committed an abuse in the process.¹²¹

Others have suggested that police officers get additional consideration during a police controlled internal investigation by alleging that scrupulous measures are taken to protect the right to counsel, the right to silence, making lawyers available before an interview, and by not arresting officers before they are interviewed.¹²² Freckelton felt that officers under investigation were getting unfair consideration because they were interviewed last.¹²³ Other commentators note that officers are allowed to get away with making blanket statements or assertions that are left unchallenged, and that normal questions that should have been answered were left unaddressed because officers were allowed to prepare statements in advance.¹²⁴ Goldsmith claims that, in the end, the public no longer believes in the ruthlessness of internal investigations by the police.¹²⁵ Moreover, even when a complaint


¹²² Lustgarten, supra, note 47 at 150-5; Avery and Rudovsky, note 96 at 4-1 to 4-2. This has not been consistent with the author's experience. Steps to avoid appearances of favouritism can result in more oppressive treatment of police officers.

¹²³ Ian Freckelton, "Shooting the Messenger: The Trial and Execution of the Victoria Police Complaints Authority" in Andrew Goldsmith, ed., Complaints Against the Police: The Trend to External Review (New York: Oxford University Press, 1991) at 63-114. The validity of this point is questionable since every case must be judged on its own as to when to interview. Interviewing a suspect last, for obvious reasons, is not an uncommon practice.

¹²⁴ Grant, supra, note 74.

¹²⁵ Supra, note 84 at 25-28; others, such as Berger, supra, note 26, believe that there is simply a lack of checks and balances over police control because, unlike other agencies, the police have been able to regulate themselves and few other agencies have control over the police.
is substantiated, it is claimed that no meaningful disciplinary action is imposed.126

A related issue is whether police officers can be relied upon to report misconduct of other officers. It is generally accepted that there are powerful social and familial norms in society governing the role of informants, and it is generally held that these norms mitigate against the reporting of affairs.127 In policing, as in any bureaucracy, there is at least some disincentive to report wrongdoing by co-workers.128

Some believe that officers will lie in order to protect themselves or colleagues.129 However, Carter, in a recent survey, found that the more serious the alleged misconduct, the more likely it would be reported by another officer.130 Perez also reports that more

126 Maloney, supra, note 72 at 61 in his review reported being struck by the few instances in which meaningful disciplinary action was imposed on an officer found to have engaged in misconduct. "Meaningful," however, is a matter of perception and location (i.e. revenge-punishment vs. remedial-corrective).


128 Chevigny, supra, note 93 at 249.

129 Thomas Barker and David L. Carter, "Police Lies and Perjury: A Motivation-Based Taxonomy" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 153-162 have developed a taxonomy of police categories of lying: 1) accepted lying where it is considered to be viable and legitimate as part of role (e.g. undercover operator portraying a drug dealer); 2) tolerated lying which is considered to be a necessary evil (e.g. police enforce all laws); 3) deviant police lying which is not acceptable (e.g. false statements); 4) deviant lies in support of perceived legitimate goals occurs where the officer lies to achieve perceived legitimate goals (e.g. fluff evidence to support arrest); and 5) deviant lies in support of illegitimate goals (e.g. do not report seizure of money); see also, Bouza, supra, note 47 at 166-7.

officers are coming forward to report misconduct. Vrij and Winkel report that studies have found that misconduct reporting is the exception, even though the conduct was deviant. However, they also found several other interesting features of misconduct reporting by officers. First, operational officers are less likely to report misconduct to a "task-oriented" supervisor (i.e. by the book) than a "relationship-oriented" supervisor (i.e. humanistic). In addition, a task-oriented supervisor is more likely to report misconduct than a relationship-oriented supervisor. This accords with the need for teamwork and collegiality among officers, which mitigates against reporting the conduct of another officer. On the positive side, however, Vrij and Winkel also reported that studies have found that it is possible to increase the willingness of officers to report misconduct by incorporating a normative component into policing which convinces officers that they are actually expected to report misconduct, and it is their duty to report misconduct. Proper recruit and in-service training can inculcate and import the correct attitude towards misconduct.

131 Supra, note 49 at 100, and more specifically see the reference to Guyot’s 1991 study at 181.


133 Ibid. at 114.

134 Ibid. at 111.

135 Ibid. at 114. After 17 years experience in the criminal justice system, in various capacities and professions, the author is not convinced that police officers are any more likely to obfuscate about misconduct than any other professional, such as lawyers, doctors, and journalists. On occasion the author has been concerned by acts of impropriety and unethical behaviour known to other professionals in that group that have gone unreported or acted upon either by the individual professional or governing society.
d. Adjudicating Misconduct

The traditional argument in support of the police adjudicating misconduct is that it is completely appropriate for the employer to sit in judgement of its employee.\textsuperscript{136} Further, it is felt that police adjudicators are more acquainted with the department, and possibly the officer, which enables them to be more subtle and alive to the issues.\textsuperscript{137} Moreover, police adjudicators, because of their experience and training, are less likely to be swayed by specious defences put forth by operational officers.\textsuperscript{138} Police adjudicators can also be more effective at setting acceptable standards and values within the department.\textsuperscript{139}

Some of the concerns over permitting the police to adjudicate allegations of police misconduct are that the organization will not be inclined to find itself at fault, resorting to the repeated use of the bad-apple explanation, or the blame-it-on-the-recently-departed-decision-maker (or officer) defence to avoid institutional examination.\textsuperscript{140} The other problem, from a public perspective, is that a police adjudicator is placed in a conflict by the need to be impartial, and yet address the complaint in a manner that satisfies numerous interests including those of the complainant, the organization, the law, the subject officer, and the public, not to mention the potential personal, career and professional interests of the

\textsuperscript{136} Hudson (1971), supra, note 66.


\textsuperscript{138} Skolnick and Fyfe, supra, note 52 at 226-7.

\textsuperscript{139} Bayley, supra, note 69 at 167-72; Reiner, supra, note 137.

\textsuperscript{140} Ericson, supra, note 47 at 61; Goldstein, note 94 at 167; Goldsmith, note 84; Austin T. Turk, "Organizational Deviance and Political Policing" in Clifford Shearing, ed., Organizational Police Deviance: Its Structure and Control (Toronto: Butterworths, 1981) at 111-126.
The police adjudicator may also be concerned about, or inclined to mitigate, organizational liability \textit{(i.e. civil suits)}.\footnote{Grant, \textit{supra}, note 74 at 408-12.} It is also possible that, because promotion occurs almost entirely within the department, an adjudicator may be reluctant to discipline the subject officer because he or she may possess professional or personal information that is damaging to the adjudicator.\footnote{Skolnick and Fyfe, \textit{supra}, note 52 at 223-31.} Of course, it is equally possible that the adjudicator may have a personal dislike or grudge against the subject officer. Internal adjudicators may also fear internal reprisals from the department or subordinates for making the "wrong" decision.

Chevigny also expressed concern that disciplinary charges can be manipulated in the interests of internal organizational goals.\footnote{Chevigny, \textit{supra}, note 93 at 261-3. In other words, the hearing officer cannot be objective, and may have an inherent bias towards (or against) the named officer.} Other concerns are that police internal hearings are too judicialized, accusatorial, hostile, and are prone to the solidarity of department.\footnote{Barton, \textit{supra}, note 63 at 455.} In some jurisdictions the test for proving an allegation is beyond a reasonable doubt, which is not the test many consider appropriate for disciplinary matters.\footnote{Clare E. Lewis, "Police Complaints in Metropolitan Toronto: Perspectives on the Public Complaints Commissioner" in Andrew Goldsmith, ed., \textit{Complaints Against the Police: The Trend to External Review} (New York: Oxford University Press, 1991) at 153-176; Clare Lewis, S. Linden and J. Keene, "Public Complaints Against Police in Metropolitan Toronto--The History and Operation of the Public Complaints Commission" (1986) 29 \textit{Criminal Law Quarterly} 115; Oppal Commission, \textit{supra}, note 69 at I-44.} It is a concern that many police departments continue to hold internal police
misconduct hearings into "public" complaints in private.\textsuperscript{147} In some instances, permitting only the departmental police prosecutor, and not the complainant, to have standing and authority to question witnesses makes the process seem less effective.\textsuperscript{148} Chevigny notes that the competence and attitudes of both the adjudicating and prosecuting police officers can vary dramatically.\textsuperscript{149}

Another feature of internal police adjudication is that the police may lack specific information on previous discipline cases.\textsuperscript{150} This has two aspects: first, the department itself does not provide important information or training for adjudicators (\textit{i.e.} discipline reports, sanctioning guidelines, sanctioning precedents); and second, the rank-and-file are often not informed of decisions or findings about misconduct for training purposes or to avoid making the same mistakes.

Finally, as Skolnick and Fyfe note, internal police adjudication can never be equated with review by other professional bodies of their members because the professional body adjudicator is not the \textit{employer} of that professional, whereas the internal police adjudicator is an agent of, or in fact is, the employer (\textit{e.g.} the Chief).\textsuperscript{151} Further, unlike the professional disciplinary body role, managers/departments are expected to be involved in and regulate the daily activities of their employees. This is not the same disciplinary role played by a self-

\textsuperscript{147} Reiss, \textit{supra}, note 15 at 204 believes internal proceedings should not be secret and hearings should be open to the public, unless there is an outstanding criminal matter.

\textsuperscript{148} Chevigny, \textit{supra}, note 93 at 157.

\textsuperscript{149} \textit{Ibid.} at 261-3.

\textsuperscript{150} Oppal Commission, \textit{supra}, note 69 at I-22 and I-50 to I-51; Discussion Paper 8, note 4 at 36.

\textsuperscript{151} \textit{Supra}, note 52 at 225-28.
governing professional body. In the end, internal adjudication cannot be seen to be independent. It may be that both citizens and officers have a vested interest in some form of independent civilian participation in the adjudication or review of misconduct. It is in recognition of this fact that in British Columbia it is proposed to have provincial court judges act as arbiters of certain complaints of misconduct involving municipal police officers.

5. The View From the Bottom

Before reviewing the concerns from the rank-and-file of the organization with respect to internal accountability and discipline, it is worth recognizing that:

Sociologists have advanced the idea that, when confronted with an internal discipline system bereft of natural justice, it is only to be expected that police officers may have little concern for the rights of others.

Anyone who holds the view that police forces treat their personnel in nothing but the most professional and fair manner is not familiar with policing. As Warnken notes, history is replete with the abuse of officers, officer’s rights, and threats of personal action by police

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152 Chevigny, supra, note 93 at 261-3.

153 Marshall Commission Research Study, supra, note 12 at 69-70 outlines the civilian Police Review Board in Nova Scotia that adjudicates misconduct cases, and because it is civilian, this will ensure that it is not perceived to be biased. Saskatchewan, (unknown author) Police Discipline and Complaints in Saskatchewan (publisher unknown, 1991) at 17-18 has also disposed of officer tribunals for the appointment of independent civilian hearing officers. The only concern has been that it is more expensive because the police must pay civilians to do a job that they previously handled as part of the internal budgeting process.

departments. Perez, in his recent detailed work on police accountability, frankly states that "internal review has a dark side that can threaten an officer the way no external system could" and further, that management and internal affairs can impose a "reign of terror" on an officer through internal review. Reuss-Ianni also identified internal practices in which police officers were treated poorly and coercion was a management device applied to individual officers to deal with misconduct. It is not unusual then for officers to wonder why, if they are supposed to be professionals in a profession, they are sometimes treated little better, or worse, than "common criminals."

Fogelson notes that in the quest for police professionalism, reformers took drastic measures to ensure officers did not engage in secondary employment or activities, despite poor compensation/benefits, that could make the department look bad; it was also demanded that the rank-and-file submit to income probes, take polygraph tests, testify without immunities, and otherwise relinquish any and all civil liberties. Officers often express

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155 Bryon L. Warnken, "The Law Enforcement Officers’ Privilege Against Compelled Self-Incrimination" (1987) 16 University of Baltimore Law Review 452; Perez, supra, note 49 at 110 believes that the power held by internal affairs means "they can sometimes become abusive of police officer rights."

156 Ibid. at 110 and 121.

157 Elizabeth Reuss-Ianni, Two Cultures of Policing: Street Cops and Management Cops (New Brunswick, New Jersey: Transaction Books, 1983) at 83-7; Grant, supra, note 74 at 412 discusses how police management is not slow to dispense internal justice on an officer.

158 Robert M. Fogelson, Big-City Police (Cambridge, Mass.: Harvard University Press, 1977) at 229. This point was made in the context of the development of professionalism in the 1970's when the rank-and-file were paid little better than skilled labour, treated poorly and yet were supposedly "professionals." See also, Robert Fogelson, "Unionism Comes to Policing" in Richard C. Larson, ed., Police Accountability: Performance Measures and Unionism (Lexington, Mass.: Lexington Books, 1978) at 91-112.

159 Ibid. (1977) at 183 reviewing the second generation of professionalism up until the late 1960's. Perez, supra, note 49 at 60 reports that prior to the recent enactment of police officers'
their feelings of vulnerability and other concerns over the objectivity and impartiality of internal police processes.\textsuperscript{160}

From the individual officer's perspective at the bottom, he or she must be concerned with whether or not the department is going to be looking to blame or "scapegoat" someone for an incident.\textsuperscript{161} Police departments have a notorious practice of being more concerned with protecting the organization and asserting blame than learning or taking guidance from an incident.\textsuperscript{162} If it appears that the officer "botched" the job, the conduct is embarrassing, or heinous, police organizations tend to abandon the subject officer.\textsuperscript{163} As Manning found in his study of policing, police administrators are also highly motivated to assemble information so that it will not reveal their incompetence.\textsuperscript{164} As Bonifacio cautions:

\begin{quote}
...the police[officer] must accept the reality that the department is a public service bureaucracy with real limitations, and that it is influenced by political, economic and
\end{quote}

Bills of Rights, polygraph examinations were standard procedure whenever officers were accused of wrongdoing.


\textsuperscript{161} Bayley, \textit{supra}, note 48 at 65; Ericson, note 47 at 61; Reiner, note 137. The Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1989-90} (Minister of Supply and Services, 1990) at 67 found the R.C.M.P. sometimes gives the impression it is separating itself from members who are alleged to have acted improperly.


\textsuperscript{163} Perez, \textit{supra}, note 49 at 116. "Controversial" shootings are well known to be a causal factor in departments abandoning officers.

social forces that affect all governmental agencies.\textsuperscript{165}

One of the initial concerns of an officer when an allegation is registered, is whether he or she will be suspended. There are several formulas for suspending an officer pending the disposition of an allegation, but it is usually a suspension with pay or suspension without pay.\textsuperscript{166} The department is put in the position of having to reassure the public but also be fair to the police officer.\textsuperscript{167} The problem for the officer is that any suspension implies guilt and there is usually a considerable time delay to dispose of allegations, especially if it leads to formal proceedings.\textsuperscript{168} Suspensions without pay are sometimes used as a tool by the department to intimidate officers into resigning and avoiding the problem of dealing with a lengthy internal process.

Like complainants, officers are also the subject of pressure tactics and misrepresentations from the department designed to resolve complaints informally.\textsuperscript{169} For

\begin{itemize}
\item \textsuperscript{165} Philip Bonifacio, \textit{The Psychological Effects of Police Work: A Psychodynamic Approach} (New York: Plenum Press, 1991) at 201-2.
\item \textsuperscript{166} Royal Canadian Mounted Police External Review Committee, \textit{Suspensions-A Balanced View} (Discussion Paper 1) (Minister of Supply and Services Canada, 1988) at 35-34.
\item \textsuperscript{167} \textit{Ibid.} at 4.
\item \textsuperscript{168} \textit{Ibid.} at 4-5. Officers will argue that a suspension violates the presumption of innocence. In addition, there is considerable disparity between police forces, and even within the same department, on the application of suspensions. Officers are sometimes not allowed to work anywhere while suspended.
\item \textsuperscript{169} Maguire, and Maguire and Corbett, \textit{supra}, note 79 at 65-74 and 75-88; Syd Brown, "Comment" in Walter S. Tarnopolsky, ed., \textit{Some Civil Liberties Issues of the Seventies} (York University: Osgoode Hall Law School, 1975) in his article starting at 122 notes officers also have to be concerned about civil actions, which is going to make them defensive, yet they are being subjected to a pressure to settle when it may not be in their best interests. Landau, \textit{supra}, note 79 at 39 and Brown also report instances when officers agreed to apologize for their actions in order to informally resolve a matter and the next thing it was reported in the media. Alan Beckley, "Legal Protection Insurance For Police Officers" (1995) LXVIII \textit{The Police Journal} 319 also highlights the civil liability aspect.
\end{itemize}
example, Landau found in her study that even if an officer agrees to resolve a complaint informally, the resolution form signed by the officer has an official warning that the officer could still be the subject of discipline.\textsuperscript{170} In other instances, it was found that the use of a formal tone in resolution proceedings by the department representative did not incline an officer towards resolution.\textsuperscript{171} Even more interesting are the reported incidents from one study in which the police department never even bothered to ask the subject officer for his or her version of events.\textsuperscript{172}

Like the general public, subject officers have concerns with local or immediate supervisors conducting internal investigations. Most operational officers are not inclined to see management in a favourable light when it comes to dealing with controversial or misconduct issues.\textsuperscript{173} Some police officers believe that a majority of supervisors, especially in serious cases, lack the necessary detachment, personally or professionally, from the hierarchy of authority to stand-up effectively and objectively for an officer erroneously

\textsuperscript{170} \textit{Ibid.}; Maguire and Corbett, \textit{ibid.} The informal resolution process was found to be too formal even for the police officers as they had to sign the form, which they are not inclined to do, particularly if they are still subject to discipline. As noted above at footnote 40, the BCCLA found this approach to be a major barrier to the appropriate resolution of complaints.

\textsuperscript{171} Maguire and Corbett, \textit{ibid}.

\textsuperscript{172} \textit{Ibid}.

\textsuperscript{173} MacDonald et al., supra, note 15 at 304 in a study of Canadian police departments found the following startling attitudes of rank-and-file police officers towards management: 1) 61\% \textit{did not trust the information received from management}; 2) 46\% \textit{were unsure management would support them if it was necessary}; and 3) 40\% \textit{felt management would actively sacrifice an officer}. The researchers felt the isolation of top management and the peculiar nature of control in policing explained this views. Reiner, note 82 at 174 identified that 30\% of the time rank-and-file officers in Britain mentioned that they resented the discipline system or actions of individual supervisors.
accused of misconduct or who is being mistreated by the department.\textsuperscript{174} Furthermore, the use of senior officers or supervisors to conduct investigations can be extremely intimidating for a rank-and-file officer, especially a junior officer.\textsuperscript{175} A suspect officer cannot be seen to be uncooperative as the investigator may currently be a supervisor, or may be one sometime in the future, and any lack of cooperation could result in an unfavourable disposition being taken against the officer.\textsuperscript{176} As with criminal suspects, a police subordinate, to retain a "friendly" aura, may be inclined to make a statement or admissions to please the interviewing officer/supervisor.\textsuperscript{177} Subject officers may also be concerned, as reported by Jackson, that supervisors should be more knowledgeable about the process and careful when imposing discipline.\textsuperscript{178}

Borovoy astutely observed that suspect officers are also concerned that they will be

\textsuperscript{174} McNamara, \textit{supra}, note 13 at 188.

\textsuperscript{175} See generally, Maguire and Corbett, \textit{supra}, note 79; Landau, note 79 at 39.

\textsuperscript{176} \textit{Ibid}. Research for this thesis indicated that commissioned officers in the R.C.M.P. rely on the fact that they can intimidate members into cooperating. Failure to cooperate could result in the member being labelled as having an "attitude problem" or being "disgruntled", which can sound a death knell to any consideration for desirable transfers or opportunities, especially if it is committed to paper. Informal communication systems can sometimes be applied with even more effectiveness.

\textsuperscript{177} Mike Maguire, "The Wrong Message at the Wrong Time? The Present State of Investigative Practice" in David Morgan and Geoffrey M. Stephenson, eds., \textit{Suspicion and Silence: The Right to Silence in Criminal Investigations} (London: Blackstone Press Ltd., 1994) at 39-49 discusses how a criminal suspect, to be seen as friendly, may be more inclined to make an admission to appease the interviewing officer.

susceptible to intra-departmental rivalries which will prevail over scrupulous fact finding.\textsuperscript{179} For example, McLaughlin and Bing reported that senior and more connected personnel in a police department are more likely to have their actions positively evaluated.\textsuperscript{180} Support for concerns over fairness may also be found in the finding of Brown that internal complaints are more likely to be substantiated than a public complaint.\textsuperscript{181} It has been documented that internal affairs units, during investigations, are prepared to use semi-legal or illegal tactics during the course of investigating another police officer.\textsuperscript{182}

Maloney noted that the Metropolitan Toronto Police Association was critical of the internal police process dealing with misconduct because investigators disregarded officers' rights during investigation and there was no protection provided for ordered statements which were being used to conduct other investigations.\textsuperscript{183} Maloney documented one incident wherein words found their way into a statement that were allegedly out of the mouth of the suspect officer, but in fact were dictated by the investigator.\textsuperscript{184}

Some police departments have also aggressively used polygraph examinations to deal


\textsuperscript{181} Supra, note 1 at 92.

\textsuperscript{182} Perez, \textit{supra}, note 49 at 115-16. Unfortunately, the author has also encountered the use of illegal, semi-legal, unprofessional and/or unethical practices during internal investigations in Canada. There is also a clear perception by operational personnel that departments and investigators are willing to use such tactics during internal investigations.

\textsuperscript{183} Supra, note 72 at 133.

\textsuperscript{184} Ibid. at 76.
with allegations of misconduct.\textsuperscript{185} For example, Maloney noted that the Vancouver Police Department utilized polygraphs during investigations and the officer had to state reasons if the test was declined.\textsuperscript{186} It has also been suggested that officers involved in an accident or shooting should, as a matter of course, be mandatorily tested for drugs.\textsuperscript{187} Actions such as having officers sign orders or policy bulletins in order to prove that the officer has read them are also indicative of administrative practices that operational officer's see as patent institutional and managerial "ass covering."\textsuperscript{188} Such practices only engender mistrust between the operational ranks and management.

Another important difficulty with investigations into misconduct, either internally or by a civilian process, is that an officer may be in considerable distress when approached during the initial stages of an investigation. For example, it is reported that after a shooting, and for at least the next three days, officers suffer from fairly intense psychological factors, including flashbacks and sleep problems.\textsuperscript{189} Bonifacio also noted that police officers

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{185} Perez, \textit{supra}, note 49 at 115-16; Jerome H. Skolnick, "Deception By Police" in Thomas Barker and David L. Carter, eds., \textit{Police Deviance}, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 183-6 notes the use of polygraphs for discipline and sharply criticizes it because of the many false assumptions and inaccuracies implicit in its use.
\item\textsuperscript{186} \textit{Supra}, note 72 at 159; he also notes that the results of the polygraph process could be used in disciplinary hearings, but not criminally.
\item\textsuperscript{188} Reiss, \textit{supra}, note 15 at 164 notes the practice of signing orders. If it is important, why not have a supervisor read the material at a briefing or meeting and then list who was present at the meeting? While signing such bulletins makes sense, operational officers also become concerned because of the amount and number of policies they are expected to know.
\item\textsuperscript{189} Jennifer M. Brown and Elizabeth A. Campbell, \textit{Stress and Policing - Sources and Strategies} (Essex, England: John Wiley & Sons, 1994) at 41.
\end{enumerate}
\end{footnotesize}
involved in shootings can experience sensory distortions and post-traumatic stress disorder symptoms which can result in inaccurate information being obtained from the officer. In one incident, it is reported that an officer refused to seek counselling because he felt that what he might say could be used by the suspect's lawyer at trial, and the result was a breakdown by the officer. Although post-incident debriefings and peer counselling are recommended, officers are reluctant to use them because confidentiality is suspect and admissions could lead to discipline. Further, an officer who may be in a state of bereavement, could, like anyone else, be vulnerable to giving misleading self-incriminatory statements because of normal feelings of guilt and distress.

Many commentators fail to appreciate the impact an allegation or investigation can have on an officer. Once a police officer is suspected of misconduct, and particularly if suspended, it will matter little if the officer is exonerated in the end because in some cases


191 Bonifacio, ibid. at 182.

192 Brown and Campbell, supra, note 189 at 48 and 110-11 also note that peer counselling is not feasible because the "counsellor" may directly supervise or subsequently supervise the officer. With respect to external counselling, access to Psychologists' notes and records can be sought/obtained, and the Psychologist may be called as a witness.

the stigma which may affect promotions and other opportunities attaches for life.\textsuperscript{194}

Regardless of whether files are sealed, vetted, or destroyed, the institutional memory of the incident will impact on the officer throughout his or her career.

A feature of policing that is often overlooked is just how much authority management possesses, and how unaccountable management can be to the rank-and-file. For police officers, controlling abuse by the administration is not simply a matter of publicity and/or legal action.\textsuperscript{195} The irony, as noted by several commentators, is that after being treated poorly internally, officers are expected to be models of fairness with the public.\textsuperscript{196} As astutely observed by Borovoy:

\begin{quote}
The quest for due process should apply to the police as well. Civilians are more likely to receive fairer treatment by police when there is fairer treatment of police. In my view, police in Canada have a number of legitimate grievances concerning the way they are treated.\textsuperscript{197} (emphasis original)
\end{quote}

Jefferson and Grimshaw have confirmed that the independence of senior police managers may be limited by social relations, particularly when accountability is played out in

\textsuperscript{194} Discussion Paper 1, supra, note 166 at 14; Brown, note 1 at 128-9 highlights the fact that an officer's reputation will stick with him or her, particularly in small departments.

\textsuperscript{195} M. Anne Stalker, "The Protection Of Individual Rights And The Public Inquiry" (1994) 43 University of New Brunswick Law Journal 427 at 434 suggests this is one of the ways to deal with administrative abuse generally. In the R.C.M.P. this suggestion is impracticable because members are not permitted under the \textit{Code of Conduct} to criticize the Force, and financially it is almost impossible to finance a law suit or judicial review application. As will be discussed in Chapters 6-7, since members of the R.C.M.P. are not permitted by law to unionize, there is no real financial assistance from an employee body.

\textsuperscript{196} Borovoy, supra, note 154 at 121; Goldstein, note 94 at 265; H.W. Arthurs, "And Who Will Watch The Watchman?" (1966-67) 9 Criminal Law Quarterly 122.

\textsuperscript{197} Supra, note 110 at 113; Arthurs, \textit{ibid.} at 123-4.
a framework of legal, democratic, and occupational audiences. Subject officers have legitimate concerns over that fact that a police manager may find it difficult to dismiss charges or not proceed against an officer who is at the centre of an incident that is surrounded by public outcry and criticism.

Furthermore, as noted by the E.R.C., public complaints are sometimes part of a wider political game, which can trap the police manager:

The public attention which complaints against the police draw reflects a larger political concern about the power available to the police and its potential for misuse. This concern is frequently the explicit focus of a variety of debates and struggles... These include, for example, conflicts carried out within Parliament and the press between governing and opposition parties, conflicts between persons concerned with advancing civil liberties and governments, conflicts between defence and prosecuting attorneys within a court of law and conflicts in which minority groups seek to transform their status and position within the community. In these conflicts, police officers and police organizations often find themselves unwilling objects of, and participants in, struggles in which the specific complaints are simply moves in a wider game over which they have little control and in which objectives specific to policing are overshadowed by other considerations.... Managers will feel pressured to take action to satisfy a larger political agenda rather than deal with the managerial problems they face on their own terms. That is they will feel pressured to adopt a disciplinary rather than a remedial response.

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199 Herman Goldstein, "Controlling and Reviewing Police-Citizen Contacts" in Thomas Barker and David L. Carter, eds., *Police Deviance*, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 329; *ibid.* at 86 identified three influential factors on how a police manager will respond to their audiences: 1) official indicators of recorded time; 2) attitudes of courts; and 3) apparent indications of public opinion. An example of these variables is found in Scott Feschuk and James MacGowan, "Blacks urge chief to resign: Answers sought in Toronto killing" at A1 and "Pattern Disturbing, Rae says" at A11, *The Globe and Mail* (4 May, 1992).

200 Discussion Paper 4, *supra*, note 6 at 13. Civilian review pundits assert that civilian oversight can insulate the police from unjustified criticism as well subject departments to criticism where warranted. The problem, of course, is that in some instances civilian advocates cannot agree on common terms and leave the police without any direction. Further, civilian review can result in improper, impractical and questionable direction from civilians that are motivated by agendas unrelated to effective policing and community service; see Chapter 5.
Police officers in general have a concern over the abuse of any accountability mechanism, either internal or external. As noted by Hill and Schiff, officers have expressed concerns that minority leaders may use the police as "scapegoats" in a campaign to gain personal support. Alternatively, complaints by minorities may also be used to cover up breaches of the law by making an obfuscating allegation of misconduct against the police. There is also frustration experienced by operational officers who become the focus of a campaign of harassment by a chronic complainer.

Thus, administrators have an apparent conflict when the rank-and-file expect support, but the administrator may feel the actions were ill-advised or even illegal. Kerstetter, citing Perez, goes even further, in suggesting that in seeking to be responsive to public sentiment, administrators feel compelled to act, sometimes illegally against the individual


202 Ibid. Of course any individual is capable of making a complaint about the police to cover up his or her own actions.

203 For example, Maloney, supra, note 72 at 22 documents that Metro Toronto Police had 35 files of chronic complainers. The author, as a civilian investigator of police, became familiar with complainants who inundate a department with complaints and then subsequently complained about every officer they come into contact with operationally or during the department's attempts to resolve or handle the complaint. Frequently, it seemed that a psychological disorder accompanied this type of behaviour, but other persons appeared to be exercising a vendetta against the organization or police officer. While vexatious complainants may exist for most professional bodies or organizations, the time and resources that are mandated to deal with such complaints in the policing arena may be disproportionate to that experienced by other professions. For example, an appeal by a complainant of police misconduct in British Columbia and Nova Scotia has existed as a matter of right, regardless of the merits or seriousness of the complaint.

officer, in order to accomplish their accountability function.\textsuperscript{205}

The problem is giving administrators the freedom to manage while ensuring they do not abuse their authority against officers. Abusive tactics have lead some jurisdictions in the United States to enact a bill of rights for police officers that detail how investigations, and in particular interviews, of subject officers are to be conducted.\textsuperscript{206} It is some of the foregoing factors that ultimately lead police associations to endorse the need for some degree of external and independent assessment of complaints and hearings involving misconduct.\textsuperscript{207}

The rank-and-file have specific concerns with a pure internal police adjudication model. Like the public, subject officers and employee associations frequently express

\textsuperscript{205} Supra, note 70 at 156, citing Douglas Perez, "Police Accountability: A Question of Balance" (Ph.D. dissertation, University of California, Berkeley, 1978). For example, in the following case the officer was reportedly dismissed although the legal authority to do so was suspect: Bruce Erskine, "N.S. Police Act can’t touch Dartmouth officer--lawyer," \textit{The Chronicle Herald} (December 30, 1992) at A3; Bruce Erskine, "Dartmouth fires cop involved in scandal," \textit{The Mail Star} (January 13, 1993) at A2; Bruce Erskine, "Mayor mum on disciplinary action for cop," \textit{The Mail Star} (January 14, 1993). In this case the department appeared to expect that a criminal conviction would be registered and intended to use that as a basis to dismiss the officer. However, the officer was subsequently acquitted at trial. By that time the statutory limitation period to institute disciplinary proceedings on the basis of the original complaint had expired. Nevertheless, the department went ahead and fired the officer without any apparent statutory authority to do so. The notion of stepping outside the statutory regime to dismiss police officers has not been allowed in Canada for some time. Although the officer acted improperly, it is quite clear the department and city were being directly influenced by the public outcry over this officer’s conduct and the handling of this incident.

\textsuperscript{206} Perez, \textit{supra}, note 49 at 60 and 115-16 notes that these bills of rights are emblematic of how internal affairs and departments have abused police officer rights; see also, Rynecki and Morse, note 2, chp. 4 at 26-28 which details how a police bill of rights can be legislative or in a collective agreement, and how interviews are to be conducted: 1) on-duty; 2) allowable times; 3) recorded; 4) representation; 5) identity of investigators or interviewers; 6) no threats or transfers out; and 7) breaks. It may also be stated that no reports be taken on a shooting until the involved officer speaks to a lawyer.

\textsuperscript{207} Samuels, \textit{supra}, note 160 at 116 footnote 296 says the Montreal Urban Community Police union pursed this because internal investigations and discipline were too harsh and biased; Maloney, note 72; Walker and Bumphus, note 80 at 10.
concern about the impartiality and objectivity of officers hearing disciplinary charges. In particular, there are some jurisdictions in which a manager can receive a complaint, investigate the allegation, recommend a charge, give evidence, and adjudicate. A less egregious example, is the general perception of conflict in the manager’s role in reviewing complaints and investigations, appointing hearing officers, and hearing appeals. Brown believes it is self-evident that any person or body that makes the policy, rules, or regulations, such as police executives, boards or commissions, should not also sit in judgement of alleged violations, particularly if its rule or policy will be criticized as part of the officer’s explanation. It is a generally held belief that police management is often much harsher in imposing discipline than is necessary.

Other concerns are that police adjudicators are biased because, as senior managers, they are more concerned about the image and reputation of the force, and they will give inappropriate weight to this factor instead of doing what is proper. In the experience of

208 Maloney, *ibid.* at 132; Samuels, at 18; Rynecki and Morse, *supra*, note 2 at 27.

209 Grant, *supra*, note 74 at 41-12; for example, in *R. v. Peterborough (Town) Commissioners of Police, Ex parte Lewis*, [1965] 2 O.R. 577 involved a case where a police chief witnessed the alleged misconduct and then presided over the discipline hearing; in *Bowles v. Post* (1985), 16 D.L.R. (4th) 591 (B.C.S.C.) the Chief oversaw the complaint investigation, decided that charges should be laid, and then presided over the disciplinary hearing.


211 *Supra*, note 169 at 127. The BCCLA also objected to the use of police boards in British Columbia to adjudicate complaints for the noted reasons.


213 Marin Commission, *supra*, note 6 at 127; Ackroyd, note 64 at 113 confirms this as the executive of a major police force when he notes that "the vast majority of our command personnel are very anxious to maintain the reputation we have and to improve upon it wherever possible."
Brown:

...the problem with respect to [internal] police trials is always the principle that the image of the force must be protected regardless. When you have that sort of concept, *individual freedoms and rights disappear.*\(^{214}\) (emphasis added)

A shortcoming of internal review is that it frequently becomes focused on the individual conduct of the officer, which aside from attempts to diffuse responsibility, does little to identify and correct systemic or institutional problems.\(^{215}\)

Similarly, individual officers are concerned that inadequate weight will be given to their reputation in the police organization because of the adjudicator’s knowledge of the officer or influence from other officers. Individual officers also feel that insufficient weight will be given to organizational faults or shortcomings that may be responsible, or partially responsible, for the misconduct, because the adjudicator is highly motivated to avoid institutional examination or criticizing other police managers or executives.\(^{216}\) The result, as Reiss highlights, is that when superior officers investigate and hear misconduct charges in disciplinary hearings their judgement is subverted because they have served with the officer, or alternatively, know about or have heard about the officer’s reputation.\(^{217}\) It is virtually impossible to nullify the informal communication network that exists among senior managers.

Ironically, as Fogelson noted in his historical analysis of the development of city policing in the United States, most patrol officers soon learned that the sympathetic concern...
of an influential politician was far better protection than a departmental hearing. Police departments also rely on the inherent power imbalances between individual officers and management to extract agreements from officers to accept sanctions. Departmental rules, procedures, and policies are frequently written after an incident simply as another symbol or manifestation of the militaristic discipline that prevails in policing.

The internal adjudication process is sometimes nothing short of a status enforcing ritual or spectacle for management. Not only does the adjudicator have continuing relationships with other managers, as Grant points out, the line officer must be cognizant of his or her continuing relationship with the adjudicator after the case. The direct result of internal promotion systems and limited lateral mobility is that the notion of disinterest or objectivity is jeopardized in police discipline. Unfortunately, as the Marin Commission found, police officers may not have confidence in the organization or commissioned officer core to conduct adjudications fairly.

Grant also asserted that most adjudicators were not capable of understanding the complex and subtle legal issues that could arise. Contrary to the assumption of some,

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218 (1977), supra, note 158 at 30. The author has observed this occur in Canada in several smaller police agencies.

219 Grant, supra, note 74.

220 Jackson, supra, note 178 at 27.


222 Supra, note 74 at 419-20.

223 Reiss, supra, note 15 at 162.

224 Supra, note 6 at 129-30.

225 Supra, note 74 at 419-26.
there are instances where there is a lack of protection for police officer rights, not to mention instances where the rights of officers have been abused for the sake of discipline.\textsuperscript{226}

Borovoy agrees with Grant's concern over due process for officers, noting that in modern society virtually all unionized employees have recourse to "independent" arbitrators, but in police discipline the only recourse and appeal is frequently to police bodies, which is unfair.\textsuperscript{227} The lack of a right to outside arbitration of discipline and internal appeal process, is, in the view of Borovoy, like asking a line worker from General Motors to appeal to the Chamber of Commerce.\textsuperscript{228} That is why, recently, police employee representatives have taken the initiative to assert that open hearings will protect the public interest \textit{and} ensure that the subject officer is treated fairly.\textsuperscript{229} Rank-and-file officers have also become vocal about the need to remove or reduce the influence of senior commissioned officers or executives as adjudicators.\textsuperscript{230} As Borovoy posited generally, the knowledge that the public

\textsuperscript{226} Ibid.; Brown, \textit{supra}, note 169.

\textsuperscript{227} \textit{Supra}, note 154 at 120; also, note 110 at 113-14; Ferguson and Rusen, note 6 at 186-7 discussed the advantage of using the labour arbitration process in police discipline in British Columbia. Aside from neutral third party independence, among the advantages noted, was that the union is responsible for proceeding with the grievance and not the employee, which may reduce grievances.

\textsuperscript{228} Borovoy (1988), \textit{ibid.} at 113-14.

\textsuperscript{229} Samuels, \textit{supra}, note 160 at 183-197; Jackson, note 178 at 26 found that Ontario police officers wanted an appeal outside of the police structure and police commission to an impartial third party.

\textsuperscript{230} Fogel, \textit{supra}, note 212 noted that in France labour representatives of police officers are part of the disciplinary tribunal along with administrative officers. Ferguson and Rusen, note 6 at 168-9 noted that in an attempt to deal with officers perception of bias, the British Columbia Federation of Police Officers recently proposed an independent tribunal for discipline in which the panel had an appointee by the Chief, one appointee by the arbitrator and the third selected by the other two or Minister of Labour. Maloney, note 72 at 219 proposed a three member tribunal of a citizen, legally trained person and a police officer of equal rank of the accused officer (\textit{i.e.} did not have to be commissioned). The legitimacy of R.C.M.P. discipline boards
is watching can serve as a deterrent and remedy against high-handedness and misjudgment on the part of those entrusted with special powers.\textsuperscript{231}

It not unusual to hear complaints from police managers and adjudicators about permitting subject officers to utilize legal counsel on the grounds that investigations and hearings become too formal and awkward. Grumblings from police executives about lawyers becoming involved in disciplinary matters are frequently more related to the limits it places on the pursuit of "summary justice" that many police managers seek.\textsuperscript{232} However, technical objections and strict rules of evidence are frequently not allowed in these types of hearings, which prompted Beral and Sisk to observe that the skill of lawyers at presenting facts and examining witnesses should make a hearing more orderly than cumbersome.\textsuperscript{233}

There is also uncertainty among the rank-and-file, despite the rhetoric of managers and external oversight bodies, whether the object of the exercise is to satisfy the complainant, punish the officer, protect the department, or to correct the officer.\textsuperscript{234} As well, there is disparity in the different philosophies and ranges of sanctions departments rely upon in dealing with misconduct.\textsuperscript{235} The problem of disparity is compounded by the fact that no legislative or policy statements generally exist identifying what aggravating or

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\textsuperscript{231} Supra, note 110 at 137. This rationale also support arguments against R.C.M.P. adjudication proceedings being held in private.
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\textsuperscript{232} The author has repeatedly heard police executives grumble about how the process and procedure prevents them from imposing discipline on an officer they "know" to be guilty. There is a common theme of presumption of guilt in internal processes.
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\textsuperscript{233} Supra, note 57 at 508.
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\textsuperscript{234} Goldsmith, supra, note 84.
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\textsuperscript{235} Oppal Commission, supra, note 69 at I-49 to I-65; Discussion Paper 8, note 4 at 23-25.
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mitigating circumstances should be considered when imposing a sanction.\textsuperscript{236}

Another important concern is that in some instances the final level of appeal remains within the department, which for the rank-and-file officer, as well as the civilian complainant, means the review process is undertaken by a member of the same occupational circle or club (\textit{i.e.} commissioned or executive police officers).\textsuperscript{237} The result is that there is no really \textit{effective} right of appeal for officers. In other instances, there is a bias towards the presumption of administrative regularity, a basic tenet of all complex social systems, wherein everyone assumes the previous person has done his or her job properly. This presumption can lead to serious injustices.\textsuperscript{238}

Latten probably puts it in perspective best, observing that it is demanded that the police be fair, impartial, sympathetic, considerate, honest, thoughtful and truthful, yet when in difficulty officers must provide immediate written reports, which may be culpable and incriminatory, and the officer is frequently not represented, or denied the right to counsel.\textsuperscript{239} Moreover, the same authority that laid the charges may stand in judgement, with interim appeals going to a level that has already reviewed or had a hand in the investigation or process, and the final level of appeal being to the body that instigated the charges (\textit{e.g.} management) or advised the department in the first place (\textit{e.g.} police boards or

\textsuperscript{236} Discussion Paper 8, \textit{ibid.} This paper found that the views of police disciplinarians on an internal sanction for impaired driving ranged from fine to dismissal. This study found that 31\% of discipliners felt cooperation is always/usually important in determining a sanction.

\textsuperscript{237} Brown, \textit{supra}, note 169 at 123.


\textsuperscript{239} Dennis Latten, "Goals of Police Associations" in Bryan M. Downie, and Richard L. Jackson, eds., \textit{Conflict and Cooperation in Police Labour Relations} (Ottawa: Minster of Supply and Services, 1980) at 182.
commissions).\textsuperscript{240} If the internal process is to have any validity:

Hearings into complaints must be scrupulously fair to the officer. They must feature due process at every stage, they must embody the principles of natural justice, and they must assure him [or her] of the right to counsel.\textsuperscript{241}

Officers also have legitimate concerns that being subjected to internal disciplinary hearings while parallel criminal or civil actions are pending may force them to reveal their case/defence, which may have a prejudicial impact.\textsuperscript{242}

6. Observations

While police managers have every right to control and manage their subordinates, a number of legitimate and illegitimate methods have been identified that are used to accomplish these ends. There is little doubt that internal accountability and discipline can be tyrannical and oppressive in a police organization.\textsuperscript{243} There also seems to be little doubt that internal systems of accountability and discipline have considerable influence over police officers.\textsuperscript{244} The feelings of vulnerability and lack of control experienced by officers are being constantly reinforced by internal accountability and discipline mechanisms that are generally punitive and, in some instances, patently abusive in nature. However, it may be that the pervasiveness of discipline, at least in Canada, has been fairly successful at

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\textsuperscript{240} Ibid.

\textsuperscript{241} Maloney, supra, note 72 at 195.

\textsuperscript{242} Beral and Sisk, supra, note 57 at 506.

\textsuperscript{243} Perez, supra, note 49 at 102 and 115-16.

\textsuperscript{244} Ibid. at 240. Police officers do report being influenced by internal review, and at 117 Perez reviews the findings of a study where it was found that: 1) 43\% felt internal affairs had a positive influence on police behaviour; 2) 28\% indicated that they felt "slight" impact; 3) 11\% reported no affect felt; and 4) 12\% felt internal affairs was counterproductive.
regulating police conduct as compared to other police jurisdictions. What is becoming evident is that there is a tension between the "normalization" approach to police accountability in which officers have the same rights as other citizens and the "uniqueness" approach in which, because police are subject to criminal as well as employment related sanctions for misconduct, the employer should not be permitted to take advantage of the civil/administrative process to advantage the criminal process.

Both citizens and operational officers have expressed serious reservations and concerns about the internal accountability and discipline process. While the rank-and-file may overall support internal investigations, they are much more concerned with internal adjudication by executive officers. Some civilian review advocates, however, seriously question any internal investigation or adjudicative function by the police. Others are more concerned about providing a fair, accountable and realistic process for all parties.

With respect to compelled statements, internal and managerial abuse by police organizations has led to the enactment of specific bills of rights for officers in some American jurisdictions to govern the interview and interrogation process.²⁴⁵ The difficulty though is that substantiation rates for, and actual findings of, police misconduct under internal accountability regimes are generally felt by many critics of the internal process to be

²⁴⁵ Perez, supra, note 49; Warnken, note 155; see also, a Bill recently introduced in the United States Congress (Bill H.R. 878)(Senate s. 334) to amend title I of the Omnibus Crime Control and Safe Streets Act of 1968 to encourage States to enact a Law Enforcement Officers' Bill of Rights, to provide standards and protection for the conduct of internal police investigations, and for other purposes, cited as the Law Enforcement Officers' Bill of Rights Act of 1995. In part, the impetus for this Bill arose from the fact that at least one prosecution witness in the trial of the officers for the Rodney King incident was purportedly provided with a transcript of one officer's compelled testimony by internal investigators prior to the witness testifying. This scenario will have a ring of familiarity in Chapter 7, infra.
Rightly or wrongly, substantiation rates have become the measure of effectiveness for some. The next two chapters will attempt to explore the underlying tenets of external and civilian mechanisms of review for police misconduct. Chapter 4 will examine in detail the next layer of accountability which consists of a number of external mechanisms. Chapter 5 will explore in detail the question of civilian review or oversight of police misconduct. The important feature arising from this Chapter, is that the reader must be mindful of the excesses and failings of internal police discipline and accountability from not only the public’s perspective, but also from those operating at the bottom of the police organization.

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246 It might be suggested that, based on the low substantiation rates, the rank-and-file are not as opposed to the disciplinary process as is indicated in the literature and studies. In other words, although the rank-and-file complain bitterly about the process they are in fact supportive because they are well protected under it. Based on the literature, experience, interviews, and discussions the author does not consider such a suggestion sustainable.
Chapter 4

EXTERNAL REVIEW MECHANISMS

"...in the long as well as in the short run, a civil police depends upon a civil citizenry."
Reiss (1971: 220)

1. Introduction

Generally speaking, accountability mechanisms that deal with police misconduct can be divided into those that are external to the police and those that are internal.¹ Chapters 2 and 3 canvassed in detail the mechanism of "internal" accountability, but a complete discussion of police accountability requires a review of the various safeguards or institutions that can deal outside the police organization (i.e. externally) with police regulation and misconduct. This Chapter will set out in some detail the breadth, and provide a review of, the more prominent and central mechanisms that constitute integral parts of the external accountability regime for police misconduct. Chapter 5 will then examine the theory and practice of civilian review mechanisms that are expressly mandated to deal with police misconduct. Unlike other public and private employment contexts, the likelihood of a police officer being influenced by or encountering one or all of these mechanisms is quite high.

One of the main reasons for this, is that law enforcement officers find themselves in adversarial interactions or situations requiring the use of force more frequently than virtually any other class of employee. Moreover, the complexity of the accountability framework in

concert with the legitimate desire to hold officers accountable serves to highlight the unusual employment context of the police.

2. Rule of Law and Consent

Two orthodox arguments are frequently adopted by the police to sustain the view that they are externally accountable: first, that the police can only act with the consent of the public; and second, that they are bound by the rule of law in their activities.²

The consent position is based on the view that "the community are the police and the police are the community." In other words, the police can only function with the consent of the public, and if they are not acting in the interests of the public as a whole, they will be held accountable by the public and/or elected representatives.³ Most police representatives are, however, a little vague on how consent is obtained, how it is measured, and how it regulates behaviour. Conceptually, "consent" permits the police to present an image that their actions are publicly sanctioned. As Spencer points out though, what if real consent is lacking in the community, or part of the community?⁴ Even more sceptically, some assert that the police use the consent argument, among other measures, to manufacture public

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³ Oliver, Spencer at 96-7, ibid.

⁴ Spencer, ibid. at 97-9.
opinion to support police actions. The consent argument is also incorporated into the "social control" theory of police accountability that society holds the police accountable.

But, as Stark points out, the social control mechanism for police misconduct is ineffective because people are either tolerant of police abuse or do not believe that it occurs. In the author's experience, however, it cannot be ignored that the police take very seriously the assertion that they cannot function if their actions do not have considerable support and consent from the public. The issue of consent often enters into police operational discussions in considering the ramifications of one course of action over another.

Related to consent, but sometimes independently asserted, is the rule of law argument which holds that the police are accountable through the law because they have a duty to enforce the law, must act within the law, and be impartial in their application of the law. The paradox that the police tend to distrust the justice system, but have an innominate faith in "the law" has been noted. Recent inquiries into wrongful convictions in several

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5 Ibid.


countries, however, discredit the notion that the police are necessarily impartial and faithful servants who act within the rule of law. The notion of operating within the law, however, should not be completely discounted. Recruits, through training, and the majority of officers in the field, are heavily influenced by the concept that they must operate within the law (hence the credo that any action must be "legal, ethical, moral and within budget"). The doctrine of acting within the law is a valid philosophy of policing even though there is evidence that it is not always put into practice. Observers should not be so cynical as to think that acting within the law is never put into practice, since it is central in the minds of many police officers. Although consent and the rule of law are intricate aspects of accountability, neither, in and of itself, or even together, is sufficient to regulate police conduct. As a result, other external mechanisms have developed to monitor police activity.

3. Political Accountability

The rule of law and consent arguments are also related to the independence principle which the police inevitably insert into any discussion of accountability, especially when it relates to political accountability. However, the notion that the police will be held accountable through democratically elected representatives has a checkered past to say the least. In the United States, because of past (some say current) overt political interference exercised over policing, there now appears exist a certain number of politicians who are very


reluctant to put political or accountability pressure on the police. This has lead to an almost unchecked autonomy in policing in some states. In the United Kingdom, the police have aggressively and persistently asserted that they are "independent" from political review of their decisions. The arguments over political interference should not be dismissed too quickly as a non-Canadian problem, since Reed notes that the first four Commissioners of the Royal Canadian Mounted Police ("R.C.M.P.") all resigned under duress regarding political issues with the government of the day. In most western jurisdictions, including Canada, there now appears to be a preserve of (operational) police authority which is purported to be free from review, political or otherwise. Thus, the notion of democratic accountability is complicated by the argument that certain decisions and actions of the police are exempt from review.

It is generally acknowledged that the political process can provide legitimate, but in some instances weak, mechanisms to hold the police accountable. In the United


11 Goldstein, *ibid*.


14 P.C.C., *supra*, note 1 at 162.
Kingston, Lustgarten notes that some democratic accountability is provided by virtue of the fact that responsible government ministers can be questioned regarding the activities of the police, including allegations of misconduct. This principle also holds true in Canada, since the R.C.M.P. is ministerially responsible to the federal Solicitor General, while provincial, and to some degree municipal, politicians are responsible for policing in a province or municipality (e.g. Attorney General or Mayor). In Canada, the notion of democratic responsibility of the police is further complicated by the fact that the R.C.M.P. is not directly accountable to the Attorney General of the province. For example, in British Columbia the R.C.M.P. is under contract with the province to act as the "provincial police force." Although the Commanding Officer ("C.O.") of "E" Division (British Columbia) is the Commissioner of the Provincial Police Force, the C.O. is not responsible statutorily or ministerially to the provincial Attorney General, nor are individual members of the Force. The C.O. of British Columbia qua Commanding Officer is accountable to the Commissioner in Ottawa, and ultimately to the federal Solicitor General under the R.C.M.P. Act. Even

15 *Supra*, note 2 at 94-7 and Chp. 7.


18 F.G. Palmer (Deputy Commissioner, rtd.), *Politics and Politicians In Canadian Law Enforcement* (paper submitted as partial fulfilment of the qualification requirements for promotion to the rank of Chief Superintendent in the Royal Canadian Mounted Police: April 29, 1983) (unpublished) at 67-8 documents disagreements over accountability of the R.C.M.P. to the Province versus the Federal government as the provincial police force. He also documents at 73-75 that any attempts by the provinces to discipline and control the Force have been
more anomalous is the fact that the R.C.M.P. also contracts with municipalities in British Columbia to provide municipal policing services, but the Force and its members are not directly accountable to the local municipal government. While conducting research for the Oppal Commission, Scorer noted that the Municipal Policing Agreement expressly recognized that the administration and control of the Force remains with the federal government, and as a result, the provincial policing legislation and/or discipline provisions for municipal and provincial police officers in British Columbia do not apply to the R.C.M.P. Conversely, the view of the Oppal Commission, Supreme Court of Canada jurisprudence and the constitutional division of powers makes provincial control over the R.C.M.P. more complicated than it appears in its report.

Gabrielle Scorer, *The Royal Canadian Mounted Police: Complaints & Discipline* (Draft Report Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) at 71 cites Article 3.1(a) of the Municipal Policing Agreement, which is probably reflective of the constitutional position of the R.C.M.P. However, in the last year, while the author was working in Operations Policy Unit, it became evident that the R.C.M.P. has adopted a very deferential attitude towards its "policing partner", the Province. In fact, on a couple of occasions the author was concerned that the Force nearly adopted a course of action at the behest of the Province that raised serious and real legal (criminal and civil) and liability issues for the Force and members. These experiences (and others with federal government ministers/bureaucracies) clearly identified to the author the need to be always be cognizant of operational versus political direction in policing.

Spencer also notes that ministers have a variety of means to avoid responding to issues of police accountability.\textsuperscript{21} In particular, the government will want to avoid implicating itself or a minister in a political embarrassment, which makes the efficacy of this form of accountability open to question.\textsuperscript{22} Brown also comments on how politicians and ministers, to look responsive and in control, tend to tell the media they will "demand a report" of the incident.\textsuperscript{23}

There are also a number of issues raised by the notion of politicians governing police organizations and/or being directly involved with misconduct and accountability issues, be they institutional or officer based. First, from the police manager's perspective, there is a problem with permitting elected representatives to decide matters of policy or misconduct, in that representatives and agendas come and go, and unpalatable political decisions can leave the police with long term operational difficulties.\textsuperscript{24} The concern, of course, is that the

\textsuperscript{21} Spencer, \textit{supra}, note 2 at 72-82; For example, in Britain, for historical reasons, the Home Secretary is responsible for the Metropolitan Police department of London, and the Minister may avoid answering a question by asserting that it pertains to an "operational matter" not within his or her ambit to properly query (\textit{i.e.} the policy vs. operational independence argument), it is not in the "public interest," or it is too "expensive" to find out. This type of tactic seems to have been used by the government in Canada prior to the inquiries into R.C.M.P. misconduct; see generally, Canada, (D.C. McDonald, Chairman), Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, \textit{Third Report: Certain R.C.M.P. Activities and the Question of Governmental Knowledge} (Minister of Supply and Services, 1981) and \textit{Second Report: Freedom and Security under the Law} (Minister of Supply and Services, 1981) ("McDonald Commission"); Quebec (J. Keable, Pres.), \textit{Commission of Inquiry Into Police Operations on Quebec Territory} (Quebec, 1981) ("Keable Commission").

\textsuperscript{22} McDonald Commission and Keable Commission, \textit{ibid.}


\textsuperscript{24} Lustgarten, \textit{supra}, note 2 at Chps. 7-8; see also, author, note 19.
police will become mere pawns in partisan politics.\textsuperscript{25} Oliver asserts that advocates of increased political accountability have failed to show that the influence of elected representatives in police decisions will make matters more impartial and neutral.\textsuperscript{26} Further, once saddled with a bad political decision the police are not in a position, practically, financially or perceptually to use the courts to overturn politically based decisions either as a matter of course or when dealing with uncontrollable operational circumstances.\textsuperscript{27} It is also very difficult to recover credibility with the community if the direction followed by the police was blatantly political. Permitting outside political control will also inevitably result in executive police officers losing deference and loyalty from subordinates.\textsuperscript{28} Many commentators point to historical, and in some instances current, policing problems in the United States as a basis to refute direct political control.\textsuperscript{29}

Second, on a more theoretical level, a general criticism that can be levelled at the democratic or political accountability model is that it is assumed that elected representatives are representative of the general public and not just part of the community elite.\textsuperscript{30} On the

\textsuperscript{25} \textit{Ibid.}; Oliver, \textit{supra}, note 2 at Chp. 1 and 53-6, Spencer at 89. For example, one city counsellor in the Lower Mainland during a dispute with the Province over photoradar publicly stated that if the local R.C.M.P. detachment commander followed the direction of the Attorney General to use photoradar he would use it against the detachment at budget time.

\textsuperscript{26} Oliver, \textit{ibid.} at 230.

\textsuperscript{27} \textit{Ibid.} at 41-60.

\textsuperscript{28} \textit{Ibid.} at 20.

\textsuperscript{29} See, Fogelson, \textit{supra}, note 10. Reading a copy of \textit{Law Enforcement News} (A publication of John Jay College of Criminal Justice/CUNY, New York) in any given month will highlight the extent to which politicians, particularly mayors, continue to hire and fire police executives at will in many jurisdictions.

\textsuperscript{30} Spencer, \textit{supra}, note 2 at 7 and Chp. 3 notes that politicians and legislatures are not necessarily representative of the community; also, Maeve W. McMahon and Richard V. Ericson, \textit{Policing Reform: A Study of the Reform Process and Police Institution in Toronto} (Research
other hand, elected representatives may be more acceptable than persons who are appointed to have control or responsibility over policing in that they are at least elected.\(^{31}\)

Third, others assert that politicians and legislatures should have the larger mandate of setting standards and laws, and the regulation of government generally, but not the day-to-day operations of the police department.\(^{32}\) One important role that politicians and governments can play in moulding police departments is that they can have a function in selecting the executive officer of the department (e.g. the Chief). However, this could leave the executive officer vulnerable by being beholden to the current government, or making his or her tenure directly linked to the continued success of the government.\(^{33}\) Moreover, many discussions over democratic control overlook the fact that the government controls the purse

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\(^{31}\) Spencer, \textit{ibid.} at 7-8.


\(^{33}\) Any review of \textit{Law Enforcement News}, \textit{supra}, note 29, makes it plain that chiefs in many areas are as vulnerable as the political person (usually the mayor) that appointed them. In many areas it is common practice for the new mayor to appoint a new chief when taking over the political reins. The firing of police chiefs by mayors or city managers over political differences in the United States is not uncommon. In the author’s experience as a civilian investigator of police there was on occasion a flavour of politics surrounding the local police executive and certain powerful political forces.
strings of departments, which can provide enormous direct and indirect control over the organization. The author has observed first hand the tremendous influence the budgetary process has over police departments and how it impacts on operational matters.

A more recent phenomenon that must also be considered is that the police themselves have become more politically active, which may lead an elected representative responsible for policing to be less inclined to take what is perceived as an anti-police stance. In more extreme cases, the police may determine the outcome of an election, which can militate against the notion of political accountability. The likelihood of the police or any other single group determining an election beyond the municipal level in Canada is remote, however, they could affect the outcomes of elections and careers of individual politicians.

Governments can also provide accountability through the use of independent inspection and audit sections, as well as influencing and rationalizing police practices through

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35 Ibid.; Bouza, supra, note 6 at 36 observed that in the United States, "Recognizing the importance of key bodies such as civil service commissions, police unions set out to capture them through the application of political muscle to the appointing authority, usually the mayor. Union coffers and support can be critical to a candidate's chances, and the unions, preferring to work quietly behind the scene, find these sorts of payoffs very lucrative in the long run." Further, at 240 he notes that "In the 1960s unions added to their strength by entering the political arena, with checkoff funds, campaign workers, votes for candidates, newsletters, and such. They rapidly developed formidable lobbying skills at city halls and state legislatures."
the use of circulars and the implementation of general policy guidelines. In Canada, this function occurs in provinces through the use of police commissions or a policing services branch within the ministry responsible for policing in the province.\(^{36}\) These mechanisms can have tremendous influence over the police by setting mandatory standards or determining how the police will employ certain tactics (e.g. classifying the use of the carotid control technique as deadly force level). Although the notion of ministerial responsibility and government review over policing are influential, they are not a complete mechanism for accountability.

4. Police Boards and Commissions

Although Canada seems to have escaped the more blatant aspects of political interference in policing that exists in the United States, concern over perceptions of political interference did fuel the creation of local boards responsible for policing.\(^{37}\) Police Commissions have also been established provincially to deal with police governance and

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\(^{36}\) For example, as noted by the Oppal Commission, \textit{supra}, note 17 at B-45 to B-80 in British Columbia (until recently) general policy guidelines and standards were set by the provincial Police Commission. While the Commission is now disbanded, this function is to pass to Police Services Branch under Bill 16, \textit{supra}, note 16. The R.C.M.P. generally determines its own national, divisional, district, detachment and unit policy, however, the province can set guidelines that the R.C.M.P. have incorporated into its policy manuals (e.g. Attorney General’s guidelines on police pursuits, and policy on domestic violence). As noted by Lustgarten, \textit{supra}, note 2 at 105-8 in the United Kingdom this role is undertaken by the Home Office.

\(^{37}\) See, Philip C. Stenning, "The Role of Police Boards and Commissions as Institutions of Municipal Police Governance" in Clifford Shearing, ed., \textit{Organizational Police Deviance: Its Structure and Control} (Toronto: Butterworths, 1981) at 161 where he refers to evidence that political interference was a causal factor in prompting the creation of police boards in Canada. A more disturbing example is found in \textit{Roncarelli v. Duplessis}, [1959] S.C.R. 121 where the various regulatory agencies, including the police, became agents of the government to prevent the distribution of literature relating to Jehovah Witnesses and the active restriction of the faith (e.g. "padlock laws").
misconduct, and to avoid accusations of political interference.\textsuperscript{38} The problem with police boards and commissions is that they may have conflicting mandates by being responsible for employing officers, development of policy/operations, and dealing with misconduct allegations.

The purpose of a police board is to remove politics from policing and provide accountability of the department and officers. Police board members can be either elected or appointed.\textsuperscript{39} As Stenning notes, there are as many configurations of board membership and authority as there are boards.\textsuperscript{40} In general terms, boards and board members are frequently criticized as being, or seeming to be, powerless and ineffectual on accountability issues.\textsuperscript{41} More generally, Oliver criticized boards for lacking continuity, experience, and being generally unaware of their powers and responsibilities.\textsuperscript{42} Boards have also been criticized for being reluctant to impinge on the operational preserve of police forces.\textsuperscript{43} Spencer again raises the fundamental question of whether boards are in fact representative of communities.\textsuperscript{44} Lustgarten also raised concerns about giving powers in a democratic model

\textsuperscript{38} Stenning, \textit{ibid.}; P.C.C., \textit{supra}, note 1 at 162.

\textsuperscript{39} Stenning, \textit{ibid.} at 176; Spencer, \textit{supra}, note 2 at Chp. 3.

\textsuperscript{40} \textit{Ibid.} at 176.

\textsuperscript{41} Lustgarten, \textit{supra}, note 2 at 85-6. This is probably more so in Britain where police boards/authorities exist under a tripartite system and the Home Office and local government are seen as controlling policy and finances.

\textsuperscript{42} \textit{Supra}, note 2 at Ch. 3.

\textsuperscript{43} Lustgarten, \textit{supra}, note 2 at 85-90.

\textsuperscript{44} \textit{Supra}, note 2 at 125-131.
to unelected officials.\textsuperscript{45}

Some commentators are also concerned about the motivations of board members who may be, or be seen to be, lackeys of special interest groups or politically motivated in a manner that is inconsistent with the needs of the community; if the board is elected, concerns are also raised that actions may be taken with a view to obtaining re-election.\textsuperscript{46} As an example, Perez believes American Civil Liberties Union lawyers could potentially find themselves in a conflict when they sit on police boards that deal with misconduct while representing an interest group that is committed to fighting police misconduct.\textsuperscript{47}

Despite the foregoing criticisms, the authority of police boards to deal with complaints of misconduct is a very live issue for operational officers. The author has dealt with municipal police officers in three provinces in several capacities and can state that police boards were considered to have influence in policing. While the comments ranged across the spectrum, most officers were fully aware that they could end up before a police board to respond to an allegation. In British Columbia, the Oppal Commission specifically raised concerns about the use of police boards as part of the discipline process for municipal police officers.\textsuperscript{48} For police officers, particular concerns have been raised that appeals are

\textsuperscript{45} Lustgarten, \textit{supra}, note 2 at 171-2. At 80 he is specifically concerned about giving powers to unelected magistrates sitting on police boards—would this not also raise issues about the appointment of magistrates in general?

\textsuperscript{46} Oliver, \textit{supra}, note 2 at 93; the others at note 2 also discuss this issue.

\textsuperscript{47} Douglas W. Perez, \textit{Common Sense About Police Review} (Philadelphia: Temple University Press, 1994) at 221-3. He also notes the paradox found in the complete lack of a complaint mechanism in the American Civil Liberties Union to deal with counsel that act inappropriately.

\textsuperscript{48} Supra, note 17 at B-42 to B-72. Some of the concerns were that board members were isolated and aloof from police officers, the members could have too much influence or involvement in directing the chief or decisions that could lead to complaints against police officers, they were too secretive, and the interests of the board members, chief and department
heard by police boards or commissions that are responsible for policing in the area and appointees may be more representative of the management point of view, either by definition or disposition.\textsuperscript{49} In other words, the police officer is concerned that inordinate weight may be given to supporting police management, or alternatively, the public interest. In relation to the R.C.M.P. a police board has no role to play whatsoever in the accountability or discipline of R.C.M.P. officers.\textsuperscript{50} However, police boards do have a prominent role in the accountability of police officers in many jurisdictions. In some jurisdictions (e.g. Nova Scotia) officers do not enjoy any testimonial immunity and they will be called to the stand if a complaint makes it way to the board. The compellability authority possessed by some boards, particularly when there are outstanding criminal investigations or charges against the police officer, can raise a number of concerns (e.g. disclosure of evidence that goes to a defence).

5. Consultative Committees

Police agencies in North America are currently experiencing a broad movement

\\textsuperscript{49} Ian Scott, "Rights Arbitration in Canadian Police Labour Relations" in Bryan M. Downie and Richard L. Jackson, eds., \textit{Conflict and Cooperation in Police Labour Relations} (Ottawa: Minister of Supply and Services, 1980) at 165.

\textsuperscript{50} Scorer, \textit{supra}, note 19 at 72-74; see also the cases cited in note 20 on the jurisdiction of provincial boards/commission to deal with R.C.M.P. misconduct and internal management. Surprisingly, Palmer, \textit{supra}, note 18 at 93-4, in a commissioned officer paper in the R.C.M.P. recommended the creation of police boards in order to ensure politics did not impact on police decisions. However, he indicated the boards would need competent experts on them to ensure they operated effectively.
towards community-based policing.\textsuperscript{51} Without detailing the implications of this philosophical shift, it should be noted that the creation of "consultative committees" is one of the cornerstones of implementing community-based policing.\textsuperscript{52} Consultative committees are to be created with the "community" (or communities) to form partnerships between the police and the community and to provide community input into decision-making regarding policing services and priorities.\textsuperscript{53} Although not directly responsible for police misconduct, it is envisioned that the function of consultative committees will be to advise the police on local problems, help educate the public about crime and enlist public cooperation, provide personal contact outside of the bureaucracy, provide feedback on police efforts, and reflect general problems.

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  \item \textsuperscript{53} Oppal Commission, \textit{ibid.}; Spencer, \textit{supra}, note 2 at 104-6.
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community concerns or issues over departmental or officer conduct.\textsuperscript{54} Despite concerns that such committees are unelected and perhaps unrepresentative, Lustgarten, and the Oppal Commission, suggest it is possible that such committees can reach the voiceless by the use of open meetings to air issues and perhaps provide better input than elected representatives because the committee members are from the "community."\textsuperscript{55}

On the other hand, as several writers have noted, while these committees may enhance community input into policing, they have no formal control over the police or the accountability process.\textsuperscript{56} Further, there is no requirement that police managers consult with or listen to the committees.\textsuperscript{57} Lustgarten has noted concerns that consultative committees are not democratically elected, and perhaps constitute an illegal delegation of authority, depending on the format adopted.\textsuperscript{58} It also seems clear the committees will not be permitted to encroach on operational issues or infringe on the independence of police principle.\textsuperscript{59}

Petterson is critical of consultative committees because they tend to be staffed by

\textsuperscript{54} Bayley (1994), \textit{supra}, note 32 at 105-11.

\textsuperscript{55} \textit{Supra}, note 2 at 89-94 and note 17, respectively. A "community" does not necessarily dovetail with electoral boundaries, and can include numerous communities within a community.


\textsuperscript{58} Lustgarten, \textit{supra}, note 2 at 89-94.

\textsuperscript{59} \textit{Ibid.}; Spencer, \textit{supra}, note 2 at 102-6.
police supporters who uncritically accept police proposals. In the spirit of the Spencerian analysis, one also has to wonder how representative of the "community" these committees actually are. Since the current philosophy seems to be to create a consultative committee for each identifiable group, the question becomes whether or not they can continue to be legitimate if the police make decisions that go against the desires of that committee. Others have wondered whether community-based policing, and consultative committees in particular, will re-introduce risks of corruption into policing, risks the police have striven to eliminate and/or place illegitimate/excessive interest-based demands on the police. There have also been a host of other concerns relating to consultative committees.

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62 The following are some of the issues that have been raised relative to consultative committees:

1) setting up such groups is an attempt to appease calls for accountability or divert attention from real accountability (Spencer, supra, note 2 and Lee, note 51);
2) it provides a means for police to outflank the local government where it is not supportive (Lustgarten and Spencer, note 2);
3) mandate limited to general issues and information and cannot address specific concerns making them ineffectual, powerless and nothing more than an ideological tool of hegemony (Lee, note 56);
4) there is an assumption of shared norms, consensus, sense of community and uniform expectations (Goldstein (1990), note 51);
5) in practice participation is limited (Oppal Commission, note 17) and not necessarily representational, which could cause more conflict, marginalization and alienation (Lustgarten, note 2);
6) studies have found that the perceptions of neighbourhood activists do not necessarily correlate with the perceptions of the community regarding problem identification (Oppal Commission, note 17 and Mastroski & Greene, ibid.);
7) assumes the problems identified are the most important to the community (Goldstein (1990), note 51);
In British Columbia the R.C.M.P. has initiated a program to implement various consultative committees, but as the Oppal Commission found, despite the existence of a formal statutory basis to form committees, only one detachment knew of and implemented this process.\(^{63}\) However, both the Oppal Commission and Bayley indicate that consultative committees insert another level of demand on policing which inevitably leads to increased accountability of the department and officers.\(^{64}\) Yet, this increased accountability is more related to departmental responses to the community than the individual officer. Nonetheless,

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8) not uniform and lack formal authority (Oppal Commission, note 17);
9) difficult to get commitment from members (Bittner, note 51), lack of consistency in the frequency of meetings, sporadic attendance and apathy often lead to disbanding (Oppal Commission, note 17);
10) difficult to get consensus, interest soon fades and the strongest voices inevitably prevail (Goldstein (1977), note 7);
11) majority of the population is usually concerned with personal safety and want short term solutions for immediate problems and are not likely to support complex and expensive proposals over a long period of time; in particular, some segments of committees/communities will not be interested in protecting rights or minorities at dominant society’s expense, and may even demand insensitive instrumental response (Goldstein (1977), note 7); for example Bouza, (supra, note 6 at 22) points out that "The frightened and impatient citizen’s eyes glaze over with frustration and ill-concealed hostility at the mention of culture, social, or, especially, economic forces channelling the underclass" and "Action now" is demanded; whether accepted or rejected this will lead to a credibility and legitimacy problem for the police;
12) concerns that such initiatives will put the police into competition, and ultimately conflict, with other agencies as the police become "advocates" for groups, which can lead to agency alienation (Bayley (1994), note 32);
13) police will only support those who agree with them (Bittner, note 51); and
14) reliance on the police will be too high, as they are seen as the experts, and they will end up running meetings and proposing solutions; on the other hand, the police may leave action and implementation to the committee rather than themselves.

Some of the more cynical concerns have been that consultative groups may be:
1) used as a nefarious mechanism to gather information on citizens and/or marginalized groups (Reiner, note 9); and
2) to legitimate excesses in police crackdowns by explaining or legitimating such action in advance by consulting.

\(^{63}\) Supra, note 17 at Part B.

\(^{64}\) Ibid. at Parts B and C; Bayley (1994), supra, note 32 at 105-20.
as a corollary, the theory is that officers will be more familiar and known to the community, which should reduce the incidents of misconduct. The author can state from personal experience with the consultation process that many community leaders are not afraid to voice specific concerns regarding specific officers and demand action.

6. Media

Whether or not the media provide an effective mechanism in the larger accountability regime seems to depend on a number of factors. In general, the media are indicted for failing to inculcate respect for legal norms in society, or alternatively, as propagators of ideology sanctifying existing social institutions. There is little doubt that the mass media influence public interests, perceptions, and can formulate or construct public opinion. Most will concede that the media exert influence on the police and police conduct and have a role in accountability. As Yarmey notes, the media are in a critical position, as "gatekeepers" of information, to instill feelings of mistrust or support for the police. It seems to be generally accepted that there is an increase in media coverage of complaints regarding police misconduct.

65 Reiner, supra, note 9 at 171-201.

66 Supra, note 12 at 86-7; Goldstein (1977), note 7 at 316-18; see also, Eli Sopow, The Age of Outrage (Victoria, B.C.: Mediascope International Inc., 1997).

67 Skolnick and Fyfe, supra, note 52 at 217-18; P.C.C., note 1 at 162; Kerstetter, note 1 at 158-9; Yarmey, note 52 at 136-40; Bouza, note 6 at 10 notes that "The criminal justice system’s practitioners can and do bury their mistakes, if they are unimportant enough to escape the interest of a powerful champion, such as the press."

68 Ibid.

69 Supra, note 67; Arthur Maloney, The Metropolitan Toronto Review Of Citizen-Police Complaint Procedures (Report To The Metropolitan Toronto Board Of Commissioners Of
Goldstein, Skolnick and Fyfe believe that the media can exert considerable influence on police departments, officers, and the level of service. As noted by Reiner, the media-constructed image of the police is vital for the maintenance and/or attainment of the minimum consent which is essential for the preservation of police authority. Although the police have some control over information and the management of its image, failing to have a good rapport with, or releasing information to the media can lead to poor relations. Reuss-Ianni was also convinced that police management is activated by bad publicity and criticism. The notion that the media can affect police conduct was sustained by Reuss-Ianni when she found that police officers were afraid of the repercussions from bad press or the exposure of mistakes. The validity of these observations has been confirmed in the experience of this author.

Maloney, in a review of Metro-Toronto policing practices, felt publicity or media are avenues that provide some redress regarding police misconduct. In general, Maloney found Police, 1975) at 17-19 (Chp. 1) also attributes an increase in complaints to factors other than a necessary increase in police misconduct (e.g. increased awareness of rights).


Supra, note 9 at 171-201.

Yarmey, supra, note 52 at 136-40. The power of the media and reporters is something may departments consider. As a member of the newly formed Hate Crimes Team in British Columbia and recent student of a Media Relations Course, the author has experienced and observed first hand how the media can influence the police and government initiatives.


Ibid.
that journalists are willing to expose police misconduct and would often conduct preliminary inquiries to determine the validity of an allegation.\textsuperscript{75} It was noted, however, that some journalists may be inhibited from proceeding with a story because it could impact on their ability to compete for "news" if the police consequently gave preference to other journalists.\textsuperscript{76} However, Maloney also felt the impact of the media was limited because it provided neither an adjudication of the merits of the complainant's version of events, nor an avenue to ensure the officer was disciplined.\textsuperscript{77} In a related concern, Skolnick and Fyfe felt the media were limited in their ability to analyze the effectiveness and liabilities of the misconduct or to conduct long term supervision of a misconduct story to ensure changes followed.\textsuperscript{78} The media can also inadvertently encourage abuses if misconduct is ignored.\textsuperscript{79} Of course, the media will have no effect if the complainant has engaged in activity that she or he does not want known to the public.\textsuperscript{80} As with making a misconduct complaint

\textsuperscript{75} Supra, note 69 at 35.

\textsuperscript{76} Kerstetter, supra, note 1 at 158-9. The author can say that a journalists "reputation" with the police was a focal point for both officers and individual journalists while attending a recent Media Relations Course. Journalists on the course were aware that lack of trust by the police could impact their ability to function. On the other hand, it was openly acknowledged that some journalists build their reputations by being underhanded and willing to do anything to make/get a story. Truth and accuracy were acknowledged victims of such reporters.

\textsuperscript{77} Supra, note 69 at 35. Setting aside whether or not the complaint is valid, which Maloney assumes, he fails to consider that departments can initiate investigations on the basis of complaints outlined in the newspaper. A recent example is the investigation of the Chief Constable of the Vancouver Police Department and an Inspector in relation to a media report that may have disclosed confidential information.

\textsuperscript{78} Supra, note 52 at 218; see also, Kerstetter, note 1 at 158-9 who notes the media have limited resources and cannot sustain review for long periods of time.

\textsuperscript{79} Perez, supra, note 47 at 219-20.

\textsuperscript{80} Maloney, supra, note 69 at 35. Someone accused of molesting a child is not likely to go to the media to complain of police misconduct. This does not prevent some third party who knows about the incident from going to the media.
generally, some believe that going to the media may result in harassment from the department or officers. On the other hand, it is also felt that media attention may prevent or stop improper police action.

In general, the police are critical of the media because they tend to sensationalize incidents and create unrealistic views of the police role and their capabilities. Yarmey feels that the media and television "cop shows" are also responsible for distorting interactions between the police and public by creating expectations and stereotypes that do not accord with reality. The media also tend to be uninterested in reporting the common or boring parts of police work that make up the majority of an officer’s time. The result is that the public may be less able to discriminate between fiction and reality. Because of this, many officers are not open with or trustful of the media. Ward probably captures the views of the individual police officer best:

For most law enforcement officers trying to cope with the media there is a feeling that it is a no-win situation: there are very few "right" decisions. All law enforcement actions are open to a broad range of interpretations by pseudo-experts who have little or no knowledge of the facts of a case and the nature of the decision-making process, and who refuse to realize that in almost every complex situation when something can

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81 Ibid.

82 Goldstein (1977), supra, note 7 at 316-18; Yarmey, note 52 at 136-7; see also, Sopow, note 66 at 123 who notes that "there is a danger when what is defined as news is increasingly sensational action on the fringe of reasonable debate." Further, "[t]he narrowly defined and sensational bent of news coverage can not only distort the more complex larger picture, it can leave misleading impressions that get stored in our brain’s data banks." Sopow is highly critical of the media showing tape of one incident repeatedly which 1) ends up out of context over time; and 2) creates false impressions about events.

83 Supra, note 52 at 136-7; Bouza, note 6 at 29 criticizes television and the media because they convey "grotesque distortions of reality and ultimately give rise to impossible expectations of the police."

84 Ibid. at 136-40.
go wrong, there is a high probability that something will.  

Officers are also concerned that the media, in their self-proclaimed roles as watchdogs of public interest, will negatively influence the course of an investigation. Further, the distinction between an honest mistake because of inadequate information, human error, imprudent decision under pressure, or no training and outright malfeasance is rarely portrayed in favourable terms, or even considered, by the media. Frequently, allegations of misconduct become effectively "trial by media" with an expectation that "heads will roll." The result is that police managers may be improperly pushed to impose more severe discipline than is necessary because the adequacy of the redress system is gauged by punishment, although this is contrary to the proposed remedial approach.

There have also been instances, identified by Kelly and Kelly, in which the media appear to have libellously reported or deliberately misreported alleged police misconduct in order to get a story. The media have also been accused of ignoring policy, facts, law,


86 Ibid. at 4; Royal Canadian Mounted Police External Review Committee, Post-Complaint Management: The Impact of Complaint Procedures in Police Discipline (Discussion Paper 4) by Clifford D. Shearing (Minister of Supply and Services Canada, 1990) at 1.

87 Ward, supra, note 85 at 4.

88 Ibid.

89 Discussion Paper 4, supra, note 86 at 1.

90 William Kelly and Nora Kelly, Policing In Canada (Toronto: MacLean-Hunter Press, 1976) at 620-1. Operational police officers are constantly amazed at the "angle," agendas, errors or inflammatory language and headlines that creep into journalists reports; for example, see; Greg Middleton, "Cops defend shooting - One witness says man was shot down 'like a dog'" The Province (22 April 1994) at A5 (where police shot a man who attacked an officer with a knife); Charlie Anderson, "Cops victim 'competent'" The Province (11 August 1994) at A10 (where police used deadly force after a suspect stabbed a man, stabbed a police dog and came
and regulations to report a story in a particular way. Goldstein has also concluded that sometimes the issues raised by misconduct or police actions come second to "the story," which along with poor reporting, reinforces stereotypes. Reiner concluded that the general trend of media coverage is towards increased criticism and that the police can become the scapegoats for general social failure. Perez is even stronger in his view, noting that "the press is easily the most unaccountable political entity in America." It is

at officers); Neal Hall, "Did city police have to kill disturbed man, citizen asks" *Vancouver Sun* (d.u.) at B1-2 (where a citizen complained that the police should have "wounded" a disturbed man).

91 Kelly and Kelly, and newspaper articles, *ibid.*

92 *Supra*, (1977), note 7 at 316-18.

93 *Supra*, note 9 at 171-203.

94 *Supra*, note 47 at 219. For example, the front page two inch high headline "MR. SCAM ON THE LAM - Police chasing top welfare cheat" *The Province* (20 October 1994) ran with a colour photograph identifying the alleged suspect but the picture was in fact of the wrong man. The next day the newspaper ran a small non-front page article entitled "Photo of innocent man ran in error" apologizing for the mistake. Other questionable tactics have also been identified; see Kim Bolan, "BCTV target of probe after fake claim for welfare fails" *The Vancouver Sun* (24 November 1995) at B3; Kim Bolan, "BCTV news told to tell story of getting caught attempting welfare fraud" (29 November 1995) at B7; Canadian Press, "Reporter quits over fake story" *The Vancouver Sun* (5 October 1995) at A7; Chris Cobb, "CBC program apology saved it from wrath of spy committee" *The Vancouver Sun* (15 December 1994) at A4; Ian Mulgrew, "CKNW considers appealing ethics ruling" *The Vancouver Sun* (14 February 1997 at B5 (where it was found a journalist improperly filed a complaint requesting an investigation and then reported on it). One major U.S. television program was recently caught fabricating news by using a hidden incendiary device to demonstrate how one make of pick-up truck purportedly exploded when hit from the side. The notion of using self-interested "Press Councils" to deliver accountability in journalism has not been satisfactory; see, Adam Ross, "Metro Toronto Police fight back - Controversial cartoon sparks reaction from police community," *Blue Line Magazine* (May, 1997) at 24-5. As Sopow, *supra*, note 66 at 122, states, "Of all the institutions in North America, few have become so discredited as the news media" (emphasis added). For example, Sopow at 122 cites: 1) a national Angus Reid/Bloomberg Business News poll conducted in October of 1996 that found only 13% of Americans trusted the news media; 2) a December 1996 MarkTrend poll of 1,002 adults living in British Columbia that found 79% of respondents felt the news media had "too much power and influence over public opinion"; 3) a 1996 Harris poll that found 84% of Americans agreed with the notion of government regulating journalists in
much simpler for the media to criticize than constructively approach issues.

The individual officer can easily come to the conclusion that some of the difficulties with police misconduct arise from the inadequate publicity of good police work and over-zealous publicity of occasional police misconduct.\textsuperscript{95} In other instances, particularly when lethal force is used, the reporting appears to be patently biased, speculative and sensational which causes considerable distress for officers.\textsuperscript{96} The very nature of police work means that officers are susceptible to media analysis which is not a common feature of most employment. It is clear that the police are influenced by potential and actual media coverage.

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\textit{order to curb bias}.
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\textsuperscript{95} Peter G. Barton, "Civilian Review Boards And The Handling Of Complaints Against The Police" (1970) 20 \textit{University of Toronto Law Journal} 448 at 449.

\textsuperscript{96} Richard B. Parent, "Aspects of Police Use of Deadly Force in British Columbia: The Phenomenon of Victim-Precipitated Homicide" (M.A. thesis, School of Criminology, Simon Fraser University, 1996) (unpublished) at 103-06 found that \textit{"The media was cited by most of the police officers as one of the greatest sources of stress immediately after their fatal shooting incidents... particularly painful was the speculation and supposition taken by many journalists who were impatient regarding the release of the official police investigation. These journalists would often produce media articles that were written in a negative manner towards the actions of the shooting officer or the police agency that employed him"} (emphasis added). Parent also reports that officers reported that they felt they were "getting fucked" when headlines like the following appeared after their shooting incident: \"Relatives Want Police Charged in Shooting\"; \"Were Four Bullets The Only Answer?\"; \"Mayor Questions Police Policy\"; \"Police Training Called Flawed\"; \"Slain Man's Mother Asks Premier For Probe.\" Further, as horrifying as the Rodney King beating was, how many people are aware that shortly after this videotaped incident, a second videotaped incident arose in which a white Texas constable was attacked and beaten/stabbed to death by several non-white males? How many are aware that a black man entered a halfway house to kill former LAPD Sgt. Koon (supervisor at King incident) and shot and killed one person and wounded two others before he was killed by police?; see \textit{Law Enforcement News} (15 December 1995) at 6-7.
7. Prosecutors

The notion that the prosecution service provides an effective mechanism to review police misconduct, or at least act as a check on police misconduct, has been criticized on several grounds. Before reviewing these criticisms, the reader must understand the nature of the relationship between the police and Crown prosecutors. Unlike many jurisdictions in Europe, in Canada the police primarily determine who is investigated, charged, and what charges to lay (sometimes they even conduct minor prosecutions). In contrast to the United States, where the prosecution service may have its own investigators, in Canada the police are solely responsible for conducting criminal investigations and presenting the case to the prosecutor. The police then, occupy a positional advantage in relation to the prosecutor, which results in a dependent relationship between the police and prosecution service.

The first feature that limits the ability of prosecutors to act as a check on police misconduct is that they only see a limited number of the cases that the police actually

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97 Lustgarten, *supra*, note 2 at 3-4. For example, in British Columbia the police frequently conduct the prosecution of traffic offenses before a justice of the peace. However, unlike other provinces (e.g. Nova Scotia) where the police lay the charges and then forward the file to Crown, here the police forward a report recommending charges, and the Crown decides whether or not to lay the recommended charge, lay no charges, or lay an alternative charge (i.e. charge approval system). The decision can be administratively reviewed at the request of the police by a Regional Crown, or alternatively by an ad hoc Crown, if it is a sensitive issue (e.g. allegations against a police officer or a politician); see British Columbia, Minister of Attorney General, Criminal Justice Branch, *Crown Counsel Policy Manual*.

98 Lustgarten, *ibid.*; although the Crown can request the police to conduct further inquiries on a file.

handle. The fact is that a large percentage of police activity does not result in charges that are forwarded to Crown counsel. Secondly, it has been asserted that prosecutors are co-opted by the police because of the symbiotic relationship between the two agencies. It is argued that the decision by the police to charge becomes effectively a decision to prosecute by the prosecutor. While this may be true to some degree, anyone experienced in the criminal justice system knows that such a broad assertion is unfounded, particularly in British Columbia which uses the "charge approval system." At a minimum, however, as noted by Ericson, because of the number of prosecutors that may handle a file, the sheer volume of work, and the inability of prosecutors to prepare many files prior to a hearing, prosecutors come to rely heavily upon, and frequently defer to, the view or recommendations of the police. While it is true that prosecutors cannot deal with misconduct that is based on inactivity or misfeasance when no charges are filed, it must be remembered that the police often require prosecutorial blessing to get charges laid. If the police want to proceed to prosecution it is critical that they avoid misconduct because the alternative may be a refusal by the prosecution to proceed with the case. The police will not retain prosecutorial or public confidence for very long if charges cannot be laid because of improper police activity. Similarly, individual officers cannot afford to develop reputations for misconduct or they will find out the prosecutors will not support them in charges or cases.

100 Kerstetter, supra, note 1 at 158-9.


102 Brian A. Grosman, Police Command: Decisions and Discretion (Toronto: Macmillan Co., 1975) at 83-5; Ericson, supra, note 99 at 22-3 and 180-1.

103 Ibid. at 180-1. This is particularly true where the officer is endorsing a plea resolution, or has been approached by, or approached the defence counsel, to deal with a file expeditiously.
Interestingly, although prior to the more rigorous disclosure requirements imposed on police, Ericson found that the police were also able to regulate what information defence counsel received, which even left defence lawyers reliant on the police. Further, if a defence counsel frequently and vigorously challenges police accounts of incidents, the police could, to a degree, ostracize or ignore the lawyer, which can reduce the effectiveness of the lawyer in negotiations with the police and prosecutors.

Based on professional, and in some cases social, relationships that exist between prosecutors and police officers, some commentators have queried whether prosecutors can be vigorous in dealing with police misconduct. Lustgarten notes that some believe the police receive more protection when it comes to charging a police officer because the file is referred to the prosecution service for a decision, while the decision to charge an ordinary citizen is made by the police. In addition, Chevigny found that in New York some prosecutors actually laid charges for "false reports" against persons that allege police misconduct.

104 Ibid. at 22-3 and 180-1.

105 Ibid.


107 Supra, note 2 at 138-40.

In British Columbia, the decision to charge a police officer is generally made by the Regional Crown, or alternatively, it may be referred out to a private lawyer for a charging decision.\footnote{Crown Manual, supra, note 97 at Pol. 1, "Police - Allegations Against Peace Officers".} Further, it has been the author’s experience in British Columbia that the criminal prosecution of police misconduct is often undertaken by an \textit{ad hoc} prosecutor or a prosecutor from another jurisdiction than that of the police officer. In fact, in the author’s discussion with one experienced former provincial Crown Counsel from a jurisdiction other than British Columbia, it was noted that prosecutors who vigorously pursued charges and prosecutions against police officers were advanced much quicker in the prosecution service.\footnote{Personal communication on January 31, 1996. This former Crown was also of the view that individuals who assert the position that no police officer should be permitted to lay a criminal charge against a complainant arising from false complaints are obstructing justice. It was very clear that prosecuting police officers was seen as a way to advance a career in this province from some prosecutors.} The author has not experienced an unwillingness among prosecutors to report misconduct of police officers that comes to their attention to departments. In fact the author is aware of cases where a prosecutor has filed a formal complaint, sent a letter to the chief/detachment commander, or forwarded to the appropriate authority a copy of transcripts or reasons for judgement that identify improper police actions.

Although some forms of police misconduct are blatant and unambiguous, Wilson and Alprin make an important point that there is an unwillingness by prosecutors, because of personnel shortages, satisfaction with the \textit{status quo}, or disinterest, to express clearly to the police simplified interpretations of sophisticated rulings.\footnote{Jerry V. Wilson and Geoffrey M. Alprin, "Controlling Police Conduct: Alternatives To The Exclusionary Rule" (1971) 36 Law & Contemporary Problems 487 at 494.} Even more directly, the case-by-case method so eagerly adopted by courts is useless to officers because facts are never
exactly the same and dissimilar cases arise all the time. The Oppal Commission recently echoed these concerns when it pointed out that prosecutors are reluctant to become involved in or provide legal advice during investigations, and any legal information the prosecutors provide to the police is not uniform. This has several implications for prosecutors as an accountability mechanism. First, in those areas where the law is unclear, it is inherently contradictory for the agency that refused to give advice or failed to provide advice during an investigation to be tasked with making determinations of misconduct against police officers. Second, if prosecution advice was provided to the police that is incorrect or inappropriate, the same agency will review its own decision. Third, this state of affairs challenges the notion that the police are receiving appropriate direction on complicated legal issues that can easily ensnare an officer in an allegation of misconduct, regardless of his or her good faith. The problem is that many falsely assume the police are receiving adequate advice on complicated legal developments to avoid allegations of misconduct when in reality it is a haphazard, patchwork, and seat-of-the-pants model. While it is clear that there are certain legal standards that even moderately well-trained police officers know are inappropriate (e.g. torturing a prisoner) there are grey areas where culpability can be assigned even though the law is unclear. These grey areas can result in discipline, even where the officer did not know about the legal decision, because the police are expected to know the law and many codes of conduct make it an express disciplinary offence to violate a person's Charter or legal rights. The author is aware of cases in which discipline has been

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112 Ibid. at 493.

113 Supra, note 17 at H-40 to H-41.

114 See, MacMillan and Thatcher, supra, note 13.
sought for violating a person's constitutional rights. The problem is that the police are falling further behind in their understanding of these rights because of broad and frequent legislative changes and judicial decisions. The ability of police officers or supervisors to maintain even a "working knowledge" of the Criminal Code, federal and provincial statutes and case law is quickly becoming a fiction. Unlike other professionals who can refuse to take a case outside the sphere of expertise or practice, no such luxury exists for the police. While the frequent and immediate wide-ranging demands on the police to perform all types of service increase, training and legal advice have not kept up with the demand.

8. Judicial Review

Prior to discussing criminal and civil remedies to address police misconduct, the general limitations on judicial review of police conduct must be considered. Both the legislatures and the courts are constantly challenged to re-adjust the checks and balances that circumscribe the powers of those who enforce laws in society. Police conduct can be the subject of judicial review in two ways. First, judicial review can occur in the context of civil suits against the police, through a review of operational (e.g. non-enforcement of law) or administrative (e.g. deny a permit) decisions by police departments or officers, and appeals of complaints against officers. The second form of judicial scrutiny occurs in the criminal context where judges exercise a discretion to exclude evidence improperly obtained by the police.

In the 1960s and 1970s, there was considerable discussion around the need to restrict

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police discretion and provide rules for policing. The problem was that the police denied that they exercised discretion or that some laws were not enforced. In reality police officers did exercise discretion and did not enforce all laws, which could lead to abuse. The overriding concern was that many departments operated without any formal rules or policy to guide police behaviour, leaving officers to act on an ad hoc basis. Although local customs or practices evolved, there was no consistency or uniformity in application. The argument was that formal rules would check discretion and set boundaries for officers. In addition, there was the possibility of judicial review of such decisions.

Once police departments started down the policy and rules path, a further issue became the process by which rules and policy were developed. In particular, Davis was astounded by the fact that no studies or professional staffs or agencies were utilized to develop policy. Further, Davis outlined five basic facts about police policy that, at the time, he considered "astonishing": 1) much of it was illegal or of doubtful legality; 2) subordinates at or near the bottom of the organization, not senior officers, make much of the policy; 3) most of it is kept secret from those who are affected; 4) it is based on superficial


117 Davis (1975), ibid. at 145.

118 Ibid. at 164-5.
guesswork and hardly at all on systematic studies by qualified specialists; and 5) most of it is completely exempt from the limited judicial review deemed necessary for administrative agencies.\textsuperscript{119} To varying degrees, in the author's experience, these observations are still quite valid today.

One problem with rules is whether or not the rank-and-file actually adhere to the them. Operational officers quickly learn that what is touted as a "guideline" can, when convenient, become a mandatory direction for management and any failure to adhere to it will lead to discipline.\textsuperscript{120} The result can be greater uncertainty for officers. Rules can quickly become a tool of deference to keep subordinates in constant fear of infringement and disciplinary consequences.\textsuperscript{121} Despite Davis' affection for the administrative approach to police rule making, he did not seem to have a complete appreciation about making decisions operationally. Endorsing 300 plus page manuals is not a response an operational officer can effectively work with during many incidents.\textsuperscript{122}

\textsuperscript{119} (1973-74), \textit{ibid.} at 703-4.

\textsuperscript{120} John McNamara, "Uncertainties in Police Work: The Relevance of Police Recruits' Backgrounds and Training" in David J. Bordua, ed., \textit{The Police: Six Sociological Essays} (New York: John Wiley & Sons, 1967) at 183-4. For example, at the front of the R.C.M.P.'s Operational Manual the Office of the Commissioner states in paragraph 3 that "Each member \textit{shall observe and comply with the policy and procedural directives in this manual}, and is expected to interpret them reasonably and intelligently \textit{in the best interests of the RCMP}" (emphasis added).

\textsuperscript{121} Dilip K. Das, "Military Models of Policing: Comparative Impressions" (1986) 10 \textit{Canadian Police College Journal} 267 at 269 referring to Bittner.

\textsuperscript{122} (1973-74), \textit{supra}, note 116 at 715-16. The size and number of policy manuals, and the constant amendments, can make it hopeless for officers to stay current. In despair, many operational officers simply give up and they make "commonsense" decisions which will hopefully comply with policy. The author endorses the requirement for policy on the basis of the volume of information an officer is required to be familiar with, on the premise that a core working knowledge is no longer possible for the average officer, they must have the ability to look up direction somewhere. It has been suggested that rules/policy can be developed on the
At best, as noted by Bittner, courts can only provide occasional supervision of police conduct because they do not have general authority to direct the police or pro-actively review police activities. Zuckerman also points out that judges are ineffective at monitoring police conduct because so little of what actually occurs ends up before the courts. Unless police activity results in arrest, prosecution, and proceedings that end up before a judge, courts have no effective means to supervise and review police activities. Even where charges are laid the potential for judicial review is limited by the fact that guilty pleas can prevent the disclosure of misconduct. However, observers should not underestimate the

basis of: 1) need to know, 2) ought to know, and 3) good to know. The notion is that failure to know category #1 policy will reflect evidence of incompetence, while failure to know category #2 policy will result in remedial action rather than culpability. While theoretically appealing, there are two problems with this approach. First, whether or not failing to know the rule will result in discipline will become dependent on the nature of the incident (e.g. injuries, law suit, embarrassment to officer/force) to selectively impose discipline. Second, based on the author’s experience, senior executive officers are incapable of seeing policy/rules as anything but "the law." Hopefully technology will provide a better answer by making all rules/policies/legislation available in a police car through a computer. The alternative, because of rising expectations created by community-based policing, will be more complaints and greater public dissatisfaction.

123 Egon Bittner, "The Function of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models" in Egon Bittner, ed., Aspects of Police Work (Boston: Northeastern University Press, 1990) at 116-19; also, Goldstein (1967), supra, note 7 at 168-71; Kerstetter, note 1 at 158-9 notes that like prosecutors, judges only see a limited number of cases and have no resources for ongoing review.


125 Bittner, supra, note 8 at 110; Skolnick and Fyfe, note 52 at 193-4; Jerome H. Skolnick, "Deception By Police" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 169-193 on tactics that reduce review. Although police misconduct may have occurred, there are many reasons why the accused/complainant may not want to raise the issue. For example, the offence may be heinous, accuser's credibility poor, or there is no independent evidence. Further, pleading guilty is taken into account by some judges in mitigating sentence.
concern police officers have over judicial criticism or scandal arising from a case.\textsuperscript{126}

As noted, concern is frequently raised over the fact that the police have and exercise considerable discretion which is not subject to any regulation or rules. One of the responses to this situation is the demand that courts undertake to promulgate judicial rules to guide the police. Davis identifies two problems with judges making rules for police: first, courts do not consult the police about rules; and second, there are no appropriate sanctions to enforce any deviance from rules.\textsuperscript{127} Reiss also notes that there is relatively little formal provision in the criminal justice system to control the exercise of discretion by a sub-system such as the police.\textsuperscript{128} On the other hand, those supportive of judicial review assert that the police are becoming more accountable because police discretion is constantly being tested and a consensus about limits is eventually established.\textsuperscript{129}

\textsuperscript{126} Skolnick and Fyfe, \textit{ibid.} at 217-18; Bittner, \textit{supra}, note 8 at 114; Reiner, note 9 at 81-5.

\textsuperscript{127} (1975), \textit{supra}, note 116 at 125. More recently, the police have taken up producing rules and policy, but have not tended to consult with anyone outside the agency to determine if the rule is appropriate and accords with clientele expectations.

\textsuperscript{128} Albert J. Reiss Jr., \textit{The Police And The Public} (New Haven: Yale University Press, 1971) at 117.

\textsuperscript{129} Barrie Irving, \textit{Police Interrogation: A Case Study of Current Practice} (Royal Commission on Criminal Procedure Research Study No. 2) (H.M.S.O., 1980) at 89. Given what is at stake, the human, social and operational expense of such an approach cannot be supported. It must be recognized, however, that it is becoming increasingly unlikely (and inappropriate) for police to unilaterally create rules governing their own conduct and activities. Some of the virtues of the judicial review approach are: 1) cases provide a factual context within which rules can be developed; 2) police have at least indirect input through their ability to influence the position taken by the Crown (or indeed, their own lawyer); 3) depending on results of decisions influence, directly or indirectly, legislative initiatives; and 4) convince courts of the inappropriateness of earlier decisions. It may be that community consultation on proposed rules or policy may be appropriate on many issues. One of the evident features of many current \textit{Charter} decisions is the courts are not grappling very well with providing clear and effective direction on operational policing issues. Debating the proper approach to a legal issue in several cases over several years is entirely unacceptable.
Others have questioned how interested the courts are in regulating police discretion and abuses.\footnote{Ericson, \textit{supra}, note 99 at 21-2.} Based on cases such as \textit{Blackburn}, it is clear that the courts have been prepared, under the guise of the independence principle, not to regulate police discretion unless it amounts to non-enforcement.\footnote{Lustgarten, \textit{supra}, note 2 at 62-7; Spencer, note 2 at 92-5; Ericson, note 99 at 20-22; see, \textit{R. v. M.P.C., ex. p. Blackburn}, [1968] 2 Q.B. 118; \textit{R. v. Metropolitan Police Commission, ex. p. Blackburn (No. 3)}, [1973] Q.B. 241; \textit{R. v. Chief Constable of Devon and Cornwall, ex. p. C.E.G.B.}, [1981] 3 W.L.R. 961.} However, legislative initiatives, technological advances, and constitutional changes have demanded that judges become inclined towards reviewing police activities.\footnote{For example, the \textit{Charter} in Canada has demanded more judicial scrutiny of police activities. As described by Reiner, \textit{supra}, note 9 at 209-22; the articles in Morgan and Stephenson, \textit{supra}, note 9; and John Baldwin and Timothy Moloney, "Supervision of Police Investigation in Serious Criminal Cases" in \textit{The Conduct of Police Investigations: Records of Interview, The Defence Lawyer’s Role and Standards of Supervision} (The Royal Commission on Criminal Justice Research Studies No. 2, 3 and 4) (London: H.M.S.O., 1992) legislative measures in Britain (\textit{e.g. Police and Criminal Evidence Act} ("PACE")) regarding the collection of evidence by police and the abolition of the right to silence in some instances have demanded greater judicial involvement; see also, Matthew Goode, "Complaints Against the Police in Australia: Where We are Now and What We Might Learn about the Process of Law Reform, with Some Comments about the Process of Legal Change" in Andrew Goldsmith, ed., \textit{Complaints Against the Police: The Trend to External Review} (New York: Oxford University Press, 1991) at 115-152.}

The fundamental flaw with judicial review is that the courts and police operate in two irreconcilable contexts: the police officer operates in a situational and order maintenance context, which demands quick and error-free decision-making, while the judge operates in an individualistic and rule-oriented context, with time for reflective judgement.\footnote{See, Ericson, \textit{supra}, note 99 at 20-25; Wilson and Alprin, note 111; Goldstein (1977) at 157-58; James Q. Wilson, \textit{Varieties of Police Behaviour: The Management of Law & Order in Eight Communities} (Cambridge, Mass.: Harvard University Press, 1968).} The police often see judges as acting without first hand knowledge and in ignorance of what can actually
be done within the confines of the current system.\textsuperscript{134}

The police are critical of judges and their attempts to supervise or regulate police activity. For the police, there is a lack of reality to judicial supervision of police conduct. As noted by Reiss:

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Unlike the lawyer or judge, who may take a long time gathering information to make a diagnosis or reviewing the decisions that lead up to a fate decision \textit{i.e.} what will happen, a line officer must make a quick fate decision.\textsuperscript{135}
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The line officer is almost automatically in conflict with accountability expectations because all internal and external reviews are conducted in a different context.

As for judicial assistance to the police, Wilson and Alprin effectively put the position of the average police officer:

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Thus, the net effect many times is a hazy rule, announced in a judicial opinion obviously not written for police\[officers\], and enforced in the courts on a rather haphazard basis, sometimes with diametrically opposite results in cases presenting identical fact patterns. Such is not the stuff out of which police are effectively policed.\textsuperscript{136}
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\textsuperscript{134} Ericson, Wilson, \textit{ibid.}; Wilson and Alprin, \textit{supra}, note 111 at 492 also point out that it is not the judges or prosecutors that get letters and pressure for action, it is the police, usually the chief, and the assumption of the public is that what they want can be accomplished within the current system. Once community-based policing is implemented this type of pressure will come directly on the constable, which may have some interesting (unexpected) results from an accountability and disciplinary point of view.

\textsuperscript{135} \textit{Supra}, note 128 at 130; at 131 he ironically noted that the lowest person in the decision-making hierarchy is the most vulnerable to counterclaims of competence and is the least defensible.

\textsuperscript{136} \textit{Supra}, note 111 at 491; see also Goldstein (1977), note 7 at 114 who notes judges sometimes do not take responsibility for clarifying difficult areas of procedure; Perez, note 47 at 52 echoes this concern, noting that many times officers do not even know or have explained to them why the decision was made or evidence was excluded; and Bouza, note 6 at 258 discusses the "uninformed meat-axe approach" to describe some court reforms and decisions. The author has become very concerned, as a recent member of the Operations Policy Unit of the R.C.M.P., with the inability of the Supreme Court of Canada to provide decisions that have clear or convincing majorities and that do not require a score card to determine where each judge landed on an issue. The failure of the Supreme Court to provide clear direction and
Bittner also raises the point that if the courts took over the general supervision of police the judge would be placed in an incongruous position by virtue of the fact that the judge would implicitly be responsible for the manner in which the direction is implemented, not to mention that the court would no longer be a disinterested and independent party.137

Some even question the effectiveness of judicial review when it has been exercised, since the police may just amend their "presentational strategies" rather than actual practice.138 Moreover, in jurisdictions where judges are elected (which is not the case in Canada) some judges may be reluctant to deal with allegations of police misconduct because they do not want to be labelled anti-police or be seen as condemnatory of police, particularly if the police enjoy considerable support in the community or constitute a political force.139

Police also seem to have been unfairly judged in relation to the use of discretion and lack of rules. Wilson and Alprin point out that the police are simply taking cues from a system in which they are exposed on a daily basis to "compromises" made by prosecutors, defence counsel, and judges in order to accommodate statutory or policy rules to their own understandable direction to the police is not acceptable. The damage it is doing to the Court’s reputation is also becoming an issue. For example, see R. v. Feeney, [1997] S.C.J. No. 49 (22 May 1997) (Q.L.); R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.); R. v. Burlingham, [1995] 2 S.C.R. 206; R. v. S. (R.J.) (1995), 177 N.R. 81 (S.C.C.).

137 Supra, note 8 at 109-119. This argument may be somewhat misplaced. Many of the above arguments are familiar in the administrative law field regarding the "absentee landlord" approach to agency supervision that judicial review represents. However, the notion that judges and lawyers are not in the same position as police in operational situations may not fully appreciate the role of the courts in this capacity. Theoretically judicial review is not a critique of what was done (although it certainly comes out that way), but a search for what is expected to be done. The problem is that during the course of this search, criticism of police conduct/rules/standards is implicit and even explicit in decisions. This is where the nexus between operational and judicial forums comes into perceptual conflict as identified.

138 Ericson, supra, note 99 at 21-2.

139 Goldstein (1977), supra, note 7 at 181; generally, Reiner, note 9; note 10.
convenience, and the police should not be seen, surprisingly, as doing the same thing.\(^{140}\)

One mechanism that has gained prominence is the exclusion of evidence that is improperly obtained by the police. At common law, excluding evidence at a trial in response to police misconduct was not an approach adopted by the courts. Traditionally, the more dominate concern of the common law was the reliability of the evidence and not the manner in which it was obtained.\(^{141}\) However, the "due process revolution" in the 1950's in the United States resulted in courts seeing police misconduct as a constitutional matter and the response was to exclude evidence.\(^{142}\) In the United Kingdom, prior to the introduction of certain legislative initiatives, the courts also considered police misconduct as a matter for civil, criminal, or internal redress.\(^{143}\) In Canada, despite judicial statements to the contrary, the Charter has led courts to exhibit a much greater concern with police misconduct

\(^{140}\) *Supra*, note 111 at 488-491. This observation is equally valid in Canada: plea-bargaining, release conditions, adjournments, scheduling and sentencing are examples where the rules are not always followed by judges and lawyers. Another is domestic violence, in that despite having a statutory discretion about arrest (and direction not to arrest or detain unless necessary), the police are directed in policy that they shall arrest in every instance; see, British Columbia, Ministry of Attorney General, *Policy on the Criminal Justice System Response to Violence Against Women In Relationships* (Victoria: Queen’s Printer, 1996). To the officers on the street, it sometimes seems that the rules are interpreted so as not to inconvenience the judge (*i.e.* "do as we say, not as we do"). Another example arose recently after *R. v. Connors* (15 January 1996), Van. CC941349 (B.C.S.C.) when Crown Counsel were put in the position of having to try and guide the police on how to technically avoid the decision and recent legislative changes in relation to fingerprinting.

\(^{141}\) Lustgarten, *supra*, note 2 at 8-9. While many common law rules of evidence (*e.g.* confessions rule (*i.e.* voluntary)) were concerned with police conduct, some evidence (*e.g.* real) was still admitted despite improper police tactics.

\(^{142}\) Goldstein (1977), *supra*, note 7 at 157; Wilson and Alprin, note 111; Bouza, note 6 at 160-4.

\(^{143}\) Lustgarten, *supra*, note 2 at 8-9. With the introduction of PACE the conduct of the police has become an explicit factor to be considered by the courts in determining whether evidence is admissible.
in determining whether or not evidence will be excluded.\textsuperscript{144}

Whether or not the exclusion of evidence deters police misconduct is unclear, but there appears to be at least some evidence that exclusion impacts on police behaviour.\textsuperscript{145}

As has been pointed out, the problem with the United States constitutional decisions, which is beginning to apply with equal force to Canadian decisions, is that they are behaviourally standardless, in that the courts approach these situations on a "case-by-case" basis, based on "all the circumstances".\textsuperscript{146} It is evident that the judges are not taking responsibility for clarifying difficult areas of procedure that they have created or cannot agree on.\textsuperscript{147} In fact,

\textsuperscript{144} See, David S. Frankel, "Charter, Section 24(2): Real Evidence - The "But For" or "Discoverability" Test in Criminal Law Update '96 -Charter & Evidence (Vancouver, B.C.: Continuing Legal Education Society of B.C., April 20, 1996); Stephen G. Coughlan, "Good Faith and Exclusion of Evidence Under the Charter" (1992) 11 Criminal Reports (4th) 304; Michael Brundrett, "Remedies Under Section 24(1) of the Charter" in Criminal Law Update '96 -Charter & Evidence (Vancouver, B.C.: Continuing Legal Education Society of B.C., April 20, 1996); P.C.C., supra, note 1 at 162 comments on the role of courts via the Charter for review of police misconduct; more generally, Roger E. Salhany, A Basic Guide to Evidence in Criminal Cases (Toronto: Carswell, 1990); John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada (Markham, Ont.: Butterworths, 1992). Despite the fact that the courts say they are not concerned with punishing the police, it is quite clear that is what is at work in some cases; see, Feeney, supra, note 136; Neal Hall, "Murdered man's relatives say Charter protects criminals" and "Dissenting judges praise actions of RCMP officers", The Vancouver Sun (30 May 1997) at A1 and A22.

\textsuperscript{145} Lustgarten, supra, note 2 at 9; Perez, note 47 at 52 is concerned that officers often do not know or have explained to them why evidence was excluded.

\textsuperscript{146} Wilson and Alprin, supra, note 111; also Skolnick and Fyfe, note 52 at 193-4.

\textsuperscript{147} Supra, note 136; Wilson and Alprin, ibid.; Goldstein (1977), supra, note 7. Some of the recent divisions in the Supreme Court of Canada on important issues such as search and seizure, right to counsel, and derivative evidence have in some instances done little to provide direction and clarity to those trying to cope with the impact of Charter; see, supra, note 144; David Rose, "Calder Success Will Be Rare and the Procedure Uncertain" (1996) 46 C.R. (4th) 151; Marc Rosenberg, "Controlling Intrusive Police Investigative Techniques Under Section 8" (1990) 1 Criminal Reports (4th) 32; Alan W. Mewett, "More On The Right To Silence" (1995) 37 Criminal Law Quarterly 253; Alan W. Mewett, "Derivative Evidence" (1990-91) 33 Criminal Law Quarterly 129; Alan D. Gold, "Notes and Comments: Charter of Rights--Self-Incrimination-Jailhouse Informant" (1991-92) 34 Criminal Law Quarterly 9; Alan D. Gold, "Notes and
because of decisions like *Feeney* (which, without notice, reversed two hundred years of settled law on arrest), the Supreme Court is in very real danger of losing its ability to fashion norms for the public and police as the Court's decision-making is called into question. Further, while the exclusion of evidence does not mean that police administrators will take corrective action against the officer, it is starting to become the basis of disciplinary action. It is evident, however, that judicial review in the form of excluding evidence and the consideration of rules has tremendous impact on police activities and conduct.

9. **Criminal Charges**

Police officers are criminally liable for misconduct. 148 While employment-related criminal charges are a real possibility for any police officer, there are a number of reasons why the criminal process may not be a complete mechanism for someone alleging misconduct by a police officer. One of the most important reasons, as noted by several authors, is that much of the conduct of an officer that may form the basis of a complaint may not be criminal in nature (*e.g.* rudeness), leaving a portion of misconduct unregulated unless there is specific legislation. 149 Another problem for a criminal complainant of police conduct is

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Comments: Charter of Rights--Self-Incrimination--Prior Testimony" (1990-91) 33 Criminal Law Quarterly 403; Alan D. Gold, "Notes and Commentary: *R. v. Wong*" (1990-1991) 33 Criminal Law Quarterly 149; Alan D. Gold, Annual Review of Criminal Law 1990 (Toronto: Carswell Co., 1990). The difficulty is that it becomes unclear precisely where along the continuum that behavioral norms move from being contested to established (and can result in discipline). While the police have an obligation to change their behaviour in response to judicially articulated norms regarding the acquisition of evidence, the Supreme Court of Canada continues to fundamentally disagree on what those norms are.


getting over the "integrity" assumption of police investigations in the criminal process.\textsuperscript{150}

Even if police conduct is criminal in nature, critics have identified a number of factors that may limit the success of this mechanism in holding officers accountable. First, in some instances the only witnesses to the conduct, aside from the complainant, is the respondent officer and perhaps other police officers.\textsuperscript{151} Some have also argued that in some jurisdictions, primarily where the police normally lay charges against citizens, the police receive greater protection than citizens because the decision to charge is made by the prosecution service, rather than the police.\textsuperscript{152} Further, Henshel complains that citizens wanting to swear a private criminal information in Ontario charging an officer with a criminal offence are confronted by dubious justices of the peace who will closely examine the complainant before signing the information.\textsuperscript{153} Henshel also points out that even if the complainant is successful in laying a private information the Attorney General intervenes and usually stays the information.\textsuperscript{154} If a private information is not stayed by the Attorney

\textsuperscript{150} Zuckerman, \textit{supra}, note 124 at 120.

\textsuperscript{151} Maloney, \textit{supra}, note 69 at 39.

\textsuperscript{152} Lustgarten, \textit{supra}, note 2 at 139-40. Ironically, the notion of referring police cases to Crown Counsel is to ensure that the public feel an objective decision is being made.

\textsuperscript{153} Richard L. Henshel, \textit{Police Misconduct In Metropolitan Toronto: A Study Of Formal Complaints} (Downsview, Ont.: LaMarsh Research Programme on Violence, 1983) at 13-15; see also, Maloney, \textit{supra}, note 69. Henshel's point is that Justices of the Peace ("JP") did not closely examine police officers who routinely swore Informations. Although this point is important, a JP should not necessarily be faulted for examining a "lay" person in detail about an Information, since the JP cannot assume, unlike dealing with a police officer or lawyer, that the layperson understands the tests and duties of swearing an Information (\textit{e.g.} formed reasonable and probable grounds to believe). If the JP uncritically permitted a layperson to swear an Information the JP would not be performing his or her duty under the law. If the JP, however, goes further than this, it would be inappropriate.

\textsuperscript{154} \textit{Ibid.}
General, the prosecution branch takes over the case, despite the fact that it may have declined to proceed with charges in the first instance. Henshel is also critical of the fact that even if criminal charges are successfully laid, it is the state that conducts the prosecution.

As noted earlier, because of the relationship that exists between the prosecution and police, some commentators have queried whether the Crown will be as vigorous in dealing with police misconduct. In British Columbia the decision to charge a police officer is generally made by the Regional Crown, or alternatively it may be referred out to a private lawyer. The prosecution is generally undertaken by an *ad hoc* privately retained Crown, or a Crown from another jurisdiction.

As a practical matter, unless the complainant or civilian witnesses know the officer, it can be difficult to identify the officer who allegedly engaged in the misconduct. It is also asserted that police officers as witnesses are generally favoured in court and officers are

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157 Hess, *supra*, note 115 at 184-5; Terrill (1991), note 106 at 292; Borovoy, *supra*, note 106 at 107; Lustgarten, note 2 at 139-40 notes that some assert the police get more protection when it comes to charging because the file is referred to the Director of Public Prosecutions for a decision, while the decision to charge a citizen is made by the police; Chevigny, note 108 at 145 and 265-6 found that in New York some prosecutors laid charges for "false reports" against persons that alleged police misconduct, or required the complainant to withdraw, waive or release officers from criminal or civil actions.

158 Henshel, *supra*, note 153 at 13-15. This is particularly true where several officers may be assigned to deal with an incident, or respond to an incident. Although officers usually wear name tags or identification numbers, for a member of the public police officers in uniform "all look the same." However, computerized records, radio communications, vehicle assignments, location assignments and advanced monitoring/tracking systems have made it easier to identify what members were at the scene, which reduces the pool of officers that may have been involved.
more experienced at testifying. Maloney further questions whether a judge can disabuse him or herself of bias towards the police. It is further noted that in a majority of cases complainants of police misconduct are poor, unemployed, and have criminal records, which further affects their credibility as a complainant and witness during a proceeding.

A more fundamental difficulty to proving criminal misconduct (which is no different than any criminal charge) is that a criminal allegation must be proved beyond a reasonable doubt. Complicating matters in some jurisdictions is the fact that officers can rely on legislative immunities to provide protection against criminal charges. Even if there is no complete immunity, under the Criminal Code, police officers can avoid a criminal conviction by relying on various sections that provide a recognized defence for their actions (e.g. reasonable force). While obtaining a conviction against an officer in the past may have

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159 Peter K. Manning, Police Work: The Social Organization of Policing (Cambridge, Mass.: The M.I.T. Press, 1977) details throughout his work how the nature of the relations between criminal justice actors (i.e. police, public, media, prosecutors, defense, judges, corrections, probation/parole) create an intricate system of information, support and affirmation of decisions/conduct. Terrill (1991), supra, note 106 at 292 echoes this point by indicating that the components of the system must work with each other to achieve a modicum of success which frequently leads to compromise; also, Maloney, note 69 at 39.

160 Ibid. Although this bias may operate, it can also operate in reverse, as there are judges that seem to exude a bias against the police.

161 Maloney, ibid.; Hess, note 115 at 184-5.


163 Goode, supra, note 132 at 117.

164 For example, see sections 25, 27, and 34 of the Criminal Code on the use of force. However, these sections are closely circumscribed and do not provide a complete immunity by any means; see, Parent, supra, note 96 at Chp. 1.
proved difficult, this has not prevented convictions against officers.\textsuperscript{165}

It is reported in some police misconduct cases that departments engage in over-arresting and over-charging of complainants as a bid to obtain guilty pleas to lesser offences.\textsuperscript{166} In particular, several commentators indicated that officers in some jurisdictions "routinely" respond with "cover charges," such as making a false or misleading complaint, resisting arrest, or assault, against those alleging criminal police misconduct.\textsuperscript{167} Henshel also claimed that instituting a malicious prosecution civil action against a complainant if the officer was acquitted was a practice in Toronto.\textsuperscript{168} The observation about malicious prosecution actions has not been confirmed in the authors’s experience or research.\textsuperscript{169}

\textsuperscript{165} Maloney, \textit{supra}, note 59 at 36-8 found that of 86 private Informations against police officers (e.g. assault), 64 were dismissed, 21 withdrawn and only one lead to conviction (that was appealed). Between 1969-73, 301 criminal charges were laid against police officers and two convictions were registered. Based on experience as a civilian investigator, legal researcher, police officer and legal counsel to police officers, the author is aware of criminal convictions of police officers in this province. Some of the foregoing criticisms are not really persuasive as the identified hurdles are present for any criminal prosecution (e.g. identity).

\textsuperscript{166} Chevigny, \textit{supra}, note 108 at 26-7. The author has also seen this practice in the form of threatening numerous charges against subject officers in order to push them out of the organization.

\textsuperscript{167} Henshel, \textit{supra}, note 153 at 17; Davis (1973-74), note 116 at 724; Michael Avery and David Rudovsky, \textit{Police Misconduct: Law and Litigation} (New York: Clark Boardman Co., 1980) at 8-3; Chevigny, \textit{ibid.} at 142-4 claimed laying charges to cover abuse and overcharging was "standard" practice in the New York Police Department.

\textsuperscript{168} \textit{Ibid.} at 17-18.

\textsuperscript{169} Although it may have been the case in Toronto in the 1970's and early 1980's, the author, with police and civilian experience in three provinces, municipally and federally, is only aware of one or two civil actions by a police officer against a complainant for malicious prosecution. Civil actions arising from motor vehicle accidents have been instituted, but the author cannot conclude that civil actions in response to an allegation of misconduct is a practice. In fact, the author, in discussions with executive members of the Canadian Police Association, was advised that civil actions are a lost cause because of the expense and because the vast
Hess feels the criminal process is flawed in dealing with police misconduct because, even if convicted, no financial compensatory remedy exists for the complainant.\textsuperscript{170} Setting aside whether or not compensation is a purpose that should be contemplated in the criminal law, the \textit{Criminal Code} in Canada (which is applicable in every provincial jurisdiction) does contemplate financial compensation for damage to property and/or more recently persons.\textsuperscript{171}

One advantage of the criminal mechanism is that unlike civil actions and/or public-internal complaint processes, there is no statutory limitation period for proceeding with serious criminal charges.\textsuperscript{172} Although there is a six month limitation period to proceed with some minor criminal allegations, most criminal misconduct by police officers can be captured by proceeding indictably, although this is not without complications for the majority of complainants are basically judgement proof (\textit{i.e.} impecunious).

\textsuperscript{170} \textit{Supra}, note 115 at 184.

\textsuperscript{171} R.S.C. 1985, c. C-46 (as amended) ("\textit{Criminal Code}")\textsuperscript{, s. 738 sets out that the court can award damages for personal injury that can be filed in civil court and can lead to gaol. Compensation under the criminal regime for property damage has also been available for many years.}

\textsuperscript{172} Civil actions and public complaints are governed by various specific and general limitation periods federally, provincially and municipally to file a claim against a police officer or department depending on the level of government involved; see, \textit{Crown Liability and Proceedings Act}, R.S.C. 1985, c. C-50, s. 3 of the \textit{Limitations Act}, R.S.B.C. 1996, c. 266; s. 285 of the \textit{Municipal Act}, R.S.B.C. 1996, c. 323 (six months to file claim), \textit{Police Act, supra}, note 16 (six months to make a public complaint against a municipal officer). There may be a constitutional limitation period argument in that the officer could argue that the expiration of time has limited his or her ability to present a defence (\textit{i.e.} key witnesses cannot be located) and the court may enter a stay because constitutional rights have been infringed or denied. The court may also find that proceeding after a considerable length of time has expired is an abuse of process.
prosecutor\textsuperscript{173} (\textit{e.g.} right to a jury trial). In addition, there are no direct expenses for a complainant in making an allegation, in that the investigation and prosecution are undertaken at the expense of the state. Of course, incidental costs such as missing work to attend an interview, travelling to court and testifying, not to mention emotional stress, will be present for the complainant. Moreover, as noted by Avery and Rudovsky, the criminal trial can be used by the police or civilian as a discovery mechanism to obtain information upon which to pursue or defend a civil claim.\textsuperscript{174} In addition, a finding of guilt, or at least of certain facts, by the judge may raise an \textit{estoppel} on certain issues in subsequent proceedings, which may lead to earlier settlements.

On the other side, police officers have their own concerns about the criminal process as an accountability mechanism. In general, although officers expect to be charged if they act criminally, they also claim they should have the same rights and duties as anyone else that is the subject of a criminal complaint.\textsuperscript{175} Further, as Lustgarten concedes, there is a great

\textsuperscript{173} Summary conviction charges must be laid within six months under s. 786 of the \textit{Criminal Code}. The majority of indictable or dual procedure offences (where the Crown can proceed indictably) do not have limitation periods. By proceeding indictably, the accused officer will have the right to elect trial by provincial court judge, judge (\textit{i.e.} supreme court) without a jury or judge with a jury (s. 536(2)). For the complainant (and Crown), unless there is a direct indictment, this will significantly increase the length of time to complete the proceedings because it will be necessary to conduct a preliminary inquiry. Thus, the cost to the province will be greater, and for the complainant, it will be necessary to testify at least twice. Hess, \textit{supra}, note 115 at 185-6 makes a point in relation to federal civil rights charges against police officers that is applicable in this context: if on the facts the officer has been charged with a more serious offence than is necessary, or there is no lesser included offence, a jury may be less likely to convict because the consequences are more severe in law than is required.

\textsuperscript{174} \textit{Supra}, note 167 at 8-4. They also recommend that the complainant not let the Crown or police know a civil claim is contemplated since the police may more rigorously defend the criminal matter than otherwise would be the case. However, if the officer is using competent counsel, it will be assumed that a civil action is possible and/or a rigorous defence would be pursued in any event.

\textsuperscript{175} Graham Parker, "The Police and the Public" (1971) 19 \textit{Chitty's Law Journal} 96 at 97.
incentive for a person accused of criminal activities to make allegations against an officer in order to challenge the legality of the action and avoid conviction.\textsuperscript{176} In some jurisdictions it has been asserted that police departments rigidly, in some cases over-zealously, send every case of alleged criminal conduct by police officers to the prosecution service.\textsuperscript{177} These referrals for a determination regarding criminal allegations against an officer are done even when it is clearly not necessary, which would not be that case if it were a civilian. In British Columbia sending a report to Crown counsel regardless of the investigative findings is becoming a frequent practice. Some assert that R.C.M.P. policy requires a report to Crown counsel in every case of alleged statutory misconduct by a member. In British Columbia, under the current regime for municipal officers a Crown decision not to prosecute or an acquittal generally results in no internal discipline because the threshold of beyond a reasonable doubt applies in both forums.

The length of time taken to complete criminal investigations against officers is also of concern because it has led to situations where officers are unnecessarily charged with more serious offences because the summary conviction limitation period has expired.\textsuperscript{178}

\textsuperscript{176} Supra, note 2 at 126.

\textsuperscript{177} Derek Humphry, "The Complaints System" in Peter Hain, Derek Humphry and Brian Rose-Smith, eds., Policing The Police (London: John Calder Publishers Ltd., 1979) at 61; Royal Canadian Mounted Police Public Complaints Commission, Annual Report 1991-92 (Minister of Supply and Services, 1992) at 21 notes that "R.C.M.P. policy is that, where there is some evidence of an assault having occurred, the matter must be investigated and referred to Crown Counsel" (emphasis added). The problem is that the test for laying a charge in British Columbia is whether 1) there is a substantial likelihood of conviction, and 2) it is in the public interest.

\textsuperscript{178} Sharon Samuels, Complaints About Municipal Police In British Columbia, Volume I (Report Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) at 157-6 at footnote 422 notes the problem that the six month limitation period can cause for criminal prosecutions of officers. The author has encountered three cases in the last two years where police officers have been charged with a more serious offence because the six month period expired. In one case, the complainants made a complaint and then waited almost two
Objection is also taken to the assertion that police officers can easily respond with criminal charges against complainants who make allegations, even false allegations. In the author's experience, it is very difficult for an officer to get his or her department to initiate, recommend, or even consider public mischief charges against someone who has made a patently false complaint, even when the evidence is clear.\textsuperscript{179} The usual rationalization of the department is that it does not want to dissuade complainants from coming forward with allegations of misconduct. The R.C.M.P. Public Complaints Commission ("P.C.C.") itself noted that a complaint by a young offender against two officers that they had assaulted him was refuted on the basis that independent witnesses provided evidence that the incident never happened.\textsuperscript{180} It does not appear that public mischief charges were pursued by the police. Even if the police officer pursued a private information he or she faces the same limitations as a citizen who tries to proceed with a private information: the Crown takes over the conduct of private prosecutions and can stay the charge.

Officers are also concerned by the length of time it can take to deal with allegations. For example, to avoid public/internal complaint limitation periods one proposal is to allow years before they would provide a statement. This may be mitigated by proposed amendments to the \textit{Criminal Code} which will allow Crown and defense to agree to waiving the six month limitation period after it has expired and proceed summarily.

\textsuperscript{179} The author is aware of two situations where the R.C.M.P. refused to proceed with criminal charges against complainants who made false allegations against R.C.M.P. officers. The evidence exonerating the officers consisted of tape recordings that not only refuted the allegations, but conclusively indicated that the alleged misconduct did not happen. Tape recording certain contacts with the public can protect members from allegations of misconduct; see, Craig S. MacMillan, "Rebutting Presumptions: How Can Police Officers Protect Themselves Against Allegations of Misconduct?" (1995) 1 \textit{Appeal - Review of Current Law and Law Reform} 10.

\textsuperscript{180} Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1992-93} (Minister of Supply and Services, 1993) at 72-3. They also documented an incident where there was no evidence of excessive force.
complainants to file their complaints after criminal allegations against the complainant have been concluded.\textsuperscript{181} The difficulty with this approach is that criminal matters against the complainant can easily take one to two years and then another several years to deal with criminal proceedings against the officer.\textsuperscript{182} The problems for an officer, and complainant, with deferring the requirement to file a complaint and/or investigations until the completion of criminal allegations against the complainant are that memories fade, potential witnesses are not identified, witnesses cannot be located, and evidence, records, or exhibits can be destroyed.\textsuperscript{183} If an officer is not given notice that there is a conduct issue until after the criminal proceeding against the complainant is resolved the officer will be prejudiced by virtue of the fact that steps were not taken to identify or preserve items that relate to the complaint.

The courts have accepted that suspending an internal investigation or proceeding until the completion of criminal proceedings is not prejudicial or an extraordinary delay because it involves two different proceedings.\textsuperscript{184} Although it could be to an officer's advantage that

\textsuperscript{181} Samuels, \textit{supra}, note 178 at 157-8.

\textsuperscript{182} The author is aware of two cases in which the criminal/public complaint against the officers was not dealt with until the criminal matters against the complainants were disposed of, which resulted in the investigation occurring 2-3 years after the incident.

\textsuperscript{183} Henshel, \textit{supra}, note 153 at 12-13. For example, certain police files (paper or computer) have specific retention periods and then are automatically destroyed/purged. Further, recordings of police radio communications are also kept for a limited period of time (\textit{e.g.} 30 days). These forms of evidence could be crucial to determining an allegation.

\textsuperscript{184}\textit{Brunelle v. Royal Canadian Mounted Police} (1991), 81 D.L.R. (4th) 153 (F.C. T.D.); see also, Samuels, \textit{supra}, note 178 at 107 who found that Crown counsel were reviewing criminal investigations and then making recommendations as to disciplinary charges. In April, 1997, the author was involved in a case where the Crown declined to proceed with charges against an R.C.M.P. officer, but then, inappropriately in the author's view, commented on the disciplinary aspect of the case. One member involved in the disciplinary process confirmed that it was "routine" for Crown to comment on how the matter should be handled internally (\textit{i.e.}
an allegation be delayed as long as possible, for an officer who has not engaged in the alleged misconduct, it can be extremely frustrating to have internal proceedings delayed pending the outcome of a criminal proceeding against the complainant or officer. Some police departments do not independently determine disciplinary matters and rely on the criminal proceedings to dispose of a complaint. Under the current statutory regime in British Columbia, the acquittal of an officer criminally, or the decision by Crown not to proceed with charges, effectively ends any possibility of internal discipline.\footnote{As noted above, the current disciplinary regime for municipal police officers in British Columbia is based on the threshold of beyond a reasonable doubt. Therefore, an acquittal criminally or decision not to proceed generally disposes of the internal matter. The proposed amendments to the \textit{Police Act} under Bill 16 will set a new threshold of balance of probabilities for discipline.} The R.C.M.P., however, is governed by federal legislation and not provincial legislation on matters of discipline, which means that three quarters of the police officers in British Columbia are judged on a different internal disciplinary standard. The standard of proof in the R.C.M.P. is on a balance of probabilities.

While in some respects police are no different from anybody else in their exposure to criminal prosecution for work-related misconduct (e.g. a truck driver who drives impaired or cashier who steals from the till), the nature of police work (e.g. authorization to use force, necessity to interact regularly with violent and uncooperative individuals who are motivated strongly to induce improper behaviour on the part of police) makes the police more vulnerable to both criminal allegations and sanctions for employment-related behaviour than is the case for most other forms of employment, private or public. Moreover, as alluded to above, there can be conflicting behavioral or tactical methods that render the police unprofessional conduct deserving of discipline, but it was not criminal), particularly when no charges had been approved.
vulnerable to criminal sanction for conduct that would be regarded as neutral or even praiseworthy by co-workers, managers and a large segment of the society. For example, an officer who is taught to use a neck restraint method in training may rely on this technique in the field for several years. Then one day during its "routine" application to an individual resisting arrest the individual dies. Suddenly the technique is under intense scrutiny, the deceased may be a visible minority, and the officer finds him or herself charged with criminal negligence causing death. Another example is an officer who turns his or her marked police vehicle around on a paved four lane highway to catch up to a speeding vehicle. As trained and practiced, based on light traffic, clear visibility, dry road conditions, the officer does not activate any emergency equipment until the target vehicle is within range. Unfortunately, the driver of an approaching vehicle turns directly into the path of the now speeding police vehicle and both young persons travelling in the vehicle are killed. Despite having the express statutory and policy authority to pursue speeders without emergency equipment, a storm of protest from the family and media occurs and the officer finds himself charged with dangerous driving causing death. These examples are not fictitious, and clearly highlight the criminal vulnerability of police officers. As shown in this section there is a degree of vulnerability that must be taken into account when considering the issue of ordered statements from police officers in subsequent chapters.

10. **Civil Remedy**

Police officers are also civilly liable for their conduct.\(^{186}\) The general theory is that someone complaining about police misconduct can pursue a civil remedy comfortable in the

\(^{186}\) Chappell and Graham, *supra*, note 148 at 47-8; Parent, note 96 at Chp. 1.
fact that it provides an independent adjudication of the allegations outside of the criminal, public complaint, or internal mechanisms.\textsuperscript{187} Moreover, the civil burden of proof is lower (\textit{i.e.} balance of probabilities) than the criminal burden (\textit{i.e.} beyond a reasonable doubt), which makes success more likely. However, critics of the civil process as a mechanism to hold police officers accountable for misconduct have a number of concerns about the effectiveness of this remedy.

Stenning states that historically in Canada it was firmly established at common law that municipalities or police authorities were not vicariously liable for torts of police officers exercising duties as a police officer unless the conduct was instructed, authorized or approved by prior authorization or subsequent ratification.\textsuperscript{188} This had important implications because the decision on whether or not a police officer was sued depended on whether or not there was any hope of recovery. Usually police officers had "empty pockets" and a law suit was not feasible. Civil actions provide no remedy if the police officer cannot pay, and even if the officer has some ability to pay, there is no assurance that it will be possible to collect.\textsuperscript{189}

Eventually, with the statutory removal of crown immunity, and the extension of vicarious liability, authorities responsible for police officers could be sued for the misconduct of their officers. In British Columbia, police boards, municipalities and/or the province are,

\textsuperscript{187} Lustgarten, \textit{supra}, note 2 at 131-38.

\textsuperscript{188} \textit{Supra}, note 16 at 109; Ceyssens, \textit{infra}, note 231 at 3-1 to 3-6. There is jurisprudence to suggest that absent ratification or statutory liability, no level government of is responsible at common law for the activities of public/peace officers acting within the scope of their duties.

\textsuperscript{189} Davis (1973-74), \textit{supra}, note 116 at 717-18.
by statute, liable for torts committed by police employees.\textsuperscript{190} As Henshel notes, the advantage for the plaintiff is that even if the identity of the officer cannot be established a person can still sue the city as long as it can be proven that the unknown officer was an "employee" of the city.\textsuperscript{191} In British Columbia, no action for damages lies against a police officer (or any other municipal employee) in the performance of duty unless the officer acted dishonestly, with gross negligence, malice or wilfully.\textsuperscript{192} Goode asserts that the removal of crown immunity and the extension of vicarious liability has not had the expected impact on police misconduct or agencies.\textsuperscript{193} In other instances, civil remedies such as injunctions are also of no value because they are difficult to draft, enforce, and obtain.\textsuperscript{194}

As with criminal allegations, Maloney found that some forms of police misconduct are not open to a civil claim (e.g. verbal abuse).\textsuperscript{195} Even if the misconduct is actionable, Stenning found that if the complainant waits until the completion of criminal, internal, or

\textsuperscript{190} See, ss. 11 and 20, \textit{Police Act, supra}, note 16. This will continue under the proposed amendments.

\textsuperscript{191} \textit{Supra}, note 153 at 15-16. In most civil actions the officer may also receive some form of representation from the employer.

\textsuperscript{192} Section 21, \textit{Police Act, supra}, note 16. This is not altered by the proposed amendments in Bill 16. Under s. 287 of the \textit{Municipal Act, supra}, note 172 municipal actors have the same protection and exemptions.

\textsuperscript{193} \textit{Supra}, note 132 at 117.


\textsuperscript{195} \textit{Supra}, note 69 at 40; Even more generally, as noted by Alan Grant, "The Control of Police Behaviour" in Kevin R.E. McCormick and Livy E. Visano, eds., \textit{Understanding Policing} (Toronto: Canadian Scholars' Press, 1992) at 406-7 difficulty can be encountered in that certain tort claims require proof of elements than can make it virtually impossible to succeed, which limits the availability of redress (e.g. malicious prosecution).
public complaint mechanisms the civil remedy may be statute barred by a limitation period. Further, civil remedies are considered ineffective because of the prohibitive cost and time to pursue. Davis asserts that many potential plaintiffs are poor and cannot afford civil litigation. Civil cases are also very emotionally taxing. Partial relief to these criticisms may be found in the ability of complainants to now proceed on the basis of a small claims civil court action which is premised on the fact that the parties will be unrepresented and the procedure will be easier. Nevertheless, it appears that a number of low level cases cannot really be addressed by the civil process. Courts are also unable to provide any ongoing review of police misconduct.

Davis notes that if a judge and/or jury must choose between the testimony of an

196 Supra, note 16 at 99 and 133 where he sets out some provincial limitation periods; see also, Henshel, note 153 at 15-16 (footnote #7). The limitation period can vary significantly from days to months depending on whether the police officer is employed by a federal, provincial or municipal government. An interesting question that has not been fully resolved is which limitation period applies to R.C.M.P. officers who may be contracted as "municipal" or "provincial" police officers.

197 Chevigny, supra, note 108 at 255; Henshel, note 153 at 15-16; Kerstetter, note 1 at 158-9; Goldstein (1967), note 7 at 168-71; A. Alan Borovoy, "Denial of Civil Liberties by Police in Canada" (1977) 22 Canadian Labour 10.


199 Borovoy, supra, note 197 at 10.

200 Small Claims Act, R.S.B.C. 1996, c. 430. Henshel, supra, note 153 at 20 was critical of the small claims process because of the limited level of damage awards. This has been recently mitigated by the fact that the caps in small claims have been dramatically increased (e.g. s. 3(1)(a) sets the cap for damages at $10,000.00). Henshel was also critical of the fact that not all torts can proceed in small claims court (e.g. under s. 3(2) libel, slander and malicious prosecution are still excluded in British Columbia). However, the potential of the small claims process to hold officers accountable should not be dismissed.

201 Kerstetter, supra, note 1 at 158-9.

202 Ibid.
officer and a plaintiff, who is usually charged, the officer will be supported. Terrill also notes that without supporting witnesses and evidence, a plaintiff is less likely to be believed. Chevigny found that in some instances lawyers in small towns are subject to the prejudices of judges when trying to prove police misconduct. Chevigny feels civil suits against a police officer will almost automatically fail if the criminal charges against the complainant are successful. Even further, Davis feels juries will surmise that the officer has a family and will be reluctant to find against the officer. The result is that an action against a police officer must be built on a near perfect case. To compound matters, Hess found that even if the plaintiff gets tort damages, in many instances the award will be nominal because the conduct was only passing or a mere inconvenience to the plaintiff, which provides no deterrence to the police.

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203 (1973-74), supra, note 116 at 717-18. This is not necessarily the case in Canada; see, Gratt v. R., [1982] 2 S.C.R. 819 (opinion of police officers not to be given preferential treatment merely because they have extensive experience with impaired drivers).

204 (1991), supra, note 106 at 301.

205 Supra, note 108 at 251-2. Conversely, some defence counsel repeatedly (without foundation) claim/insinuate police misconduct before a judge known to be sympathetic/biased to such arguments. In large cities it is possible to allege police misconduct in cases without repercussions because of the number of judges and counsel. Although, as one judge stated to the author’s bar admission class, judges regularly discuss the conduct of lawyers over coffee. Therefore, lawyers that make repeated or baseless claims of police misconduct can develop a reputation within the judicial community.

206 Ibid. at 255.

207 (1973-74), supra at 717-18.

208 Chevigny, supra, note 108 at 255.

209 Supra, note 115 at 197; also, (1991) Terrill, note 106 at 301-2.
In many instances civil actions are not overly successful. Despite this, Chappell and Graham found in their review of reported judicial decisions dealing with the police use of force that officers are more likely to come under civil review than criminal review. More recently, del Carmen, reviewing the United States context, asserted that suing public officials has become the second most popular indoor sport, especially in law enforcement. One has to be careful however, since the high general and punitive damages award in the United States may create somewhat of a "jackpot" mentality among plaintiffs/lawyers. In Canada the awards are not as large, however, there is no lack of cases dealing with the civil liability of officers and departments. Similar to the American experience, with the presence of government in the form of police officers, the issue of findings the "deep pockets" to make a civil action worthwhile is removed as a consideration.

From the police perspective, the civil process raises a number of concerns. Despite an emphasis on trying to resolve misconduct allegations informally, the institution of a civil

\[\text{210 Maloney, supra, note 69 at 40-41 found that between 1969 and 1975, 79 civil actions were initiated against the Metropolitan Toronto Police with the following results: 1) 10 were settled before trial; 2) 1 went to trial; 3) 12 were dismissed after trial; 4) 21 dismissed prior to trial; 5) 34 are pending; 6) 1 had no writ served; and 7) 11 with no process were settled. The average settlement/award with costs was $1,000.00. The author is aware that the R.C.M.P. routinely settle civil actions or claims on the basis of the "nuisance principle."}\

\[\text{211 Supra, note 148 at 60.}\

\[\text{212 Rolando V. del Carmen, "Civil and Criminal Liabilities of Police Officers" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 405 notes that from 1960-70 there was a 1,614% increase in actions, and federally there was a 4,991% increase in civil claims. At 408 del Carmen found that police officers are "particularly susceptible" to the following tort actions: 1) false arrest and/or imprisonment; 2) malicious prosecution; 3) use of excessive force; and 4) wrongful death. Interestingly, Grant, supra, note 195 at 406 felt that the threshold for proving malicious prosecution was too high by requiring "malice", and it should be replaced by a test of whether or not the officer had reasonable grounds. On the other hand, a reduced threshold would also open the door to police claims against complainants for malicious prosecution.}\]
action, or the threat of instituting a civil action, immediately puts the police agency in a
defensive orientation. As Skolnick and Fyfe note, civil actions can create a disincentive
for departments to make policy because it inevitably becomes the standard by which the
reasonableness of the action is measured. Although the concept of the police creating
policy is generally endorsed, sometimes courts become fixated on the standard the policy
demands and fail to appreciate completely the nuances of individual situations which the
policy does not address. From the individual officers perspective, it is disconcerting to be
held liable for a policy breach in a civil action when no law was in fact violated.

It is often assumed that police officers are adequately represented in relation to
allegations of misconduct. Generally in criminal or civil proceedings officers may receive
legal representation by the employer if they are found to have acted within the scope of their
duties. Alternatively, an employee association may provide counsel. As for inquests
and inquiries, the department is always represented, and if there is a conflict between the
interests of the officer and the department, independent counsel may be provided. It is
not unusual to find, however, that representation for officers is resisted by departments and

213 Goldstein (1977), supra, note 7 at 164-5.

214 Supra, note 52 at 200-5; also, ibid. at 122-24. Recently, during a civil decision arising
from a police pursuit the judge relied on Vancouver Police Department "policy" to determine
the standard of care; see also, Jones v. Denomme (1994), 46 A.C.W.S. (3d) 1072 (Ont. Gen.
Div.) where the court considered the pursuit rules formulated by the province in a civil action
to determine negligence.

215 Vance McLaughlin and Robert Bing, "Selection, Training, and Discipline of Police
Officers" in Dennis J. Kenney, ed. Police and Policing: Contemporary Issues (New York:

216 Alan Beckley, "Legal Protection Insurance For Police Officers" (1995) LXVIII The
Police Journal 319 at 320-1.

217 Ibid.
unrealistically low legal fee rates and other provisions may further limit the effectiveness of representation.\textsuperscript{218} While other public and private employees may face this similar problem, they are not likely as matter of course, to find themselves involved in employment situations that can lead to civil actions. Moreover, other professionals such as lawyers and doctors are assured representation through professional insurance plans. Thus, the notion of professional liability insurance coverage for police officers has recently obtained some currency. Beckley, writing in Britain, has concluded that all police officers, regardless of rank, should take out personal protection insurance against legal action and public liability.\textsuperscript{219} del Carmen also feels that liability insurance for police officers may be a reasonable alternative, since it will cover damage awards, and the insurance company will ensure, or undertake, the defence of the officer.\textsuperscript{220} However, del Carmen also noted that protection insurance may encourage more law suits or motivate judges and/or juries to award greater damages if they are aware of the insurance coverage.\textsuperscript{221} Beckley even goes so far as to suggest that officers should continue coverage upon retirement or resignation because the department may not be inclined to pay for legal fees after retirement.\textsuperscript{222} The irony for officers is that plaintiffs may qualify for legal aid, or lawyers may file suits on a contingency basis, but officers may

\begin{footnotes}
\item[218] \textit{Ibid.}
\item[219] \textit{Ibid.} at 324.
\item[220] \textit{Supra}, note 212 at 415-16. One issue is who will pay the premiums.
\item[221] \textit{Ibid.}
\item[222] \textit{Supra}, note 216 at 322-3. This is particularly important given the lengthy limitation periods that may exist for certain actions (\textit{e.g.} 2 years or more).
\end{footnotes}
be left to fend for themselves.\textsuperscript{223}

In fact, Nagler and Carlington have recently identified "Police Litigation Syndrome" as a psychological condition that officers may suffer when involved in pending civil suits arising from actions taken on duty.\textsuperscript{224} It is reported that some officers are paralyzed by pending litigation in that "[t]he fear that an officer could lose their job, their income, and their savings because of litigation, takes a severe toll on officer responsiveness."\textsuperscript{225}

Some have asserted that the police "routinely" file civil suits against those

\textsuperscript{223}Ibid. at 323. There are three reasons that officers may be in a different situation than other employees: 1) the nature of employment raises the likelihood of being named in a civil action; 2) police officers as a matter of course will be named individually in suits even when the employer is being pursued; and 3) an officer's income or assets may, on average, be high enough to make civil suits, especially where damages can be pursued in small claims court, worthwhile.


\textsuperscript{225}Ibid. It is reported that Police Litigation Syndrome ("PLS") causes some officers to become more tentative in response to situations. Officers may avoid or respond slowly to calls as a defensive avoidance, reduce the numbers of files and paperwork, be underaggressive, lose initiative, and their appearance and uniform may degenerate. The classic symptoms of burn-out, apathy, amotivational, reduced job satisfaction, lateness and increased absences may arise. The most severe PLS symptoms occur with the first and second law suits. The key to intervening and alleviating PLS, according to the authors, is the department must communicate support for the officer, help defend the officers rights, reassure the officer that he or she acted appropriately or within the scope of duties. Of course, if the officer did act inappropriately the department will have a difficult time supporting the officer. Jennifer M. Brown and Elizabeth A. Campbell, \textit{Stress and Policing -Sources and Strategies} (Essex, England: John Wiley & Sons, 1994) at 41 also report that fear of legal proceedings was a reported response from officers involved in shooting incidents. Parent, \textit{supra}, note 96 found that officers involved in fatal shooting suffered extreme psychological stress immediately after the incident and for years after. Biased media reporting and the lack of public support from the police department contributed significantly to the emotional damage. Officers encountered by the author that were under investigation often expressed concern about their personal civil liability.
complaining of police misconduct and are successful. It was found by del Carmen that the actual number of civil actions by police officers remains comparatively small, although it has increased somewhat. Avery and Rudovsky echoed this view, stating in their book on suing officers for misconduct, that the risk of an officer individually starting a law suit is quite minimal because complainants/plaintiffs of misconduct are frequently judgement proof. del Carmen concurs with this view, noting the limited ability to recover fees in a law suit, along with the fact that most of the individuals dealt with by the police are indigent, makes recovery of any award minimal. There are several additional impediments to police officers suing persons who make misconduct allegations and/or injure officers, most of which parallel the limitations encountered by a civilian civil action. If a police officer is going to sue someone, he or she must retain a private lawyer at his or her own expense. Tort remedies for an officer can also be limited by the elements that need to be proved (e.g. malice in defamation to defeat qualified privilege). It can also be difficult for officers to establish a claim if the defendant cannot be identified or is unknown. Thus, it may be more

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226 McMahon and Ericson, supra, note 30 at 42-3 attribute this view to CIRPA in Toronto. The author can state with certainty that the police, and R.C.M.P. members in particular, do not "routinely" file civil suits.

227 Supra, note 212 at 420.

228 Supra, note 167 at 4-14.

229 Supra, note 212 at 421. He estimates that 60% of persons that the police deal with are indigent.

230 Ibid. Contingency is frequently not an option because most potential defendants are not very well off.

231 Paul Ceyssens, Legal Aspects of Policing (Scarborough: Thomson Canada Ltd., 1994) at 7-11 notes that public complaints against police officers are probably privileged, unless malice is shown, making an action for defamation much more difficult to establish.
effective for officers to proceed criminally, if the conduct is covered, than to proceed
civilly.\textsuperscript{232} It has also been asserted that it is "part of the job" to be sued civilly, and the
officer is expected to endure such situations without recourse or comment.\textsuperscript{233} The author
has not found civil actions by police officers against those who make allegations of
misconduct to be a frequent occurrence. As is the case criminally, the employment context
of police officers exposes them to the potential of a civil suit more so than do most other
employment contexts. While other professions such as doctors may face the potential of civil
action, their roles are not inherently adversarial as is the case with police.

11. Human Rights Complaints

A mechanism seldom discussed in the accountability regime is the potential for human
rights complaints regarding police misconduct. In Canada, there is no common law tort of
discrimination.\textsuperscript{234} However, a complaint may be made pursuant to legislative provisions
that deal with violations of human rights protections, or potentially, a claim may be made
pursuant to the \textit{Charter}.\textsuperscript{235} In the United States, there is a specific statutory provision
under which to initiate a federal tort action for civil rights violations.\textsuperscript{236}

\textsuperscript{232} del Carmen, \textit{supra}, note 212 at 421.

\textsuperscript{233} \textit{Ibid.}


\textsuperscript{235} A person may claim that his or her right to equality has been violated (s. 15) or that
discriminatory treatment or actions by the police should result in a remedy under s. 24(1) of the
\textit{Charter}.

\textsuperscript{236} See, 42 U.S.C. Section 1983. This section was originally enacted in 1871 and was known
as the Ku Klux Klan law, but is referred to as a 1983 action. del Carmen, \textit{supra}, note 212 at
409-13 provides a good overview of the elements to prove a 1983 action (defendant must natural
person or local government, must be acting under "colour of state law", violation of
An advantage of the human rights process is that a complaint is made to a human rights agency that independently investigates the allegation, and if necessary, holds a hearing. Depending on the nature of the legislative scheme it is usually not necessary for the complainant to retain counsel to present a case.\(^\text{237}\) The human rights process can also award damages to the complainant on several grounds (e.g. hurt feelings), and issue directions to the department that are binding. In particular, depending on the nature of the violation, human rights agencies can put pressure on the entire department which focuses on continuing, not just past, action.\(^\text{238}\) Human rights tribunals may even require the police department to develop policy and plans, which must be approved by the agency, to alleviate the problem that gave rise to the misconduct/violation\(^\text{239}\) (e.g. cultural sensitivity training).

There are disadvantages to the human rights process. First, the misconduct must involve a breach of one of the proscribed grounds in the relevant human rights statute.\(^\text{240}\) Second, it is a general rule that a person must exhaust other avenues that could remedy the constitutional or federally-protected right, violation must reach constitutional level), and some of the cases; 1983 actions have become a popular remedy because: 1) suit is against officer who must pay damages; 2) discovery in federal courts more liberal; 3) do not have to exhaust state remedies which reduces delay in lower courts; 4) prevailing plaintiff can recover legal fees. It should also be noted that the Federal Government, through the F.B.I. and Department of Justice, conduct federal civil rights investigations and prosecutions, and not the state.

\(^{237}\) Under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("CHRA") process, if there is a hearing, counsel is provided by the Commission to present the case.

\(^{238}\) Goldstein (1977), *supra*, note 7 at 178-81.

\(^{239}\) Ibid.

\(^{240}\) For example, s. 3(1) of the *CHRA* identifies "race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction" (where a pardon is granted) as prohibited grounds of discrimination.
situation before turning to the human rights process. 241 Third, human rights complaints also involve a protracted investigation and, if necessary, adjudication proceedings. 242 One of the primary shortfalls of human rights complaints is the length of time to deal with a complaint. On the other hand, the interjection of a human rights agency may prompt a quicker response and settlement from the police. The human rights regime also provides much more freedom to fashion a remedy that is meaningful to the complainant. However, some police misconduct would, as in the criminal context, not necessarily be covered. Many police codes are also expressly incorporating discriminatory police conduct as a specific disciplinary offence, and in some cases the grounds may be broader than those found in human rights statutes. 243 Because police officers work for the state, however, if they engage in discriminatory practices or conduct, human rights commissions can provide an independent forum of review.

241 This is a much debated point, but generally human rights agencies require any alternate mechanism be exhausted first. The problem is that the entity set up to deal with the misconduct may not have the authority to deal with the allegation, and/or broad enough jurisdiction to provide an effective remedy (i.e. hurt feelings and embarrassment not financially compensable in most police review mechanisms).

242 In 1992-93, the author was engaged as a contract investigator with the Canadian Human Rights Commission, Atlantic Region, as part of a project to deal with an investigational backlog of about two years. It was taking two years for an investigation to be started after the complaint had been filed.

243 For example, in 1994, the R.C.M.P. Regulations, SOR/94-219 were changed to indicate that "A member shall respect the rights of every person." In particular, "a member shall not by words or actions exhibit conduct that discriminates against any person in respect of that person’s race, national or ethnic origin, religion, sex, age, mental or physical disability or family or marital status" (s. 48). Proposed amendments to the British Columbia regime in Bill 16, supra, note 16 will also deal with discrimination by police officers. Effective October 1, 1994, Nova Scotia amended its regulations relative to police discipline and s. 5(1)(k) now makes it an abuse of authority to act contrary to human rights legislation.
12. Coroner’s Inquest

A mechanism that is often overlooked in the accountability debate is the impact of Coroner’s Inquests involving police activity. The authority of a Coroner in each province may vary, but essentially it mandates a public inquiry into deaths to determine certain matters. Generally, the Coroner’s office will examine the circumstances surrounding a death and may order an inquest before a jury in public to determine the facts surrounding the death (e.g. police related shooting).244 In British Columbia, pursuant to the Coroners Act, an investigation and inquest are held to determine the cause of death.245 Particular note should be taken of the fact that an inquest is mandatory when someone dies while in the custody of the police.246

The Coroner does not have any jurisdiction over the police unless there has been a death, thus any other activity of the police is not subject to review. In a study of the police use of deadly force Chappell and Graham concluded that Coroner’s inquests are not adequate for holding the police accountable for the use of force, but they also noted that inquests can form part of the public accountability regime.247 Chappell and Graham found that inquests were of limited value in the accountability process because there must be a death before an inquest can be held.248 The Coroner’s jury can only make recommendations and has no

244 Chappell and Graham, supra, note 148 at 83; Parent, note 164.

245 R.S.B.C. 1996, c. 72, ss. 9, 15, 21 and 27.

246 Sections 9(3) and 10; see also, T. David Marshall, Canadian Law of Inquests (Toronto, Canada: Carswell Co., 1980).

247 Supra, note 148 at 90. Parent, note 96 at 72 noted, however, that Coroner’s inquests at least provide an independent public review of an incident.

248 Ibid.
authority to implement recommendations.\footnote{Ibid.; see ss. 27 and 45 of the Coroner's Act. At best, Chappell and Graham believe that inquests are nothing more than supplemental investigations. Having attended several inquests as a witness or counsel, the author gives more credit to inquests because they are open to the public and counsel for the deceased's family usually gets standing to examine police witnesses. The media often follow inquests very closely and can report the juries' findings and recommendations extensively. This is also supported by the findings of Parent, supra, note 96.} Juries are also not permitted to make findings of responsibility.\footnote{Ibid. at 94. This is the theory, because one of the findings a jury can make is that the death resulted from a homicide, which clearly imputes responsibility, particularly if the inquest questioned the "witness" that may have been involved in the alleged wrongful death.} However, s. 529 of the Criminal Code provides that where a Coroner's verdict finds murder or manslaughter and the person is not charged, the Coroner "shall" issue a warrant, arrest, and release on recognizance the person responsible.\footnote{Ibid. at 83-4. Chappell and Graham found that the police "usually" suspend internal investigations pending Coroner results. In the author's experience it is not unusual for several different scenarios to unfold: first, the internal investigation is completed and the officer is exonerated; second, the internal investigation will be substantially completed, but the results will not be made known to the officer(s); or third, the department charges the officer criminally and internally, before the inquest is held. In many cases independent officer reviews and internal investigations have formed part of the package forwarded to the Coroner's counsel in preparation for the inquest. Regardless, most departments seem anxious to determine what the Coroner is going to do before the department commits itself to a course of action.} This really questions the notion that Coroner's inquests do not engage in findings of culpability or impute criminal wrongdoing.

As a "witness" at an inquest, a police officer may have some concerns with the inquest process, as would anyone who faces potential criminal charges. Chappell and Graham found the police department will usually suspend an internal investigation until the conclusion of the Coroner's inquest, and that the verdict of the jury may influence the department's decision regarding disciplinary action.\footnote{Ibid. at 84; see also, Parent, supra, note 96.} Thus, the department relies on the
inquest to identify evidence for disciplinary or criminal matters. Another interesting feature of a Coroner's inquest, at least in British Columbia, is that Crown counsel has standing to question witnesses at the inquest.\textsuperscript{253} As Granger notes, a Coroner's inquest, or any inquiry, can be of concern because although there is no "accused," the process can become inquisitorial for the purpose of discovering evidence to be used against the "witness" later.\textsuperscript{254} One protection that does exist is that pursuant to s. 22 of the \textit{Coroners Act}, the provincial Attorney General "may" direct that no inquest be held and/or continued if criminal charges have been laid against one of the witnesses pertaining to the death to be examined at the inquest. Based on the author's experience with Coroner's inquests, both as witness and counsel, it is important to emphasize that interested parties are provided an opportunity and avenue publicly to examine the police conduct that lead to the death. Considerable media attention, although it is often inflammatory, also attends such hearings because it involves a police-related death. In fact, the author has encountered aggressive Coroner's and interested-party counsel who have demanded to talk to potential police "witnesses" represented by legal counsel without advising or asking their counsel. Further, there are very real concerns with government counsel (\textit{e.g.} Department of Justice) "representing" members at inquests because their "client" is certainly not the member or even the R.C.M.P. for that matter, it is the

\textsuperscript{253} Section 26. Chappell and Graham, \textit{ibid.} at 154-56 discuss cases where the Crown questioned police officers at an inquest on the use of deadly force. Reference, at 58, is also made to the \textit{Cross} case discussed in the \textit{Toronto Globe and Mail} (4, 15 January 1980 and 22 November 1980). This was a case where a Quebec Coroner's inquest (which may have a broader mandate than in other provinces) recommended charges against a police officer before any court proceedings had taken place. This raises further questions about the purported non-criminal purpose of an inquest.

\textsuperscript{254} C. Granger, "Crime Inquiries and Coroners Inquests: Individual Protection In Inquisitorial Proceedings" (1977) 9 \textit{Ottawa Law Review} 441. The author has observed counsel use a Coroner's inquest as a patent discovery mechanism with little control by the presiding Coroner.
Government of Canada. Coroner’s inquests can represent very real issues for police officers involved in incidents and are therefore not an innocuous process as some suggest.

13. Public Inquiries

In Canada, public inquiries into government, and in particular police activities, are not a common feature of the accountability regime.\(^{255}\) In general, public inquiries into an activity, including police action, are not intended to punish individuals/agencies, but to provide an explanation of an event/situation that will assist the government and society to avoid and/or handle such a situation better in the future.\(^{256}\) Grange feels inquiries are crucial to the right of the government to investigate and the public’s right to know.\(^{257}\) Borovoy justifies public inquiries into the police and government on the basis of "public autonomy."\(^{258}\) Inquiries, he claims, are one of the few mechanism that can hold government officials in high places accountable, and can prevent stonewalling and cover-ups.\(^{259}\) While some may assert that inquiries are not about "accountability" and more of a

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\(^{255}\) See, McDonald Commission, *supra*, note 21; Keable Commission, note 21; Maloney, note 69; Oppal Commission, note 17; Marshall Inquiry, note 9; Chilcotin Inquiry, *infra*, note 276.


\(^{258}\) *Supra*, note 106 at 131-2.

\(^{259}\) *Ibid.* In *Starr v. Houlden*, [1990] 1 S.C.R. 1366 (province exceeded its jurisdiction by creating an inquiry that in substance would serve as a substitute police investigation and preliminary inquiry into a specific criminal offence/conduct), it was made clear inquiries cannot examine matters or conduct outside the scope of the constitutional jurisdiction of the province or federal government. However, *O’Hara and Kirkbride v. The Queen*, [1987] 2 S.C.R. 591 held that the province can validly inquire into the conduct of police officers as it related to the
fact finding or policy development exercise, it is quite clear that individual accountability is examined during the course of these proceedings (e.g. Somalia and Krever Inquiries).

The concerns over public inquiries are manifold. As Stalker conceded, it is possible that a public inquiry can be a colourable attempt to punish an individual and/or gather evidence against an individual. For the individual police officer, the innocuous assertion that the purpose of an inquiry is to provide an explanation of an event is somewhat suspect. History tells us that inquiries can become blunt objects in the pursuit of explanations. Several fundamental criticisms have been made of the inquiry process as noted by Stalker. First, an inquiry is an ad hoc judicial or quasi-judicial proceeding into a specific issue and it becomes very difficult to protect individuals or assure fairness. Second, because the inquiry is investigating misconduct it is highly likely that criminal or regulatory charges may be concurrently or subsequently pursued. Third, inquiries can become a sanctioned judicial tool to compel the uncovering of facts prior to an official proper administration of justice. It was not improperly aimed at determining criminal liability or bypassing the criminal law; see also, Phillips v. Nova Scotia Commission of Inquiry into the Westray Mine Tragedy, [1995] 2 S.C.R. 97.


One only has to recall the televised testimony of Cst. Cross who was obviously under extreme mental stress and strain, and under considerable medication when forced to testify at an inquiry. The investigator in this police use of deadly force case committed suicide based on the failure to examine Cst. Cross’ gun for fingerprints. Despite the apparent fragile and strained mental condition of Cst. Cross, the inquiry pressed ahead; Cross v. Wood, Commissioner, Law Enforcement Review Act and Law Enforcement Review Board, [1990] 6 W.W.R. 369 (Man. Q.B.).

Ibid.

Stalker, supra, note 256 at 427.

Ibid. at 427-8.
criminal investigation. Fourth, the inquiry process can distort the sequence of events that normally follow an allegation, which leaves persons feeling unfairly treated.

Thus, the negative or unfair effects of an inquiry have two aspects. First, inquiries can adversely affect individuals even though they may not be in legal jeopardy. For instance, inquiries can lead to intensive and intimidating public interest, along with media reports and findings that may adversely affect a person's reputation or lead to extra-legal action. Armstrong is even more stinging in his review, concluding that public inquiries have the potential to damage individual reputations and destroy careers, yet inquiries are, in many instances, devoid of any rules of practice or evidence. The second aspect of the unfairness assertion relates to the effect an inquiry can have on a subsequent trial. In particular, an inquiry can provide direct evidence and information against a person.

More specifically, although the witness's testimony may not be admissible in a subsequent proceeding, it certainly can be used to assist investigators to search for evidence that was otherwise undiscoverable, which undermines a person's right against self-incrimination.

Roach asserts that recent Charter decisions have demonstrated that the activities of public inquiries are being curtailed or terminated because of the concern that they are unfair

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265 Ibid.; see also, Westray, supra, note 259 regarding the complications associated with this, especially compelled statements.

266 Ibid. at 428.

267 Ibid.


269 Stalker, supra, note 256 at 428.

270 Ibid.; also, Borovoy, supra, note 106 at 130-1.
to those suspected or charged with an offence.\textsuperscript{271} Because "charges" are usually not laid and inquiries proceedings are not criminal or penal in nature, section 11 of the Charter does not apply to inquiries, although the right to silence under s. 7 may have application.\textsuperscript{272} On the other hand, Kaiser feels overstating the conflict between the presumption of innocence and the need to have inquiries may result in the loss of an inquiry because the need to delay the inquiry until the conclusion of criminal proceedings would be too time consuming and defeat the purpose of an inquiry and/or result in the loss of information.\textsuperscript{273}

In relation to police accountability, however, it has been asserted that inquiries into policing are generally "reform rituals" which seldom affect substantive change.\textsuperscript{274} Inquiries into the R.C.M.P. have been somewhat limited in their ability to attain accountability. In particular, a series of Supreme Court of Canada cases have determined that a province

\textsuperscript{271} Kent Roach, "Public Inquiries, Prosecutions Or Both?" (1994) 43 University of New Brunswick Law Journal 415 at 419 discussing the Starr (supra, note 259) and Phillips v. Nova Scotia (Commission of Inquiry) (1993), 100 D.L.R. (4th) 79 (N.S.C.A.) decisions. In particular, Hallett J.A. adopted the Ontario Law Reform Commission position on inquiries: 1) an inquiry should not compel a person to testify/produce evidence concerning pending criminal charge; 2) private individuals should have a statutory right to refuse to testify at an inquiry if it would incriminate the person. The regime should be charge or inquiry, not both, unless given the protection to refuse to testify. Granger, supra, note 254 at 466 also suggested that perhaps in the inquiry context a witness (i.e. suspect/accused) should be subject to being called, but he or she can refuse to answer incriminating questions (i.e. like the U.S.). A second option would be to provide immunity to the witness.

\textsuperscript{272} H. Archibald Kaiser, "The Public Inquiry And The Presumption of Innocence: The Prospects for Mutual Survival (1994) 43 University of New Brunswick Law Journal 391 at 397-8. He also places significance on the fact that inquiries are investigations and only make recommendations in many instances. The fact that an inquiry is an investigation may necessitate more protection since the traditional safeguards found at a trial are missing.

\textsuperscript{273} Ibid. at 399.

\textsuperscript{274} McMahon and Ericson, supra, note 30 at 79.
cannot inquire into the internal management of the R.C.M.P. On the other hand, the recent Chilcotin Inquiry provides a rather chilling example of how an inquiry, in an attempt to satisfy the legitimate needs of one group, can sacrifice the needs of individual police officers. During the course of the Chilcotin Inquiry into police activities the Chair initially adopted the procedure of subpoenaing officers alleged to have committed criminal offences, however, the judge found this "distasteful" and disruptive to the context he wanted to create, because, naturally, the accused officers wanted to have counsel to challenge the allegations that were being presented. In order to respond to sensitive and legitimate cultural issues the Chilcotin Inquiry proceeded to obtain as much (unchallenged) detail of the alleged criminal act as possible, which was conveyed to the officer, who could then decide whether or not to testify, but as the Chair noted, "If the officer failed to come forward, I felt free to draw whatever inferences were appropriate from their failure to testify." Although the steps taken by the Chilcotin Inquiry are laudable on a cultural basis, it does little to reconcile the need to provide a process that is fair to both parties. The

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275 Supra, note 20; Scorer, note 19 at 66-79. Keable found that a provincial inquiry can investigate and inquire into acts of R.C.M.P. members, but it was precluded from examining the general administration and management of the Force. Putnam held that the province cannot examine conduct of R.C.M.P. members under its regime.


277 Ibid. at 15.

278 Ibid. Only one officer came forward and testified under these conditions. In speaking to participants, the author was advised that it was not permissible for officers to challenge the credibility of what was being asserted, and considerable portions of what was being claimed was open to question based on time, memory and other lapses.

279 Grange, supra, note 257 observes that in certain cases governments can infringe rights in establishing an inquiry.
purported evidence against the officers was untested and not critically challenged by the Chilcotin Inquiry. The Chilcotin Inquiry dramatically highlights the social, cultural and legal shortcomings that public inquiries present for police accountability.

While external inquiries can certainly contribute to an examination of policing and accountability, the police also have a general criticism regarding the assignment of judges and other elites to conduct inquiries. Doctors, lawyers, journalists and other professionals would object to the notion that someone who is not necessarily familiar with their professional context can properly conduct a complete inquiry. The following comment about public inquiries into police conduct validly strikes the issue:

Equally insulting to the majority of people in law enforcement are the intellectual assumptions of elite commissions. The implicit understanding of many of these commissions is that lawyers, backed by "token academics" and business people, in a few weeks of hearings and interviews, can develop an understanding of police work, the police subculture, and police organizational dynamics. It is further assumed that this understanding will be superior to that possessed by police professionals. In some cases, this presumption produces findings that to the police are absurd.280

280 Perez, supra, note 47 at 224. It is also noted by Perez that the Christopher Commission in Los Angeles made mutually exclusive suggestions to policing: first, the department was to institute community-oriented policing, which is based on de-centralization of authority; and second, it recommended centralized decision-making for complaints and training. It was apparently unnoticed by the Commission that centralized control is completely incompatible with community-oriented policing. In Canada, the assumption seems to be that judges are the best candidates and can effectively handle police inquiries, an assumption that could prove suspect. This criticism may not effectively distinguish between the two purposes that an inquiry can serve. First, an inquiry can be struck that is to provide an internal review of a situation by other peers (e.g. Board of Inquiry). Second, an inquiry can be struck to provide an "external" evaluation of an incident/agency. In such a situation it is probably unfair to criticize this type of review because it is external. It may be legitimate to assert in some instances that a peer/profession-based evaluation is more useful or that the external perspective has distorted rather than illuminated the problem. To criticize an external evaluation because it has not seen the problem the way the internal group has is an unfair approach. For instance, the external review can validate and lend credibility to the inside point of view. Moreover, such review can be more detached and dispassionate. This is not to say that intellectual or personal baggage is not brought by external reviewers which can affect their objectivity. Although some issues require specialized expertise from within the profession, which are better answered by that profession, there are instances where the larger policy issues need to be determined by a broader
14. Observations

The foregoing review makes it clear that the external police accountability regime is much more complex and multi-faceted than generally acknowledged. Moreover, each mechanism has varying advantages and disadvantages, but none is a complete response to the need for accountability. However, they do present a web of review that can respond to a variety of police actions. Aside from purely internal review, it is clear that the media, political elites, lawyers, and other agencies have an important part in monitoring and reviewing police misconduct.\(^{281}\) It is also evident that a number of these external mechanisms raise issues that require a complicated balancing of a variety of interests. One underriding feature of this Chapter is the tension that exists, but is not well understood or recognized by the various legal and social institutions examined, between the articulation of appropriate standards of police behaviour and the sanctioning of improper conduct based on thresholds that must deal with very grey areas. Similarly, as it was in Chapters 2 and 3, operational and management structures in policing are not very successful in differentiating between standards issues and improper conduct in many instances where the defined realm of acceptable standards and conduct is not clear.

The other feature that arises from this review is that officers accused of misconduct, aside from any internal review, can be exposed to any number of invasive external mechanisms. Moreover, it is clear that officers are not necessarily immune from accountability as some believe. In some instances, police action can itself trigger certain based examination outside of the parameters of the internal orientation. The author takes Perez's comments to be that the Commission did not properly understand the issue before making certain findings from a consistency perspective, not necessarily a police perspective. There is a certain elitism that does attend these types of inquiries though.

\(^{281}\) Ibid. at 195.
automatic external review mechanisms, while in other cases, it will take an actual assertion of misconduct to initiate a review. Regardless of the form(s) or avenue(s) ultimately pursued by the complainant, it is clear that officers can be the subject of a number of non-police, public and independent investigations and proceedings that can place the officer's action under intense scrutiny. While in many ways being employed as a police officer is no different than any other public, private, or professional employment, there are a number of factors that have been identified that make a police career unique. In particular, the very nature of policing and the uncontrolled exposure it can impose on police officers just by doing their job is of significance. Further, while other employees may be governed by codes, statutory requirements and legal liabilities, the very nature of their employment does not involve confrontational and volatile interactions with their "clients." In order to complete our review of the accountability framework and backdrop, the next Chapter will examine "civilian" review mechanisms that deal with police misconduct.
Chapter 5

CIVILIAN REVIEW

"...police officers are often required...to work under a style of supervision that is often more concerned with protecting the organization and supervisory personnel against allegations of wrongdoing than with providing positive guidance to prevent improper behaviour in the first place."

Goldstein (1977: 10)

1. Introduction

As highlighted in Chapters 1 to 4, there is no argument over the need for accountability in policing. The controversy, as is evident in the literature, is frequently over who is in the best position to oversee the process.¹ For many, the drive to impose civilian review is motivated by the belief that internal police control of misconduct is not impartial, adequate, effective, or accountable,² which is confirmed in part by low substantiation rates.³

¹ See generally, Andrew Goldsmith, ed., Complaints Against the Police: The Trend to External Review (New York: Oxford University Press, 1991). Michael K. Brown, Working the Street: Police Discretion and the Dilemmas of Reform (New York: Russell Sage Foundation, 1981) at 12-13 notes that the accountability debate and role of discipline in policing in the early to mid-1900's was to centralize and professionalize departments. However, the reformers in the 1970's-80's wanted police decentralized to each community, but the police have objected, arguing that it would influence continued professionalization and make accountability more tenuous.


In other instances civilian review is endorsed as a mechanism to provide increased public satisfaction/confidence by introducing an external check in the accountability process. The assumption is that civilian review will address these concerns.

It is asserted that civilian review is critical to maintaining, or regaining, police legitimacy and to demonstrating that the police are responsible to society, particularly in a multi-ethnic society. The problem, as noted in Geller, is finding a police conduct review system that maximizes both the police officers' incentives to perform well and citizen confidence in that performance. While civilian review models will be discussed, the main focus of this Chapter is twofold. First, to identify and discuss the issues that have arisen regarding civilian review. Second, to try and determine whether civilian review has attained the objectives professed by its advocates. It should be noted that civilian review does not negate the external review mechanisms discussed in the preceding Chapter. In most instances, civilian review simply constitutes another layer or branch in the broader accountability framework. This Chapter will provide further background against which to contrast and situate the Royal Canadian Mounted Police ("R.C.M.P.") regime and ordered statements in Chapters 6-8.

2. Models

There are as many ways to classify complaint systems to deal with police misconduct

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as there are systems.\textsuperscript{6} For example, civilian review can range from civilian dominated discipline boards sitting externally to discipline boards comprised of police officers sitting within the department that include citizen representation.\textsuperscript{7} One of the more helpful typologies is that of Goldsmith, who outlined six types or models of accountability.\textsuperscript{8} The first, which was reviewed in detail in Chapters 2 and 3, is the traditional model of accountability wherein the police receive, investigate, and adjudicate allegations of police misconduct. The second model is based on using civilians in-house to investigate and/or monitor complaints with adjudication and disposition remaining with the police executive. In the third model the police continue to receive, investigate, and adjudicate allegations, but there is external civilian supervision or monitoring of the process. The fourth model consists of external civilian investigation of allegations of misconduct, but adjudication remains internal to the police. The fifth model is typified by a completely external civilian investigation and adjudication of allegations of misconduct. Last is the monitoring and

\textsuperscript{6} See, Goldsmith, \textit{supra}, note 1; Wayne A. Kerstetter, "Who Disciplines the Police? Who Should?" in William A. Geller, ed., \textit{Police Leadership in America: Crises and Opportunity} (New York: Praeger, 1985) at 158-63 provides a good overview of the various complaint models; see also, Herman Goldstein, "Administrative Problems in Controlling [sic] the Exercise of Police Authority" (1967) \textit{58 Journal of Criminal Law, Criminology and Police Science} 160 at 168-71 for a general review of the inadequacies of civilian review; (unknown author), \textit{Police Discipline and Complaints in Saskatchewan} (publisher unknown, 1991) (found with Oppal Commission material on file at Justice Institute of B.C. library) at 1-10 and 16 outlines the use of civilians to conduct investigations and act as hearing officers. The author was a civilian public and internal complaint investigator with the Nova Scotia Police Commission where initial complaints and investigations were conducted by the police, on appeal civilian investigators conducted "resolutive investigations" (\textit{i.e.} non-binding findings aimed at resolving complaints) and a civilian Police Review Board acted as the final level of adjudication.


adjudication by civilians of police investigations into allegations of misconduct.\footnote{Douglas W. Perez, \textit{Common Sense About Police Review} (Philadelphia: Temple University Press, 1994) at 81-83 also discusses the following typology based on a spectrum that moves from complete police control to total external civilian control, with variations on investigational and disciplining authority: 1) internal review; 2) civilian monitor; and 3) civilian review.}

There is no one formula for creating a civilian review mechanism and there are numerous gradations or forms of civilian involvement in dealing with police misconduct. As noted from the above typology, civilian involvement can occur at the initial complaint-taking process, during the investigation (conducting, supervising, directing, and reviewing), by conducting hearings, imposing discipline, or as an appeal level to review disciplinary measures (by recommending, imposing or varying discipline).\footnote{See, \textit{ibid.}; also generally, \textit{supra}, notes 3-8; Alan Grant, "The Control of Police Behaviour" in Kevin R.E. McCormick and Livy E. Visano, eds., \textit{Understanding Policing} (Toronto: Canadian Scholars' Press, 1992) at 397-432; Richard Terrill, "Civilian Oversight of the Police Complaints Process in the United States: Concerns, Developments, More Concerns" in Andrew Goldsmith, ed., \textit{Complaints Against the Police: The Trend to External Review} (New York: Oxford University Press, 1991) at 291-322; Samuel Walker and Vic W. Bumphus, "The Effectiveness of Civilian Review: Observations on Recent Trends and New Issues Regarding the Civilian Review of the Police" (Paper presented at American Society of Criminologists, 1992) (unpublished); Clifford Shearing, ed., \textit{Organizational Police Deviance: Its Structure and Control} (Toronto: Butterworths, 1981); Peter Hain, Derek Humphry and Brian Rose-Smith, eds., \textit{Policing The Police}, vol 1. (London, England: John Calder Publishers Ltd., 1979); Peter Hain, Marin Kettle, Duncan Campbell and Joanne Rollo, eds., \textit{Policing The Police}, vol. 2 (London: John Calder Publishers Ltd., 1980).} If a mechanism claims to be external, independent, and civilian, there will have to be some degree of complaint handling outside the force, by a staff that is non-police and accountable, in some form, either to an appointed or elected body.\footnote{Andrew Goldsmith, "External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures" in Andrew Goldsmith, ed., \textit{Complaints Against the Police: The Trend to External Review} (New York: Oxford University Press, 1991) at 13-57.}

Another element used to classify civilian review models is to determine whether the civilian authority has an oversight, input, monitoring, recommendation, or adjudicative
function (e.g. recommend discipline versus imposing discipline). One of the recurring themes in the civilian review debate is who will have paramountcy. The struggle over paramountcy is based on the clash between management which wants to maintain total control and civilians who desire the final say on the matter of police accountability.

3. The Benefits

Civilian review in the accountability process has several potential benefits for the police and society. First, the police, and management in particular, have come to realize that civilian participation in the accountability process is essential to maintaining, or regaining, the police image, credibility, citizen support and public confidence. Civilian review, it is claimed by some, can also provide accountability at a lower cost, and much more speedily than internal review or other alternatives. In addition, some believe that injecting civilian

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12 Kerstetter, supra, note 6 at 158-73; Oppal Commission, note 3 at I-25 to I-26.


15 Barton, ibid. Savings may come in the form of lower salaries for investigators and adjudicating panel members, and perhaps socially by reducing the work load of criminal and civil courts. On the other hand, it is creating another layer of bureaucracy with the attendant support staff. Unfortunately, a more speedy resolution is not what has transpired with civilian review, for a number of reasons, infra. Anthony Downs, Inside Bureaucracy (Boston: Little, Brown and Company, 1967) at 153 reviews problems with "monitoring the monitors" which leads to the view that it is not necessarily going to be efficient and effective because: 1) it is necessary for another bureau to monitor the monitors; 2) use-redundancy, by-pass, and overlapping jurisdiction devices exist with both operating and monitoring bureaus; and 3)
views into the accountability process will lessen the isolation of the police.\textsuperscript{16} According to Kerstetter, the only way to have meaningful internal review is to have some form of external review, not so much on the premise of the actuality of cover-ups, but as a response to the inherent lack of credibility that exists in any internal review system not subject to external review of some sort.\textsuperscript{17} Thus, civilian review provides actual and perceptual advantages for police accountability by providing greater social legitimacy in the handling of misconduct matters.

It is asserted that civilian review can deflect unfounded criticism of the police and attest to the good faith of the police.\textsuperscript{18} In other words, civilian review should reduce, if not alleviate, public suspicion about internal police investigations by making the process more responsive and transparent.\textsuperscript{19} In particular, civilian review of police misconduct reflects the values and principles implicit in and/or demanded by society.\textsuperscript{20} A central premise is that substantiation and complainant/public satisfaction rates should increase under civilian review.

\begin{itemize}
\item operating bureaus also need to check on monitoring bureaus as well. Further, at 148-153 he notes that separate monitoring agencies inevitably engage in ever expanding \textit{strategies to have more control or jurisdiction}. This observation is evident in the comments of civilian review agencies dealing with police.
\end{itemize}

\textsuperscript{16} \textit{Ibid.} Isolation has arisen in several ways: 1) professionalism has tended to exclude public input as the police saw themselves, or were seen by others, as the "experts"; 2) individual departments, after a series of scandals, can become isolated from the community; and 3) the department, because it is not reflective of the community (\textit{e.g.} racially) is isolated because the community does not identify with the department (\textit{e.g.} the author was posted to a R.C.M.P. detachment in Nova Scotia that was responsible for policing three communities that are almost entirely black, yet, up until 1992, there were no black members in the detachment).

\textsuperscript{17} \textit{Supra}, note 6 at 173-82.

\textsuperscript{18} Bayley, \textit{supra}, note 4 at x.

\textsuperscript{19} Barton, \textit{supra}, note 14 at 459-60.

\textsuperscript{20} \textit{Ibid.}
In other words, findings of police misconduct should increase and/or the public should generally have increased satisfaction in the way complaints are dealt with when civilian review is present. Alternatively, Skolnick and Fyfe feel that civilian review provides an opportunity to at least identify patterns of misconduct, even if it is unsuccessful in sustaining allegations.21

For the police executive who must confront strong pressure from the community, interest groups, politicians, and the media to punish or react firmly to misconduct, civilian review can provide some protection or breathing space under which to take considered action.22 It is also posited that if officers are properly and fairly treated in a civilian review model they will develop a new respect for the rights of others.23 This correlates with those among the police who support some civilian involvement in the investigation and hearing stages because internal mechanisms are too harsh and unfair.24

4. Police Concerns

During the course of the debate over civilian involvement in the accountability


22 Goldstein, *supra*, note 13 at 178; Barton, note 14 at 459-60.

23 Goldstein, *ibid.* at 167-81.

process the police position has run the spectrum from overt resistance, caustic criticism, hysterical and dire predictions to, surprising to some, occasionally very supportive.\textsuperscript{25} Bayley notes validly that police resistance to and criticism of civilian review is sometimes more emotionally based than reasoned, which is also true of some of the discourse from civilian review advocates.\textsuperscript{26} As compared to other professions, the police generally assert that they are one of the most, if not \textit{the} most, scrutinized occupations. In response, regardless of the scrutiny applied to other professions, it is asserted that even if the police are scrutinized more, it is necessary to maintain public confidence because of the power they have.\textsuperscript{27}

The police assert there are already sufficient and effective mechanisms of redress, internally and externally, to deal with officer misconduct.\textsuperscript{28} Many officers are unwilling to concede to, or are dubious of, civilian review. They assert that civilians are frequently engrossed, regardless of theory and rhetoric, in looking for someone to \textit{blame} when something goes wrong.\textsuperscript{29} This view is further engrained by the fact that, from the officer’s perspective, the propriety of their action quickly becomes obscured as the press, lawyers, civil liberties organizations, politicians and minority group leaders call for an end to police

\begin{footnotes}
\item[25] Maloney, \textit{ibid}. at 133 identified that the Metropolitan Toronto Police Association supported the need for external/independent assessment of complaints and hearings because of the improper way management treated officers. Similarly, Fogel, \textit{ibid}. notes that the British Police Federation also argued for complete independence of civilian review, although it was rumoured this was because they felt civilians would prove ineffective.
\item[26] Bayley, \textit{supra}, note 4 at x.
\item[27] Maloney, \textit{supra}, note 24 at 19.
\item[29] Skolnick and Fyfe, \textit{supra}, note 21 at 225-7.
\end{footnotes}
violence and misbehaviour.\textsuperscript{30}

An element often ignored is that, within the memory of many officers, civilian intervention meant an officer could lose his or her job for political reasons.\textsuperscript{31} One of the general concerns within policing is that civilian review will re-introduce politics into policing which threatens the professionalism that the police have been diligently trying to establish.\textsuperscript{32} Another concern is that civilian review will disrupt police operations by introducing external political interference.\textsuperscript{33} More pointedly, it is asserted that civilian review boards can be dominated by "anti-police" individuals or groups with specific agendas.\textsuperscript{34}

While it can be argued that policing is political, the police concern is at a less abstract

\textsuperscript{30} Perez, \textit{supra}, note 9 at 1; Dick Ward, "Law Enforcement Feels the Stain of a Critical Press" (1993) 6:2 \textit{Criminal Justice - The Americas} 1; for example, see Scott Feschuk and James MacGowan, "Blacks urge chief to resign: Answers sought in Toronto killing" (A1) and "Pattern Disturbing, Rae says" (A11) \textit{The Globe and Mail} (4 May 1992); Geoffrey York, "Ottawa Pledges to curb police use of deadly force: Concerns that rules are \textit{too broad}" (A1), "Campbell pledge limits on use of deadly force" (A2), \textit{Globe and Mail}, (5 May, 1992). In this case politicians were making inappropriate statements and commitments within hours of a police shooting and the investigation had barely been started. In an article by Christine Samuelian, "Racism discounted as police kill man" \textit{The Vancouver Sun} (15 April 1997) A7 it appears the police were only absolved for being racially motivated because the suspected fired at the police first.


\textsuperscript{32} Perez, \textit{supra}, note 9 at 155-6 reports that there is a real danger of interest groups controlling civilian review boards, and confirms that it did happen in Berkeley California; also generally, Grant, \textit{supra}, note 10 at 414-22; Goldsmith, note 11 at 33-8 and in the Introduction at 2-3; Oppal Commission, note 3 at Chps. B and I.

\textsuperscript{33} Maloney, \textit{supra}, note 24 at 95-6 notes that civilian review boards could lead to political interference in the operations of departments; Terrill, note 28 at 77-82.

\textsuperscript{34} Perez, \textit{supra}, note 9 at 126-7.
level. Many managers in policing are concerned that civilian review will create a two-command structure, in that managerial leverage and control over the rank-and-file will be eroded and be replaced by the civilian mechanism. As an initial premise then, police management asserts that to maintain professional standards and control the investigation and disciplining of police officers must occur within the command structure; otherwise, the authority of management is undermined.


36 Terrill, supra, note 28 at 78; Goldsmith, note 11; Perez, note 9 at 160 notes that civilian review could lead to supervisors feeling that they are no longer responsible for dealing with misconduct; also, Canada, Commission of Inquiry Relating to Public Complaints, Internal Discipline, and Grievance Procedures within the Royal Canadian Mounted Police (Ottawa: Information Canada, 1976) (Chair: Rene Marin) ("Marin Commission") at 94.

37 James R. Hudson, "Police Review Boards and Police Accountability" (1971) 36 Law and Contemporary Problems 515 at 521. Anthony Bouza, The Police Mystique (New York: Plenum Press, 1990) at 253 asserts that "No police executives can afford to surrender any of the key tools that enable them to govern their agency. The power to investigate and discipline is fundamental to effectiveness." The real issue can be relating professional police conceptions of what is required for operational effectiveness with community perceptions of what interests should be served and how the police should relate to the citizens they are serving (e.g. see the discussion of consultation committees in Chapter 4). At one level this relationship is no different than exists between any professional civil service and citizen representatives who nominally or actually control their operations (e.g. nuclear power). In many instances the professionals have an expertise advantage, although some civilian representatives have been more effective in dealing with this relationship. However, civilian oversight in policing is somewhat unusual because it can encompass both policy/financial oversight and oversight of complaints in relation
In a review of arbitration cases dealing with police misconduct in the United States, Rynecki and Morse found that civilian arbitrators did have a tendency to ameliorate the disciplinary actions of police departments by finding that the discipline imposed was too harsh or modifying penalties because of the good work record of the officer.\(^\text{38}\) The concern then, is that too great a reliance on external supervision can be counterproductive to internal management and accountability systems by weakening active and responsible regulation by senior officers.\(^\text{39}\) Moreover, among senior executives in policing, there is a concern that civilian review may lead other officers of lesser rank to be loyal and deferential to outside entities instead of the executive.\(^\text{40}\) Civilian review may also provide managers with an excuse to abandon responsibility for discipline. It has even been posited that the threat posed by civilian review to police autonomy, and/or management autonomy, can lead to even more extensive cover-ups of misconduct.\(^\text{41}\) In fact, Sir Robert Mark resigned from the Metropolitan Police force in London because of the restriction civilian involvement placed on to police interaction with citizens (see the operational independence concern discussed in Chapters 3 and 4). In other venues the citizen representative usually only has policy and/or financial input.

\(^{38}\) Steven B. Rynecki and Michael J. Morse, *Police Collective Bargaining Agreements: A National Management Survey* (Police Executive Research Forum and National League of Cities, 1981) at 26; Perez, *supra*, note 9 also found that a civil service commission review format had a greater propensity to be lenient.


\(^{41}\) Bayley, *supra*, note 39 at 177-88.
him from informally inducing officers involved in misconduct to resign.\(^{42}\)

It is often asserted that civilian review will result in a "chilling effect" on police responses which will inhibit effectiveness and lead to further demoralization of rank-and-file officers.\(^{43}\) In other words, police morale will be adversely affected because officers feel threatened, which will result in them being overly restrained and ineffective.\(^{44}\) Some have even asserted that there would be an increase in resignations and retirements when civilian review is introduced.\(^{45}\) It is also claimed that civilian review will only contribute to tensions with civilians, not reduce them, because it creates an officer versus complainant perspective, leading to further polarization, not neutralization and reconciliation.\(^{46}\)

Many police officers feel that civilians in general have a lack of appreciation for the difficulties of the job, and that civilians cannot understand the stress and strains peculiar to

\(^{42}\) Baldwin and Kinsey, *supra*, note 35 at 117 report that Sir Robert Mark resigned as Commissioner of the Metropolitan London department because he felt that the then new Police Complaints Board restricted his ability to effectively "weed out" corrupt police officers because corrupt officers were clever enough to escape the formal net.

\(^{43}\) Goldsmith, *supra*, note 11 at 34; Goldstein, note 13 at 158-9; Terrill, note 28 at 78; Canada, *Report of the Canadian Committee On Corrections - Toward Unity: Criminal Justice and Corrections* Ottawa: Queen's Printer, 1969) ("Ouimet Commission") at 41 noted the frustration and damage to morale from public complaints.


\(^{45}\) Terrill, *supra*, note 28 at 78. If resignations are any indication of police officer satisfaction with employment, Rodney Stark, *Police Riots: Collective Violence and Law Enforcement* (Belmont, California: Wadsworth Publishing Company, 1968) at 190-1 reports that in urban departments the majority of officers retire as soon as they are eligible or just stop doing their job through inactivity.

\(^{46}\) Hudson, *supra*, note 37 at 521.
policing.\textsuperscript{47} As the Ouimet Committee sets out:

The police feel, and with some justification, that the public fails to realize the difficulties inherent in the duties which they are called upon to perform, and that they are frequently subjected to criticism that is unjust.\textsuperscript{48}

Martin provides an even more apt context by pointing out that:

A uniform does little to encourage cooperation and the task tends to become one of asserting personal authority in an often hostile situation. Officers soon become habituated to those hothouse conditions, dealing with people when they are aggressive, emotionally upset, savage, rowdy, lying, deceptive, injured, drugged, or deprived.\textsuperscript{49}

More caustic police criticisms are that civilian intervention will be conducted from the closeted world of academics, self-appointed experts, armchair critics, or those who respond primarily to the media and politics.\textsuperscript{50} The police are concerned that critics generally fail to recognize the complexity of situations that can confront police officers and organizations.\textsuperscript{51}

It also seems to officers that some critics assume that the police are improperly motivated and that citizens never lie and conspire.\textsuperscript{52} More particularly, the police are concerned that a civilian review process will fail to recognize the adversarial and confrontational relationship

\textsuperscript{47} Oppal Commission, \textit{supra}, note 3 at I-4 to I-18; Goldstein, note 13 at 158-9; Reiner, note 24 at 109-21.

\textsuperscript{48} \textit{Supra}, note 43 at 41.

\textsuperscript{49} Maurice A. Martin, \textit{Urban Policing in Canada: Anatomy of an Aging Craft} (Kingston: McGill-Queen's University Press, 1995) at 10-11 also points out that police get accustomed to being lied to, a feature of policing that the average citizen does not constantly encounter in her or his workplace.

\textsuperscript{50} Ian Freckelton, "Shooting the Messenger: The Trial and Execution of the Victoria Police Complaints Authority" in Andrew Goldsmith, ed., \textit{Complaints Against the Police: The Trend to External Review} (New York: Oxford University Press, 1991) at 101. It is sometimes pointed out that politicians tend to respond to misconduct issues based on media and political concerns.


\textsuperscript{52} Goldstein, \textit{supra}, note 13 at 160-1.
officers find themselves in, not to mention the lack of standards, uncertainty, vagueness, generality, and lack of consensus that pervades policies and practices in policing.\textsuperscript{53}

Most police officers see themselves as the only ones who know police culture and their specific police organization which puts them in the best position to take effective action.\textsuperscript{54} The police also argue that external or civilian investigators will have more difficulty conducting accountability investigations for several reasons: first, because the ability to access the officers, formally and informally, will be more difficult; second, getting records or access to records will be more time consuming; and third, police officers and forces will treat the process as more adversarial.\textsuperscript{55} Civilian investigators have also lacked experience which gives them limited credibility with the police.\textsuperscript{56} The perceived or actual ineffectiveness of civilian investigations and reviews could also embolden officers.\textsuperscript{57}

Police officers are also concerned that citizens will use the civilian complaints process as a tool to intimidate the police.\textsuperscript{58} As McMahon and Ericson note, in the context of the

\begin{footnotes}
53 Goldsmith, \textit{supra}, note 11 at 33-9; Bayley, note 39 at Chp. 7; Goldstein, \textit{ibid.} at 10 and 157-67.

54 Bayley, \textit{supra}, note 4 at viii; Bouza, note 37 at 253.

55 West, \textit{supra}, note 7 at 389. While conducting public and internal investigations as a "civilian investigator" for the Nova Scotia Police Commission, the author did encounter the occasional officer that was hostile and uncooperative, but generally speaking, the police community, once you established a reputation for being competent and fair, were cooperative and forthright.

56 Perez, \textit{supra}, note 9 at 143 confirms this is a valid concern; also, Skolnick and Fyfe, note 21 at 225-7.

57 Skolnick and Fyfe, \textit{ibid.} at 218-36.

reform process it is not so much the events themselves that are important as their use in putting on the public stage the interests of various political groups. The civilian review process, for example, can become a platform for minority and other political agendas. Hill and Schiff note that officers express concern that minority leaders may use the police as scapegoats in a campaign to gain personal support. It is claimed that complaints by minority group members may be used to cover up breaches of the law by making an allegation of misconduct against the police. It has also been found that lawyers may use allegations of misconduct as a tool in the plea-bargaining process.

At the hearing stage, civilian mechanisms have been accused of not being competent, or more critically, of being nothing less than "kangaroo courts" which ignore officers’

any other form of public service, are such that constables are extremely exposed to accusation and complaints, many of which are virtually certain to be unjust, insubstantial or malicious."; see also, Alan Beckley, "Legal Protection Insurance For Police Officers" (1995) LXVIII The Police Journal 319 at 323.


60 Kerstetter, supra, note 6 at 163. While advancing minority issues is clearly valid, the broader social issues may be pursued at the expense of an individual officer who did not necessarily act improperly.


62 Ibid.

63 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Vol. 2, Second Report: Freedom and Security under the Law (Minister of Supply and Services, 1981) ("McDonald Commission") at 971; John Ackroyd, "Comment" in Walter S. Tarnopolsky, ed., Some Civil Liberties Issues of the Seventies (York University: Osgoode Hall Law School, 1975) at 115 reports that "more than one citizen has admitted that he laid a counter charge on the advice of his lawyer so that it could be used as a possible bargaining counter."
The practice and procedure adopted before civilian hearings/agencies is frequently criticized by the police as insufficient in the provision of vital procedural safeguards, having inadequate or no application of the rules of evidence, and outright denials of basic fair treatment. Police officers have also raised concerns that appeals can be heard by civilian boards or commissions that are also responsible for policing in the area, leading appointees to be more representative of management’s point of view, either by definition or disposition. The individual police officer is concerned that inordinate weight may be given to supporting police management, or alternatively the public interest, than in treating officers with due process. In fact, it does seem that the public and other stakeholders sometimes have a fundamental problem with the provision of rights for police officers and the limits this creates.

Another criticism is that police lose operational time by having to appear before a civilian agency. This observation is also related to the police view that the addition of civilian review, due to the high number of minor or unfounded complaints, is a waste of

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64 Hudson, *supra*, note 37 at 521; Goldstein, note 13 at 158-65; Skolnick and Fyfe, note 21 at 220-36; Goldsmith, note 11 at 31-38.

65 Hudson, *ibid*.


68 Barton, *supra*, note 14 at 463. Another concerns is that civilian agencies can publicly proclaim decisions.
money and resources, especially if there is no screening mechanism. Patrol officers feel that management is not supportive because so many "unfounded" public complaints are recorded, yet management responds by claiming it had no choice by law but to process the complaint.70

Individual officers claim they are being subjected to "double jeopardy" because two or more processes are being used to redress the same allegation of misconduct.71 As observed by Marshall, the civilian complaint process should be designed so as to fit into the disciplinary and criminal process without subjecting the police officer to an unfair burden of jeopardy.72 Last, and a point of particular relevance to this thesis, individual officers are also fearful that statements from internal reviews will subsequently be used against them.73

5. The Results

a. Assumptions

As Hudson unfortunately had to point out, the debate over civilian review mechanisms thrives mainly on ideology, rhetoric, and ill-informed opinion.74 The overall problem with

69 Hudson, supra, note 37 at 521.


71 David Brown, "Civilian Review of Complaints Against the Police: A Survey of the United States Literature" in Kevin Heal, Roger Tarling & John Burrows, eds., Policing Today (London: H.M.S.O., 1985) at 146-7; Marshall, supra, note 58 at 64 also noted the concerns expressed over complaints that line officers could find themselves placed in jeopardy "twice over", once within the force, and again before a tribunal, with the further possibility of legal action in court.

72 Ibid. at 107.

73 Oppal Commission, supra, note 3 at 1-71; Ferguson and Rusen, infra, note 163 at 202.

much of the discourse relating to police accountability is that there seems to be several interrelated assumptions operating: first, that the police can be made perfect or completely accountable; second, that the "ideals" of the commentator can be realized; and third, that there is one identifiable set of standards about which there is complete agreement.\(^{75}\) In turn, there also seems to be an assumption that the existence of complaints against the police means something is wrong and that an ideal system would have no complaints.\(^{76}\)

More specific to some civilian review advocates, there are two often unstated assumptions operating: first, it is assumed that non-police investigators (and adjudicators) are likely to conduct more thorough investigations than the police, which will in turn lead to higher substantiation and public satisfaction rates; and second, it is assumed that more disciplinary action will be imposed by civilian review and this will lead to an improvement in the behaviour of police officers and higher substantiation and satisfaction rates.\(^{77}\) While civilian review can involve other objectives such as fair treatment, substantiation, and in particular satisfaction rates, are central to much of the civilian review discussion.

As already noted, the implementation of civilian review has frequently failed to consider the organizational and cultural ethos of policing and the realities of conducting a complaints process.\(^{78}\) For example, failure to consider adequately the hostility and resistance by the police, or any bureaucracy for that matter, to imposed changes from the


\(^{76}\) Goldsmith, *supra*, note 11 at 19-33. However, some civilian review advocates do recognize that because complaints are complex and there is no clear standard of ideal behaviour that a means is required to deal with complaints that is outside of the police management regime and give complainants and officers a vehicle to resolve issues.

\(^{77}\) Walker and Bumphus, *supra*, note 10 at 13.

\(^{78}\) For example, see Freckelton, *supra*, note 50; Goldsmith, note 11 at 32.
outside will only exacerbate an already high degree of in-group identification and result in even tighter bonding.\textsuperscript{79} Despite historical battles over civilian review, recent attempts to interpose civilians have been more successful, or at least less vigorously opposed by police, because the police have felt they were consulted and assisted in the development of an alternative review mechanism for their own reasons, rather than having it imposed.\textsuperscript{80} Persuading the police about the inevitable and beneficial impact of civilian participation has also had a positive influence.\textsuperscript{81}

b. Investigations

There have been numerous concerns and criticisms over civilian investigations of police misconduct. Stark suggested that the only way to get effective investigation by civilians of police misconduct would be to ensure that civilian investigator reputations and promotions depend upon it (\textit{i.e.} high substantiation rates).\textsuperscript{82} The concern is that civilians, like personnel in any bureaucracy, will be influenced by their own bureaucratic imperatives and public demands to be "effective," which in itself raises further accountability issues for those civilians dispensing accountability.\textsuperscript{83}

Although the quality of civilian investigators may have improved, it is accepted that in the past civilian review investigators were not successful and easily sidetracked in misconduct

\begin{footnotes}
\textsuperscript{79} \textit{Ibid.}
\textsuperscript{80} Bayley, \textit{supra}, note 39 at 177-88.
\textsuperscript{81} Goldsmith, \textit{supra}, note 11 at 56.
\textsuperscript{82} \textit{Supra}, note 45 at 237. In other words, would they look for or find misconduct when none was to be found.
\textsuperscript{83} Skolnick and Fyfe, \textit{supra}, note 21 at 225-31.
\end{footnotes}
investigations. In some cases, police officers have successfully thwarted external investigators or at least stalled the investigation. Civilian investigators have also experienced everything from passive obstructionism to overt sabotage. Brown raised concerns about the danger of civilian investigators over time identifying with the police. Alternatively, it is also possible that civilian investigators are, or can become, prejudiced against the police.

Maguire and Corbett, in a detailed study of civilian review under a British model, found that civilian investigators could develop jaundiced views of complaints. On the other hand, rather than being co-opted, it was found that some investigators perceived that the essence of their role was to convict officers. Interestingly, there were mixed results on whether civilians had any impact on the behaviour of officers or whether civilian supervision impacted police internal investigators. It was also found that heavy civilian workloads resulted in markedly reduced, if any, civilian supervision of police investigations

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84 For example, Perez, supra, note 9 at 143 documents a simple allegation where the civilian investigator did not have the skill to think about accepted police procedures to resolve the case; see also, Marin Commission, note 36 at 69; Maguire and Corbett, note 3 for the results of a civilian "supervision" model.

85 Skolnick and Fyfe, supra, note 21 at 225-36.

86 For example, see Freckelton, supra, note 50.

87 Supra, note 71 at 155-59.

88 Supra, note 3 at 109.

89 Ibid. at 130-132.

90 Ibid.; Maguire, supra note 3. It was clearly reported, however, by Maguire and Corbett at 69 and 194 that subject officers and their families experienced considerable stress and anger by complaints. This suggests that complaints do impact officers and accords with the author's experience.
of minor allegations of police misconduct. In fact, Maguire and Corbett concluded that it may be difficult to achieve any discernible difference between civilian supervised and unsupervised cases for complainants or the police.

In areas where specific legislative requirements provide for investigations by civilians depending on the type or seriousness of the allegation, it has been found that unclear legislative provisions and vague statutory definitions resulted in excessive time on trivial matters. Maguire concluded that to be supervisorily effective it may be that civilian agencies cannot be completely at arms length. It has been noted in some instances criminal allegations involving police officers are being forwarded for charge approval by the prosecution that met no test for laying charges. Because of the foregoing experiences, and the fact that many reviews have found that police investigations into misconduct are sound, some jurisdictions have elected to leave the police with the initial investigative mandate.

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91 Maguire and Corbett, *ibid.* at 129.
92 *Ibid.* at 149 and 201.
93 *Ibid.* at Chps. 8 and 9; also generally, Freckelton, *supra*, note 50.
94 *Supra*, note 3.
96 For example, see Lewis, *supra*, note 13; also, Clare Lewis, S. Linden and J. Keene, "Public Complaints Against Police in Metropolitan Toronto--The History and Operation of the Public Complaints Commission" (1986) 29 *Criminal Law Quarterly* 115; Oppal Commission, note 3 at I-23 to I-31. In British Columbia under the proposed amendments to the police accountability regime in Bill 16, the police department retains original jurisdiction to investigate a complaint unless it would undermine public confidence or the complaints commissioner directs that another department conduct the investigation. In Nova Scotia, the police have retained jurisdiction to initially try to resolve and investigate public complaints. Appeals regarding the investigation are then subject to further civilian investigation and/or adjudication.
c. Resolutions

Civilian review is supposed to be a mechanism that encourages and facilitates the earliest and most expeditious informal resolution possible.\textsuperscript{97} The results have not always been so encouraging, since some jurisdictions found that civilian review has merely added another layer of bureaucracy resulting in increased delay and substantial increases in money and personnel.\textsuperscript{98} Several commentators have observed that the delays and additional bureaucracy can result in the waste of highly paid resources on minor complaints, which has also meant a shortage of financing.\textsuperscript{99} Many jurisdictions complain of insufficient resources and political commitment.\textsuperscript{100} Civilian review also produced, and continues to produce, litigation, acrimony, divisiveness, and in some jurisdictions has been nothing short of a disaster.\textsuperscript{101}

It has also become a common criticism of complaint processes, particularly with the introduction of a civilian role, that it ends up being overly complex, disorganized,

\textsuperscript{97} Maloney, \textit{supra}, note 24 at 208.

\textsuperscript{98} Perez, \textit{supra}, note 9 at 246 notes that the R.C.M.P. P.C.C. typically spends $3 million U.S. annually to monitor 2,400 complaints per year, and has hearings so infrequently that virtually all of this expenditure is aimed at monitoring investigations already done by the R.C.M.P.; see also, Freckelton, note 50; Maguire, note 3.

\textsuperscript{99} \textit{Ibid.}; Maguire and Corbett, \textit{supra}, note 3 at Chp. 11; Skolnick and Fyfe, note 21 at 228.

\textsuperscript{100} Freckelton, Skolnick and Fyfe, \textit{ibid.}; Goldsmith, \textit{supra}, note 11 at 31-56.

\textsuperscript{101} Matthew Goode, "Complaints Against the Police in Australia: Where we are Now and What we Might Learn about the Process of Law Reform, with Some Comments about the Process of Legal Change" in Andrew Goldsmith, ed., \textit{Complaints Against the Police: The Trend to External Review} (New York: Oxford University Press, 1991) at 147; Lewis, \textit{supra}, notes 13 and 96. One gets the impression that a civilian review system that is working badly is much worse than an internal management system that is working well. This raises additional questions about how well internal management systems can work in societies that are becoming increasingly more complex and what has been learned from civilian systems that have operated poorly.
contradictory, and unclear. 102 Another frequent finding is that most of the public is unaware of the existence and role of civilian bodies that deal with police misconduct. 103 As observed by several reports, the civilian review process is hazily understood and not recognized by the public to the point that "ignorance and misunderstandings predominate." 104

d. Hearings

Stark feels the effectiveness of civilian review is limited because appointees to these positions are often not inclined to be "boat-rockers," particularly if they are politically connected. 105 In some jurisdictions, it has been found that the civilian review boards did not even have the power to formally summons witnesses. 106 Further, in some instances

102 Sharon Samuels, Complaints About Municipal Police In British Columbia, Volume I (Report Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) at 1 made this observation of the British Columbia complaints and discipline process which has a civilian component.

103 Ibid. at 30-31; Landau, supra, note 3 at Part 3; Statistics Canada (Special Surveys Division), RCMP Public Complaints Commission Survey Analytical Report (June, 1995). The assumption is that this type of knowledge is something the average person would have, or want. It is doubtful that any better results would be found with other professional bodies such as law societies or colleges for doctors and teachers. People are not inclined to consider this as everyday knowledge that they require, and to expect otherwise is naive. The real question is whether or not a person can find out about the process if required.

104 Ibid.; Maguire and Corbett, supra, note 3 at 194; Maguire, note 3; Samuels, note 102 at 1. Ensuring that the process is clear would be the responsibility of the review agency.

105 Stark, supra, note 45 at 236-7. In other words "political hacks" are not about to embarrass the government or body that appointed them. Political connections and/or the right politics is often cited when appointments are made by governments to such boards/bodies. Some jurisdictions advertise for applications to such positions, but political favouritism can still be operative.

106 Barton, supra, note 14 at 463 noted early boards did not have subpoena powers.
there was no formal record of a hearing, and no absolute privilege or immunity from defamation claims.\textsuperscript{107} Another criticism is that many of the civilian agencies engaged in reviewing police misconduct do not have the power to impose discipline on police officers and are frequently restricted to making recommendations to executives.\textsuperscript{108} Despite the importance attached to having "public" hearings, Perez reports that usually only the interested parties attend the civilian board, a finding which accords with the author's experience in three Canadian jurisdictions.\textsuperscript{109}

As noted by Weiler, Gellhorn indicated civilian review boards are inefficient because they are inevitably, or become, adjudication institutions meting out retributive justice.\textsuperscript{110} The main problem with civilian review is that it is inevitably characterized as an adversary process focused on the complainant.\textsuperscript{111} The result is that proceedings are polarized, even where the harm is minimal. The complainant's character is frequently raised which damages future relations between the parties and makes complainants reluctant to come forward.\textsuperscript{112} The process also does little to address systemic problems or practices extending beyond the

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\textsuperscript{107} Although it may be that there is a qualified privilege when making a complaint and testifying (\textit{i.e.} absent malice there is no action); see, Paul Ceyssens, \textit{Legal Aspects of Policing} (Scarborough: Thomson Canada Ltd., 1994) at 9-4.
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\textsuperscript{108} Walker and Bumphus, \textit{supra}, note 10 at 56.
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\textsuperscript{109} \textit{Supra}, note 9 at 155-6. This is probably true of most public tribunals, including the courts, except where there is a high profile case. However, while acting as civilian police complaints investigator in Nova Scotia the author was surprised how few persons attended even "high profile" cases.
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\textsuperscript{110} Paul C. Weiler, "Who Shall Watch the Watchmen? Reflections on Some Recent Literature About the Police" (1968-69) 11 \textit{Criminal Law Quarterly} 420 at 422. Others may argue that police complaints systems in conjunction with effective civilian oversight can create more opportunity and incentive for systemic review.
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\textsuperscript{111} \textit{Ibid}.
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\textsuperscript{112} \textit{Ibid}.
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subject officer because findings are made relative to isolated and discrete cases.\textsuperscript{113}

Goldsmith found that rank-and-file officers in Canada are apparently intimidated by the prospect of being called to testify before a civilian review board despite the fact that the chance of ending up before a civilian agency is small, and the finding of fault even smaller.\textsuperscript{114} The author can attest to the fact that police officers are concerned about being found at fault in the public complaint process. The explanation for this is partly contained in the fact that the police have very little reliable knowledge about the civilian role and process.\textsuperscript{115}

Hudson concluded that having some civilian representation on a review board hearing misconduct allegations may instill more confidence than a purely police review board comprised of officers.\textsuperscript{116} However, Skolnick and Fyfe, although supportive of civilian review, queried representationally based appointments to review boards because it was felt that it was not possible to fulfil the equity responsibility and remain unbiased and fair.\textsuperscript{117}

In relation to a citizen’s lack of competence and experience, Beral and Sisk assert that although civilians may not be experts in all policing matters, an officer and counsel can

\textsuperscript{113} \textit{Ibid.}; Goldstein, \textit{supra}, note 13 at 174-5; Maguire and Corbett, note 3 and Landau, note 3 observe that there may be general grievances or service complaints that can extend beyond the individual complaint or officer and citizens want a general forum for these grievances.

\textsuperscript{114} \textit{Supra}, note 8 at 67.

\textsuperscript{115} Perez, \textit{supra}, note 9 at 157.

\textsuperscript{116} \textit{Supra}, note 37 at 536. Both the individual officer and the community, for different reasons, would probably have more confidence if an officer were not solely hearing the case; for example, see Grant, note 10.

\textsuperscript{117} Skolnick and Fyfe, \textit{supra}, note 21 at 225-30. Representational appointments do raise issues; see, Perez, note 9 at 155-6.
explain or demonstrate the significance of a decision or action to the board. This observation is problematic for three reasons: first, certain operational matters cannot be explained unless a person has experienced the situation, context, and procedures (e.g. discharging a weapon after a highspeed chase, with siren still screaming, in limited lighting, with limited information, no backup, after being shot at); second, it can be a significant waste of time and money to try and explain or provide the competence and experience for a neophyte, when a trained officer would know instantly what is being posited; and third, no officer is ever going to feel he or she has been treated fairly because an inexperienced citizen cannot appreciate operational police work. Realistic or not, it must be understood that police officers feel highly vulnerable to false complaints aimed at discrediting them. On the other hand, citizens are going to feel vulnerable and concerned that their perception of events will not be assessed fairly by police officers who carry with them the values and experience of operational policing.

118 Harold Beral and Marcus Sisk, "The Administration of Complaints By Civilians Against the Police" (1963-64) 77 Harvard Law Review 499 at 518.

119 Herman Goldstein, Problem-Oriented Policing (Philadelphia: Temple University Press, 1990) generally observes, if you want support from the police for reform it must not be perceived as unrealistically complicating their job or reflect a lack of understanding of the job and conditions. The author of this thesis remembers a conversation with a senior provincial court judge who stated that he had seen everything in his courtroom, when in fact he had only heard the words and seen the pictures and did not have to deal with the actual reality of being at a murder scene, sexual assault, or fatal accident (i.e. the smells, visual observations, touching and moving bodies, seizing exhibits, dealing with the individuals involved, dealing with family, hearing the screaming or having someone die in your presence). Perez, supra, note 9 at 146 did note that over time civilian review boards can come to understand the difficulties of policing.

e. Findings

Much to the chagrin of some civilian review advocates, Dombrink notes that experience in several United States cities with civilian review has shown that it is less likely than police internal review to find officers guilty of misconduct and is more lenient in its discipline.\textsuperscript{121} Maguire, and in a separate study, Maguire and Corbett, found that there was no change in substantiation rates or that substantiation rates were in fact falling in the civilian regime under study.\textsuperscript{122} In fairness though, it was found by Maguire that complainants did have more satisfaction if the matter was informally resolved.\textsuperscript{123} The view that civilian review will eliminate police abuse is clearly wrong.\textsuperscript{124} The fact is that internal police review generally finds officers guilty of misconduct more often than does civilian review.\textsuperscript{125} As Perez summarizes the matter:

In addition, there is a central reality to civilian review that has been hard for its strongest proponents to accept. It is a substantive point about police misconduct. Put bluntly, the police have acted in a legal and proper fashion in the overwhelming

\textsuperscript{121} John Dombrink, "The Touchables: Vice and Police Corruption in the 1980's" in Thomas Barker and David L. Carter, eds., \textit{Police Deviance}, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1991) at 80; also, Kerstetter, \textit{supra}, note 6 at 159-65. Perez, \textit{supra}, note 9 at 138 states that "Civilian review boards have historically been reluctant to find police guilty of misconduct." At 138-9, after reviewing the civilian review data for the U.S. in the 1970's and 1980's, it is clear that civilian review fairly consistently had lower substantiation rates than internal review. Civilian review also tended to be more lenient.

\textsuperscript{122} \textit{Supra}, note 3; Brown, note 71 at 156 noted that in the 1970's the Chicago Office of Professional Standards did report an increase in substantiation rates (3\% to 8.4\%). Perez, \textit{ibid}. at 180 cites a Kansas City civilian monitor model that reported 90\% of the sample citizens were dissatisfied with the civilian regime; see also, the P.C.C. survey, \textit{supra}, note 103 for further low public satisfaction data.

\textsuperscript{123} Maguire, \textit{ibid}. at 194. This generally accords with the author's experience as a civilian investigator of complaints against the police.

\textsuperscript{124} Perez, \textit{supra}, note 9 at 139.

\textsuperscript{125} \textit{Ibid}. at 233.
majority of citizens’ complaint cases. No fair system will find the police guilty of misconduct very often because, in a legalistic sense, the police are not guilty of misconduct very often.\footnote{Ibid. at 146.} (emphasis original)

In many instances civilian agencies find there is insufficient evidence to substantiate many complaints and as a result officers are still exonerated most of the time.\footnote{Freckelton, supra, note 50 at 94-96; Skolnick and Fyfe, note 21 at 225-31; Landau, Maguire, Maguire and Corbett, note 3; Kerstetter, note 6 at 162-3.} Although there may be a number of explanations for this result, the bottom line is that contrary to the assumption, civilian review does not necessarily result in higher substantiation rates.

Walker and Bumphus posit the possibility that police departments may have higher substantiation rates because they receive fewer complaints than civilian review boards.\footnote{Supra, note 10 at 18. At footnote 9 it is indicated that more serious allegations of misconduct may be sustained because there is more likely to be physical evidence (e.g. doctors report).} In other words, civilian review has more credibility. Another explanation is that civilian proceedings become engrossed in procedural safeguards and assessing information.\footnote{Kerstetter, supra, note 6 at 162-3.} For instance, some civilian review models end up directing their attention not to the officer’s conduct, but to how well the department discharged its responsibility to provide an adequate and unbiased investigation/hearing, which may not be the most appropriate response to complaints.\footnote{Ibid, at 161-4.} In other instances, Perez found that civilian review boards sometimes engaged in inappropriate policy discussions in the context of an individual complaint.\footnote{Perez, supra, note 9 at 136-7 did not question that policy matters should be discussed. However, when one board engaged in a lengthy analysis of whether a certain operational unit should exist, he concluded that "it is not acceptable for an accountability process to mix its
The lesson may be that there needs to be a vehicle by which broader issues of policy that arise in the context of conduct complaints can be explored without necessarily impugning the conduct of the officer involved.

At a more general level, the difficulty may be that many reformers failed to fully appreciate that disappointment, dissatisfaction, and resentment are central to the human experience, particularly if a person is unsuccessful in proving a matter that is important to her or him.132 Goldsmith also notes that institutionalized doubt is becoming a societal norm which can make it difficult to increase public satisfaction.133 Altering the structure for dealing with complaints would make sense if the results were clearly predictable and uniform. Since they are not, many tend to overestimate the feasibility and contribution that will be made.134 The problem, as Goldstein notes, is that many complainants and reformers expect instantaneous results and confirmation.135

Findings about civilian review also seem to have confirmed that citizens are often mistaken about their allegations, complaints are sometimes made because of a desire for revenge, and complainants may have other less than honourable motivations in alleging debate over such policies with its consideration of individual complaints. It is not appropriate to hold the police officer on the street accountable for the existence of such a tactical unit" (emphasis original).

132 Goldsmith, supra, note 11 at 18-19.


134 Goldstein, supra, note 13 at 159; Skolnick and Fyfe, note 21.

135 Ibid. at 146; also see, Skolnick and Fyfe’s discussion of unrealistic expectations at 229-31.
police misconduct. In fact, the civilian Australian Police Complaints Authority found "that a significant percentage of complaints was made by disturbed, malicious, or vexatious people with an axe to grind" or were prone to complain about anything. Although many report that most complainants do not want punishment, Landau found that most complainants wanted some form of punishment (e.g. reprimand, warned, notation on personnel file).

Kerstetter is of the view that citizen dissatisfaction with the civilian review process is guaranteed because the unfairness with the process will be assessed by most complainants completely as a function of their satisfaction with the result in their particular case. In the United Kingdom, and Canada, it has been found that the overall faith in the civilian complaints system remains low, and a large majority of complainants still perceive the process in a negative light. Landau found that although there were many positive effects expected from having a civilian oversight mechanism, in the jurisdiction under study they were not found. In other instances it was found that everyone was unhappy with the

136 Samuels, supra, note 102 at 100.

137 Freckelton, supra, note 50 at 94; also, Elizabeth Reuss-Ianni, Two Cultures of Policing: Street Cops and Management Cops (New Brunswick, New Jersey: Transaction Books, 1983) at 105 documents the vulnerability of officers regarding complaints when an anonymous person called in a complaint that the officers driving the car she was riding in had a "female civilian" (i.e. her) with them; Perez, supra, note 9 at 80 also notes a review that found that many complaints are frivolous and minor. As Goldstein, supra, note 6 at 165 cautions however, regardless of the persons reputation or past, a complaint should be investigated with greater care because the tendency is to disbelieve or marginalize allegations.

138 Supra, note 3 at 51-55.

139 Kerstetter, supra, note 6 at 175.

140 See, Landau, Maguire, Maguire and Corbett, supra, note 3; P.C.C. survey, note 103; Lewis, notes 13 and 96. For U.S. feedback, see Kerstetter, supra, note 6 and Perez, note 9.
process.\textsuperscript{141} According to Maguire, one of the problems is that the civilian agencies had repeatedly to announce negative results because of lack of evidence.\textsuperscript{142} As reported by Perez, because the correlation between outcome and complainant satisfaction is inextricably linked, significant levels of citizen satisfaction "cannot be achieved by any system unless it finds the police guilty of misconduct most of the time" (emphasis in original).\textsuperscript{143} The fact is that complainants are frequently going to be dissatisfied with any review system, whether it is internal, civilian monitoring, or civilian review, if the police action is upheld.\textsuperscript{144}

Kerstetter also attributes lower substantiation rates and punishments to the fact that civilian investigators do not understand police culture.\textsuperscript{145} For example, it may be easier for an officer to claim lack of knowledge of misconduct, particularly if the civilian investigator does not fully appreciate certain practices or procedures to know whether the officer is being accurate.\textsuperscript{146}

After finding that civilian review has not been a remarkable success, Maguire and Corbett adopted what used to be the traditional police apologist line, that substantiation rates

\begin{footnotesize}
\textsuperscript{141} Maguire and Corbett, \textit{ibid.} at 184 found that 90\% of complainants were very or fairly dissatisfied; Reiner, \textit{supra}, note 24 at 234-6; Freckelton, note 50; Perez, \textit{ibid.}, note 9 at 153 notes a study which found civilian review only had marginally better acceptance than an internal process.

\textsuperscript{142} \textit{Supra}, note 3 at 186-202; see also, Freckelton, \textit{ibid.} at 94-6.

\textsuperscript{143} \textit{Supra}, note 9 at 180.

\textsuperscript{144} \textit{Ibid.} at 73 discusses a survey that found 89.4\% of complainants sampled expressed this view.

\textsuperscript{145} \textit{Supra}, note 6 at 162-74.

\textsuperscript{146} Goldstein, \textit{supra}, note 6 at 165. Which is a common feature of many other professions (\textit{e.g.} medical malpractice), see footnote 11 of Goldstein's article. It is not known if this is also true of civilian adjudication or review systems as it is of civilian investigation systems.
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are not a true indicator of effectiveness. The other defence, of course, is that the public has failed to appreciate how extensive and/or paramount new civilian processes really are in dealing with misconduct. It seems rather ironic that some civilian review advocates are now saying, like the police before them, that the public does not understand or has a lack of knowledge as to the actual effectiveness of the system. One thing is clear:

If one puts these results together [the low substantiation rates for civilian review] with the propensity for internal police systems to find outcomes sustained more often than do civilian ones, one reaches a disconcerting conclusion for proponents of civilian review: civilianized mechanisms are less likely to produce statistics that are in any way comforting to those outside the police experience.

Another noteworthy conclusion is that public complaints systems have tended to hamper rather than encourage remedial structural emphasis within police management. This is the case because the nature of the public complaints process promotes punitive, wrong-oriented responses, yet rhetorically public complaints reform is premised on becoming more remedial in orientation. Further, attempts at reform in police discipline towards remedial approaches are stymied by calls for punishment from interest groups and others

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147 Supra, note 3 at 150 they state that "It is important to emphasize at the outset that there are serious doubts about whether substantiation rates or analogous measures should be regarded as indicators of effectiveness at all."

148 Lewis, supra, note 13 generally makes this observation.

149 Perez, supra, note 9 at 234-5. Perez also observes that "other professions are far more guilty of self-serving, defensive tactics where alleged misbehaviour is concerned" (emphasis added). For example, in the U.S. the legal profession only finds misconduct in slightly more than 1% of the cases it investigates, whereas the police can sometimes find as high as approximately 20% sustained.

150 Royal Canadian Mounted Police External Review Committee, Post-Complaint Management: The Impact of Complaint Procedures in Police Discipline (Discussion Paper 4) by Clifford D. Shearing (Minister of Supply and Services Canada, 1990) at 10.
acting on their own agendas.\textsuperscript{151} The problem is that although the civilian review process may be committed to remedial measures, complainants are frequently also seeking their brand of justice, and if no "punishment" is imposed on an officer, complainants do not feel completely vindicated or that their complaint was taken seriously.\textsuperscript{152} To compound matters there is not only the "truth theory" and "adversary theory" operating in accountability, but also the redemption desire of the complainant.\textsuperscript{153}

Although it is inevitable that any monitoring agency will seek to expand its control, the impetus to engage in this activity exists, either by design or default, especially in civilian review of police.\textsuperscript{154} Further, as Reiss notes, regardless of the organizational controls or other sub-system limitations, counter-strategies can be effectively used to limit the exercise of control.\textsuperscript{155} For example, police agencies can fail to support or impart the principles of new civilian process to the rank-and-file, overload the new system, or engage in co-optation of civilians.

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\textsuperscript{151} Ibid. at 10-14.
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\textsuperscript{152} Ibid.
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\textsuperscript{153} Henry L. Molot, "Non-Disclosure Of Evidence, Adverse Inferences And The Court's Search For Truth" (1972) 10 Alberta Law Review 45 raises this as a conflict between two omnipresent and often conflicting premises of the trial process.
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\textsuperscript{154} Downs, supra, note 15 at 148-153 and 158-9 discusses the cycle of expansion and control that monitoring bureaus will engage in (\textit{i.e.} more resources, more rules, more authority). A recent example arose during a discussion with a representative from the R.C.M.P. civilian P.C.C. who stated to that author that the P.C.C. was going to try to insert itself into the public complaints process as a mediator.
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6. Observations

As Goldstein concludes, two factors must be recognized in attaining a balanced perspective to the quest for control of police misconduct: first, it has been a serious error to place so heavy a burden on control mechanisms as a way of solving long-standing problems in the police field; and second, it has been an error to view control almost exclusively in terms of identifying and taking action against wrongdoing. The misleading feature of much of the discussion surrounding police misconduct in general, and the prospects for civilian review in particular, is that it does not adequately address the fact that the relationship between allegations and review "are inherently and inevitably adversarial." Although many would like to assert otherwise, it is simply not feasible to believe that any fairly serious allegation of misconduct, given the potential consequences, is anything less than adversarial. It is unfortunate, but as noted in Chapters 2 to 4, in many instances police internal discipline systems and culture (and in some instances external review and/or civilian review mechanisms) do not seem to distinguish well between culpable conduct that deserves a disciplinary response and conduct that is determined (with the benefit of hindsight and more detailed examination) to have been merely improper. As raised in Chapter 4, in some cases there is both a conduct element and an underlying policy element to a complaint. For example, a complaint may partly be about how the individual officers behaved in relation

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158 Perez, supra, note 9 at 161 concludes that an officer has every reason to consider the review system as antagonistic, because a decision could affect the officer's career.
to a situation (e.g. high risk vehicle stop or arrest) and partly about how it is determined by
the officers that a procedure will be utilized (e.g. how confident the officer must be about
identity or risk before making this type of stop/arrest). There may be a lot that can be
learned from the policy element, but under the circumstances there is an inevitable
adversarial aspect to the conduct element for the officers.

Thus, it appears that some of the civilian reforms have not fully understood police
culture, management, internal discipline and accountability expectations.\textsuperscript{159} A significant
problem is that the measurement and evaluation of civilian review is starting from an
unknown satisfaction rate, based on ideological agendas, in pursuit of perhaps unattainable
symbolism. For example, Goldsmith objects that regardless of whether the accountability
process is civilian or police, there is excessive reliance on proceduralistic and forensic
approaches to complaints, which deafens and blinds the process to unacknowledged forms of
social and cultural diversity or experience: an objective reality and vision are assumed in
accountability regimes.\textsuperscript{160} Although this is an important observation, it is unclear how a
serious incident such as a police shooting, and all the attending implications, can be resolved
in anything but a forensic, and unfortunately, proceduralistic manner. There is an
application, however, for Goldsmith’s approach in less serious situations.

There is no question that there is a need to strike a balance between accountability
and fair treatment, as well as a need to safeguard the public perception of the accountability

\textsuperscript{159} Goldsmith, \textit{supra}, note 11 at 14-15; Freckelton, note 50 at 92-108; Kerstetter, note 6 at
173-81; also see generally, Robert Langworthy, \textit{The Structure of Police Organizations} (New

\textsuperscript{160} \textit{Supra}, note 133. Although an interesting approach, how is it possible to effectively
accommodate other realities when there is no agreement on the mainstream reality and the
repercussions are so significant for participants.
process to ensure it is legitimate. Often, the problem is knowing how something works in reality.\textsuperscript{161} Moreover, it is sometimes difficult to be encouraged about accountability and consensus when society is increasingly turning on social divisions and identity agendas, and governments are engaged in implementing policies that are considered to be unjust, divisive, and destined to increase poverty.\textsuperscript{162}

In the end, Hamilton and McKinnon posit that whatever scheme is used to deal with allegations of police misconduct all parties in the process, including the citizen, police force, police officer, and the community as a whole, must be treated fairly and believe they are treated fairly.\textsuperscript{163} Whether such a scheme can be attained remains to be seen. In the author’s view, it has not yet been clearly established whether civilian investigations or civilian adjudication is the more important element of civilian review. It is clear, however, that the generic assumptions that civilian review will necessarily increase the substantiation rates for

\textsuperscript{161} See generally, Oppal Commission, \textit{supra}, note 3 at Chp. I; Lewis, note 13; Goldsmith, note 11 at 50-7.

\textsuperscript{162} Reiner, \textit{supra}, note 24 at 261-66 made this observation during the Thatcher era in Britain, but given recent events in Canada, there is some application here.

\textsuperscript{163} Keith R. Hamilton and Gil D. McKinnon, \textit{Provincial Governance Of Policing In British Columbia} (Research Paper Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) at 66. In Hamilton and McKinnon at 5 and 66; Gerry Ferguson and Marli Rusen, \textit{Discipline of Municipal Police In British Columbia} (Report To The Commission Of Inquiry Into Policing in British Columbia, 1993) at 148; Chilcotin Inquiry, \textit{supra}, note 3 at 39; Maloney, note 24 at 180-205; Kerstetter, note 6 at 176-78, the following features are most commonly identified as desirable in a complaint regime:

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police misconduct and increase public satisfaction have not been borne out. While some may question substantiation rates as an indicator of success, it cannot be ignored that such data is frequently cited in attacks on traditional internal police control. The more unsettling feature with civilian review is the continued dissatisfaction that is found with complainants despite the presence of civilian review/oversight. Clearly more work is needed to identify what features of civilian review/oversight are successful at producing greater public satisfaction in the resolution of complaints. While the concerns and perceptions of complainants and society are central to the civilian review process, the critical issue for the individual officer though, still remains the fact that a particular civilian review regime, either on its own, or in concert with internal and/or other external review mechanisms, can impose considerable demands on an officer that may not be considered fair or balanced.

The stage has now been set for a more specific discussion of the R.C.M.P. After examining in greater detail some of the mechanisms and assumptions that operate in the police accountability framework, the R.C.M.P. regime can be considered in a more critical light. Chapters 6 and 7 will involve a detailed examination of some of the issues raised in the preceding Chapters as they pertain to the R.C.M.P. It will be important to detail the regime governing accountability in the R.C.M.P. and how the civilian/review process compares to some of the findings reported in this Chapter. It is this background that will provide the ability to examine more critically the issue of ordered statements.
THE R.C.M.P. REGIME

"...now became the occasion for the pitiless apparatus of discipline in the [R.C.M.P.] Force to come lumbering down upon them."

French and Beliveau (1979: 28)

1. Introduction

Having reviewed the general context of police culture, management, and the various forms of internal and external accountability, it is now possible to outline and situate the accountability regime that currently governs the Royal Canadian Mounted Police ("R.C.M.P."). The background and knowledge provided by Chapters 2-5 will ensure a better understanding of the R.C.M.P. regime and the context in which ordered statements operate. Context is fundamental to fully consider the impact of ordered statements. While in many ways the R.C.M.P. operates the same as any other police force, certain features will be encountered that also make the R.C.M.P. unique. As will become evident, some of the more general issues and concerns discussed in the preceding Chapters regarding police accountability have application to the R.C.M.P. Yet, in other instances, the R.C.M.P. has been very effective as an organization in regulating the conduct of its personnel. The significance of the R.C.M.P. regime and employee environment cannot be fully appreciated without the background provided to this point. It will also be possible to test some of the theoretical assumptions that inform the accountability process and ordered statements in the R.C.M.P. Before reviewing the R.C.M.P. regime in detail, it is important to review briefly and particularize the history, management, and culture of the R.C.M.P.

The R.C.M.P. is much revered and one of the few truly Canadian symbols. Much of
the literature on the R.C.M.P., both fiction and non-fiction, with a few exceptions, is rarely critical of "the Force." Although an analysis of accountability in the R.C.M.P. has occurred, there has been very little in the way of recent informed critical analysis of accountability as it relates to the treatment, investigation, and disciplining of members. There has been virtually no critical analysis of compelled statements in the R.C.M.P. It is important to delve beneath the public representations and images of the Force to understand the implications and context of compelled/ordered statements in this accountability regime. An interesting point to consider is whether the various external commissions, studies and reviews have impacted R.C.M.P. operations, particularly as they relate to discipline. The position of the "regular member" (i.e. rank-and-file officer) will receive considerable

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attention in the next two chapters. Chapters 2-5 have provided the ability to compare and contrast the employment and accountability context of members in the R.C.M.P. The reader must be prepared to transcend the fair, evenhanded, and spit and polish image of the Force. As recruits learn early in the R.C.M.P., "there is the right way, the wrong way, and the R.C.M.P. way."  

2. Management and Culture

The government of Canada formed the Northwest Mounted Police ("N.W.M.P.") in 1873 in response to the growing need to establish law and order, and sovereignty, in western Canada. The general tendency has been to idolize and romanticize much of the work that the early N.W.M.P., and subsequent R.C.M.P., have conducted, but there are some hard realities that are frequently glossed over about the Force.

MacLeod provides one of the more informative analyses of the early history of the

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2 A pearl of wisdom imparted to all recruits upon arrival at the Training Academy. This phrase may have originated during the Long March west of 1874 when the commanding officers declined to follow the established fur trade routes and went in a straight line west through an unmapped territory with no established travel routes. The Force found there was a shortage of grass and water, resulting in starving and lost livestock and horses, as well as other self-inflicted difficulties. In fact, the N.W.M.P. had to rely on the whisky traders, who they were to drive out of the west, to survive. It was not lost on the rank-and-file how the commissioned officers acted on this occasion. See, R.C. MacLeod, *The NWMP and Law Enforcement, 1873-1905* (Toronto: University of Toronto Press, 1976) at 23.

R.C.M.P. One of the more illuminating features of his account is that, like the history of many police forces in North America, political patronage was a fact of life in the R.C.M.P., particularly in relation to commissioned officers. He concludes, however, it was less debilitating than in other branches of government at the time.\textsuperscript{4} MacLeod states:

\begin{quote}
It is quite safe to say that no officer in the Mounted Police to 1905 received his commission and very few received promotions without the exercise of political influence.\textsuperscript{5}
\end{quote}

It was found that there was a remarkable correlation between the commissioned ranks of the N.W.M.P. and cabinet representation based on religion, geography, and ethnic background.\textsuperscript{6} It is apparent that recruitment for the Force was by way of suitability lists submitted by Members of Parliament for their constituencies.\textsuperscript{7} To a lesser degree constables and non-commissioned officers ("NCOs") (e.g. corporal, sergeant, staff sergeant) were also appointed on the same basis.\textsuperscript{8}

It is interesting to note that the first four Commissioners left the Force involuntarily and in unhappy circumstances.\textsuperscript{9} At the time the Force was formed, the Prime Minister, Sir John A. Macdonald, made it clear that the N.W.M.P. reported directly to him, and he had

\begin{footnotes}
\item[4] MacLeod, \textit{supra}, note 2 at x.
\item[5] \textit{Ibid.} at 93.
\item[6] \textit{Ibid.} at 78.
\item[7] \textit{Ibid.} at 76-77 & 84-5. This account has remarkable similarities to the early political patronage that occurred with the borough system in major U.S. cities. See, Robert M. Fogelson, \textit{Big-City Police} (Cambridge, Mass.: Harvard University Press, 1977).
\item[8] \textit{Ibid.} at 95.
\item[9] \textit{Ibid.} at 39. It is rumoured, even today, that senior officers have been forced out of the R.C.M.P. by the government.
\end{footnotes}
the final word on high policy matters. An example of this control is found in 1881 when Prime Minister Macdonald personally had Superintendent James Walsh placed on extended leave because the Prime Minister thought Walsh had embarrassed the government.

MacLeod found that the Force was shamelessly manipulated through communications and direct orders to obtain maximum political advantage. Citizens who had a complaint about the N.W.M.P. or a particular member certainly did not hesitate to complain to their Member of Parliament. In fact, it was not unusual for a member to be transferred because he was not in, or had fallen out of, political favour at that particular posting. Today, the Commissioner of the R.C.M.P. reports to the Solicitor General of Canada.

Social status, rank, subordination, and most important, military structure, are all elements that were inculcated in the Force from the date of its inception. As found by MacLeod, and confirmed in other writings, the "officer" hierarchy (i.e. commissioned ranks) of the N.W.M.P. was based on social class identical to that in the military, which created a gulf in the organization from the start. At one point, officers were entitled to use

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10 Ibid. at 59.
11 Ibid. at 31.
12 Ibid. at 68-9. For example, an increase in Force strength would always coincide with forthcoming elections.
13 Ibid. at 100.
14 Ibid. at 96.
15 Ibid. at 73-4, but see all of his Chp. 6, found the typical commissioned officer during the period 1873-1905 had the following features: 1) Canadian born; 2) from governing elite of eastern Canada; 3) Anglican or Roman Catholic; 4) military experience and training; 5) frequently had legal background (e.g. Commissioners Perry and MacLeod were both lawyers (at 64)); French and Beliveau, supra, note 1.
constables as servants, and did so regularly.\textsuperscript{16} Although the gulf between the officer core and rank-and-file members is undeniable, it was, and still is, also possible to identify a less pervasive distinction and status gap between NCOs and constables.\textsuperscript{17}

The unbridled and untempered treatment that members could sometimes experience, particularly those who dared question commissioned officers or step out of line, was set early in the history of the Force. For instance, MacLeod documents a letter that Commissioner A.G. Irvine had penned making it clear he would avenge himself on a subordinate who had sent a letter to the government making a complaint.\textsuperscript{18} Members were summarily dismissed for drinking, and discipline was extremely harsh. For example, the suicide of an Indian prisoner while in the custody of the N.W.M.P. resulted in a two rank demotion of a sergeant and the sentencing of a constable to one month hard labour.\textsuperscript{19}

The R.C.M.P. was, and largely still is, a very hierarchical, tightly controlled, para-military organization which places great emphasis on the importance of tradition, reputation, career, discipline, deference, and especially rank.\textsuperscript{20} A recruit learns early that, despite

\textsuperscript{16} \textit{Ibid.} at 80. An Inspector was entitled to one servant and a Superintendent to two servants. Part of the justification for servants was that it was necessary for the social entertainment obligations of officers.

\textsuperscript{17} French and Beliveau, \textit{supra}, note 1 at 46-47. For example, there are still separate messes (\textit{i.e.} social clubs) for commissioned officers (Officer’s Mess) and NCOs (NCO’s Mess). At one time NCO messes could be broken down into ranks (\textit{e.g.} Sgt.’s Mess, Cpl.’s Mess). Today commissioner officers still wear distinctly different coloured uniforms and styles of uniforms from the rest of the Force.

\textsuperscript{18} \textit{Supra}, note 2 at 39-40.

\textsuperscript{19} \textit{Ibid.} at 147.

\textsuperscript{20} Gary E. Reed, \textit{Organizational Change In The RCMP: A Longitudinal Study} (M.A. thesis, Simon Fraser University, Political Science, 1984)(unpublished) at 3; French and Beliveau, \textit{supra}, note 1 at 46.
representations, ultimately the R.C.M.P. is highly status bound, rigid, dislikes innovation or questioning of authority. Recruit training is specifically aimed at an intense indoctrination process to develop a strong sense of commitment and purpose within the R.C.M.P. membership\textsuperscript{21} (\textit{i.e.} Force comes before self). Isolationism and elitism is a fact of life in the R.C.M.P.\textsuperscript{22} Unlike most other police training programs, recruits attend and \textit{live} at the Training Academy (in Regina, Saskatchewan) for six months, and they are then transferred to areas that can further isolate them from friends and family.\textsuperscript{23} Once you join, everyone you know, your new family, is in the Force.

One lesson R.C.M.P. recruits learn the first day at approximately 6:30 a.m. on the parade square, as the chinking of spurs approaches deliberately from an unknown direction, just before an NCO in high brown boots carrying a swagger stick begins yelling, is that rank is everything. Discipline can be fast, harsh, and arbitrary. Speaking out or individualism is not tolerated. The notion that the Force can deal with and control a member as it likes is inculcated right from that moment, and reinforced throughout a member’s training and career. Overt and covert mechanisms are utilized to undermine the recruit’s sense of security and emphasize his or her vulnerability. The recruit or member who does not comprehend and live by this rule will encounter difficulties.

In policing, especially the R.C.M.P., "war stories" are used to imbue the values and history of the organization, as well as reinforce how members are treated within the

\textsuperscript{21} Reed, \textit{ibid.} at 3-4.

\textsuperscript{22} \textit{Ibid.}

\textsuperscript{23} \textit{Ibid.} L115 also commented on this feature. It is only in the last few years that recruits have been allowed to be posted in their home province. Previously, the rule was that members could not be posted to their home province.
organization. It is through war stories, experience, and sometimes crude displays of power, that a member learns that it is the member’s peers, and not the "brass" ("white shirts," "brown shoes") or Force, that may support him or her when there is trouble. But this peer support is not unconditional. If a member’s peers consider the action to be too wrongheaded, or it becomes known that an officer/management has it in for the member, support can be fleeting or non-existent. Contrary to popular opinion, members are not unconditionally protected by peers or the organization. The astute member learns the very first time that she or he is somehow connected with an "incident" that support from or within the R.C.M.P. is tenuous at best.

One of the dominant characteristics of the R.C.M.P. is a relatively small and cohesive commissioned officer cadre. The gradation of authority rests in rank, which is rooted in seniority and staying out of trouble, not in expertise. Moreover, there is a documented and formidable elitism within the commissioned officer ranks that makes many members feel that officers are isolated, unapproachable, and not really interested in, or working for the interests of members. The historical continuity and popular mythology of R.C.M.P. success as a policing organization tends to reinforce these tendencies. The status of the

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25 These are various terms used by members to refer to commissioned officers. Ibid. at 411 also discusses conditional support.

26 French and Beliveau, supra, note 1 at 10.

27 Ibid. at 46.

commissioned officer core is reinforced by disciplinary power and internal control over members.\textsuperscript{29} For those at the bottom of the organization, it is clear that originality and constructive criticism are regarded by the senior ranks as threats to the integrity of the order.\textsuperscript{30}

The "total career concept" of the R.C.M.P. has been criticised because it leads to limited initiative and imagination at all levels, and creates generational and social tensions between upper management and the rank-and-file.\textsuperscript{31} The McDonald Commission was not impressed with the level of analysis or creative thinking of senior management in the R.C.M.P.\textsuperscript{32} The McDonald Commission found that because of the generalist career path, the Force has a poor capacity for legal and policy analysis, serious deficiencies in management skills, as well as a lack of competency and expertise in key areas.\textsuperscript{33}

French and Beliveau also found that the commissioned officer core was a self-serving fraternity, based on a closed-entry system committed to self-preservation which managed by crisis, thereby resulting in conflict between the ranks.\textsuperscript{34} Promotion into the commissioned ranks is described as taking on the "aspect of initiation into a self-regulating fraternity of visceral conservatives" based on the stultifying promotion principle that "boatrockers and

\begin{itemize}
\item \textsuperscript{29} Ibid. at 55.
\item \textsuperscript{30} French and Beliveau, \textit{supra}, note 1 at 47.
\item \textsuperscript{31} Ibid. at xii; Reed, \textit{supra}, note 20 at 3-4 also held forth that the R.C.M.P. lacks innovation because of status orientation.
\item \textsuperscript{33} Ibid. vol. 2 at 965.
\item \textsuperscript{34} Supra, note 1 at 49; Reed, \textit{supra}, note 20 at 75-6.
\end{itemize}
original thinkers need not apply."\textsuperscript{35} The result is that there is little outside influence or fresh perspective injected into an essentially parochial structure.\textsuperscript{36} For example, former corporal Jack Ramsey accused commissioned officers of being preoccupied with the \textit{status quo}, maintaining power, and increasing status within what was nothing less than a caste system.\textsuperscript{37} The result is that anyone who raises a complaint is labelled as a troublemaker or has a "bad attitude." The author, after considerable experience, research, and reflection, has come to the conclusion that the commissioned officer core of the R.C.M.P. provides a quintessential example of "group think," as defined by Janis.\textsuperscript{38} One would be hard pressed to find a better Foucaultian ideological paradigm of power, surveillance, discipline, spectacle, and punishment. It is this power, actual and perceived, that the Force, and in particular commissioned officers, relies on to maintain a highly uncertain and vulnerable feeling among members, especially in relation to disciplinary matters. The two cultures of

\textsuperscript{35} French and Beliveau, \textit{ibid.} at 49.

\textsuperscript{36} Grant, \textit{supra}, note 3 at 28. The author recently had a meeting with a DSRR about the issue of external criticism of internal management practices of the R.C.M.P. by other police associations. The DSRR was "outraged" that non-RCMP organizations would dare speak to a House of Commons Sub-Committee about employee relations, because it was none of their business and an internal matter.

\textsuperscript{37} Jack Ramsey, "My Case Against the RCMP" (July 1972) \textit{MacLean's} at 19-34; Reed, \textit{supra}, note 20 at 88. The front page headline to this story read: "Confessions of Corporal Jack Ramsey: Shattering a great Canadian legend."

\textsuperscript{38} Jennifer M. Brown and Elizabeth A. Campbell, \textit{Stress and Policing - Sources and Strategies} (Essex, England: John Wiley & Sons, 1994) at 140 outline the features of "Victims of Groupthink" as discussed by Janis in 1972 (\textit{i.e.} a preoccupation with the party line such that contrary information is ignored/distorted): 1) illusion of invulnerability (\textit{i.e.} failure is impossible); 2) rationalization (\textit{i.e.} distort meaning of unwelcome or unpalatable information; 3) belief in superior morality of top managers/leaders; 4) stereotyping views of others; 5) use of self-censorship to foster illusions of agreement and unanimity; 6) conformity pressure (\textit{i.e.} force members to keep doubts to themselves); and 7) suppression of doubt through "mind guards" (\textit{i.e.} protect group from adverse information).
policing are vibrant in the Force.

As Reed concludes, R.C.M.P. ideology and social structure have "made the Force a closed organization, and in spite of organizational changes, even today, it continues to remain relatively closed to its external environment, with accountability occurring exclusively through the Commissioner." However, internal dissatisfaction in the R.C.M.P. has erupted, demonstrating the dysfunctional consequences of having a closed organization that is based on two or more internal cultures without effective internal feedback mechanisms.

As also found by the McDonald Commission, it is a fundamental precept in the R.C.M.P. that the reputation of the Force is placed above all else, and that complete loyalty is engendered by means of recruiting, training, and management processes which the Commission found to be akin to those of a monastic or religious order. The problem of course, as French and Beliveau commented, is that organizations can handle personal conflicts between individuals much better than conflict based on formal status differences within the organization or between ranks. There is no way out of this dilemma until the R.C.M.P. begins to value truly education, outside experience, and begins rewarding individual autonomy, initiative, and competence, instead of relying on formal and informal mechanisms and values of vulnerability, control, uncertainty, punishment and hierarchy.

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39 Supra, note 20 at 213.
40 Ibid. at 214.
41 Supra, note 32, vol. 1 at 102.
42 Supra, note 1 at 48.
An example of the way in which the R.C.M.P. does not truly value education is the new promotion process to the NCO rank which gives no recognition or credit to a member who has pursued post-secondary education.

There will be those who strongly object to the foregoing description, claiming that it is outdated and unfair, and that the R.C.M.P. is now pursuing community-based policing and new training, empowerment, visioning, consultation, consensus and shared leadership philosophies in management. While the author does not deny that such reforms and initiatives have been undertaken, the depth of the change, aside from certain structural adaptations, to the fundamental norms and core values operating in the organization remains to be confirmed. There are remarkable similarities between the "new" R.C.M.P. training and management philosophy in 1997 and the observations of Superintendent Constantine of the N.W.M.P. in the annual report of 1892 that:

It appears that we must trust more to men and less to regulation. Get good men forward, give more power to individuals, create confidence through all ranks, one with the other, and things will work harmoniously in maintaining the peace of the country, infusing a confidence in their vigilant guardianship of persons and property.

It cannot be ignored that the R.C.M.P., as a national police force, has very successfully utilized organizational and disciplinary mechanisms to regulate its personnel, some of whom operated with limited supervision in remote areas. It is the very success of these


44 For example, see Royal Canadian Mounted Police Communication (Commissioner Murray), Dear Employees of the Royal Canadian Mounted Police (n.d.) setting out, inter alia, the Mission, Core Values and Commitment to the Employees; Royal Canadian Mounted Police, "Digging through the parking lot in Personnel" (December 1996) Pony Express (Special Edition).
recruitment, training, control, tradition, rank, discipline and management methods that make the R.C.M.P. resistant to deep change. The vast majority of members were recruited, trained and operated within the management milieu described. Although much of the management culture described is present in other police agencies in Canada, the R.C.M.P., as a result of its particular history and policing context, is unique to the extent it has implemented and relied upon such control measures. It is important to contemplate whether discipline tends to reinforce traditional attitudes in a way that is more difficult to change than in other management areas.

Consistent with the findings discussed above and in Chapters 2-3, this thesis will demonstrate that the fundamental structures and core values relating to discipline in large measure still remain in the R.C.M.P. One theme that arose from the 107 R.C.M.P. personnel interviewed for this thesis, and confirmed by the author’s personal observations and general discussions with other members, is that many commissioned officers, behind the current modern management rhetoric and closed doors, continue to utilize the same hierarchical and status bound management, decision-making and cultural principles that have existed throughout the history of the R.C.M.P. Despite representations by the Force, this thesis will show that the iron fist in the leather riding glove is still prevalent as a management philosophy in the R.C.M.P. It is the commitment to this underlying discipline philosophy that will also make the matters of external review mechanisms and civilian oversight, as discussed in Chapters 4-5, important to considering the effectiveness of the R.C.M.P. regime. As will become evident, somewhat ironically, the extent and effectiveness of civilian oversight will be particularly important to evaluating the situation of individual members who are the subject of accountability and discipline proceedings.
3. **Discipline**

Discipline in the R.C.M.P. has, from the very beginning, played an integral part in the management of the Force. The lot of a member may have improved since 1873 when the Commissioner of the R.C.M.P. was given the authority to fine, suspend, and discharge a member for **unstated reasons**.45 However, as late as 1979, the following observation was made about the "draconian" R.C.M.P. discipline process:

By the time the RCMP’s ponderous juggernaut of discharge machinery had been set into motion, the affair had become a contest of wills which the two sergeants could never hope to win, and the whole proceedings invested with the RCMP’s understandable jealousy of its reputation for integrity and rectitude.46

Disciplinary proceedings in the R.C.M.P. for many years were treated summarily. Commissioned officers were given broad discretion, and were even permitted to "convict on view" *(i.e.)* without formal procedure.47 Although fines and discharge were the only sanctions initially available, officers were soon imbued with disciplinary authority to impose heavy fines and lengthy terms in gaol at hard labour for misconduct.48

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45 Section 22 of *An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories*, 1873, 36 Vict., c. 35. This section was amended by *An Act respecting the administration of Justice and for the establishment of a Police Force in the North-West Territories*, 1874, 37 Vict., c. 22 to include specified offences which were extremely broad *(e.g.)* wear any party emblem or otherwise manifest political partisanship; communicate, directly or indirectly, to the public press; intoxication, however slight).

46 French and Beliveau, *supra*, note 1 at 29; also, Reed, *supra*, note 20 at 53. In describing the disciplining of two members of the R.C.M.P. that had associated with an undesirable person, French and Beliveau at 28 noted that "now became the occasion for the pitiless apparatus of discipline in the Force to come lumbering down upon them." In this case the two members were given "advice" at the local level, but by the time the matter reached headquarters it had mutated into an "order" which was used to discharge two senior NCOs who had good personnel files.


disciplinary process in the R.C.M.P. were based on military tradition and language; in fact, when procedure was developed (or actually applied) it was reminiscent of court-martials, criminal law, and status-bound proceedings. The current disciplinary process, despite purported amendments, remains highly status and rank bound, particularly in formal disciplinary proceedings.

The Marin Commission in its 1976 report on public complaints, internal management, discipline, and grievance practices within the R.C.M.P. found that the ethos of commissioned officers were directed towards severe punishment, even for minor and petty breaches of policy or regulations. Another troubling feature from the Marin Commission were reports that commissioned officers frequently resorted to informal mechanisms to punish members, and officers were virtually unaccountable under such a sub-regime. For example, members who felt they had been treated improperly were frequently threatened that a grievance would affect their career. Members were unofficially transferred as punishment by commissioned officers. The Marin Commission also found that the R.C.M.P.'s traditional management approach, not unlike other police agencies (Chapters 2-3 and 5), was to locate misconduct problems at the individual rank-and-file level, and punishment was the preferred response to individual misconduct. As a result, as aptly observed by the


50 Supra, note 47 at 133.

51 Ibid. at 119.

52 Ibid. at 119 and 182. M47 and M101 confirmed that such actions continue to occur.

53 Ibid. at 123; also, Royal Canadian Mounted Police External Review Committee, Reflections on Police Management Practices (Discussion Paper 12 by Clifford D. Shearing)
R.C.M.P. External Review Committee ("E.R.C."):  

In the opinion of the [Marin] Commission, the discipline system with the greatest likelihood of success was one which earns the respect of those for whom it is administered. Essential to such a system are provisions which demonstrably \textit{recognize and protect the rights of members and ensure their continued confidence}.\textsuperscript{54} (emphasis added)

At the time of the Marin Commission, the regulations permitted the reduction of a member's pension by 1/3 upon discharge for disciplinary reasons.\textsuperscript{55} Scott also observed that suspect officers could be ordered to make statements, could be arrested, placed on suspension, and held in custody pending an internal \textit{service trial}.\textsuperscript{56} While legal counsel was not permitted during investigations or proceedings, assistance of another member was permitted.\textsuperscript{57} The R.C.M.P., in response to the Marin Commission, confessed that it needed to extend rights to members involved in disciplinary proceeding comparable to those enjoyed by citizens in criminal courts.\textsuperscript{58} However, it was to be over ten years before any statutory amendments were instituted.

Until 1986, a member of the R.C.M.P. convicted of a "Major Service Offence" under

\begin{itemize}
\item\textsuperscript{54} Royal Canadian Mounted Police External Review Committee, \textit{Annual Report 1986-1987} (Minister of Supply and Services, 1987) at 3.
\item\textsuperscript{55} \textit{Ibid.}
\item\textsuperscript{56} Ian Scott, "Rights Arbitration in Canadian Police Labour Relations" in Bryan M. Downie and Richard L. Jackson, eds., \textit{Conflict and Cooperation in Police Labour Relations} (Ottawa: Minister of Supply and Services, 1980) at 167; also, Marin Commission, \textit{supra}, note 47.
\item\textsuperscript{57} Scott, \textit{ibid.}
\item\textsuperscript{58} Reed, \textit{supra}, note 20 at 166, at footnote 161 referring to the R.C.M.P., "Bill C-69 An Act to Amend the RCMP Act - An Overview" (July, 1981) \textit{Pony Express} at 1.
\end{itemize}
the then *Royal Canadian Mounted Police Act*\(^{59}\) 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 a *fine* not exceeding *three hundred dollars*; a *fine* not exceeding fifty dollars, loss of seniority or reprimand. It should further 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.\(^{60}\) Under this regime it was possible for a member to be dismissed for Minor or Major Service offences.\(^{61}\) These legislative measures existed until just over ten years ago. However, any notion that harsh discipline and summary treatment of members are complete relics of the past should be disabused.

As the McDonald Commission reported, there are a number of reasons why a member may not be able to speak out or report incidents of misconduct internally.\(^{62}\) First, the cause of the problem may be policy and procedures that were approved by senior

\(^{59}\) 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 defined minor offences. These invasive provisions were in place until amended between 1986-88 by c. 8.

\(^{60}\) Pursuant to s. 56 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended) it remains a summary conviction offence to persuade, counsel, aid, assist, harbour, or conceal a member who deserts or is absent without leave.

\(^{61}\) E.R.C. Discussion Paper 8, *supra*, note 49 at 22 reviews the process overlap under the old Act.

\(^{62}\) *Supra*, note 32, vol. 2 at 973.
officers, which, if criticized, does not enhance career prospects. Second, the member’s superiors may have participated or acquiesced in the course of action. Third, a superior may have directed that specific action be taken. Fourth, based on previous experience or knowledge, the member is not satisfied with the Force’s response to such situations in the past (i.e. shoot the messenger, conduct a show investigation, or attack the member). A fifth reason, often overlooked, is that the member may not be satisfied that the matter will be handled effectively by the Force because of interests that are considered to transcend the individual. In other words, protecting commissioned officers or reputation of the Force may be more important than dealing with the substance of the complaint.

The Marin Commission report and its recommendations were essentially based on four principles. First, internal discipline and grievance procedures must be, and be seen to be, genuinely remedial. Second, more equitable treatment for members and the public was required. Third, management and individual members must be responsible for the exercise of authority. Fourth, a visible and independent authority for accountability should be established. The Marin Commission recommended a federal police ombudsman to oversee public complaints about misconduct and internal disciplinary-grievance matters. However, the ombudsman would only have recommendation capacity, and could not reverse actions of the Commissioner (i.e. the power of public persuasion). The Marin Commission heartily endorsed a remedial or corrective disciplinary process in the Force and

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63 E.R.C. Report, supra, note 54 at 1.

64 Supra, note 47 at 91, see also Part IV in its entirety. Palmer, supra, note 3 at 96 recommended a quasi-judicial Board or Commission as the final level of appeal on grievances and discipline which was external to the police. Paul West, "Investigation and Review of Complaints Against Police Officers: An Overview of Issues and Philosophies" in Thomas Barker and David L. Carter, eds., Police Deviance, 2d ed. (Cincinnati: Anderson Publishing Co., 1991) at 381-2 outlines the role or mandate of a police ombudsman.
also recommended more "informal discipline" procedures, which if the member felt were unwarranted, could be refused by the member by seeking a formal hearing.\textsuperscript{65} The problem is that some "discipline" is not appealable or subject to grievance, either formally or informally, under the new regime.

Although its recommendations represented a significant advancement, the Marin Commission perhaps did not give full consideration to the broader context, the empirical evidence or sufficiently highlight the unfairness with which the Force treated members.\textsuperscript{66} Despite the purported embarrassment the Marin Commission findings caused at the time, it took years to achieve any legislative change and the conduct of the R.C.M.P. in some instances has changed remarkably little. This thesis suggests that, in part, the fairness and validity of the R.C.M.P. regime (and accountability in general) is inextricably linked to the form of employee "representation" that exists.

4. Staff Relations Representation

In the author's view, many commentators fail to consider how vulnerable members are, or believe they are, in the Force. There are several reasons for the vulnerability factor. Aside from many members' perceived public view of them, one factor that contributes to this state of uncertainty and vulnerability is the form of employee representation that exists in the

\textsuperscript{65} Supra, note 54 at 2.

Prior to 1974, there was no vehicle to represent the concerns of members to management, and by law, members were prohibited from joining any association or society that had as its object the rights or interests of employees. As Hann et al. note, even today, "it must be borne in mind that the R.C.M.P. has no union and no collective agreement and that personnel issues are administered by the R.C.M.P. itself." It is illuminating of R.C.M.P. management practices, values, and views that, in 1997, members of the R.C.M.P. are not allowed, by law, to join, or have the choice to join, a union and bargain collectively. French and Beliveau report that reaction from R.C.M.P.

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68 Then Cpl. Fred Hardy (D.S.R.R. District 1), "The R.C.M.P. Staff Relations Program" (Winter 1978) *British Columbia Police Journal* 8. The basis of this prohibition was Order-in-Council, P.C. 2213, which was invoked on October 28, 1918 and rescinded in 1974. Marin Commission, supra, note 44 at 38 notes that this Order-in-Council prohibited members from forming their own association or union on pain of "instant dismissal." See also, Craig S. MacMillan, "I Am What I Am: Forms of Employee Representation" (1997) 3:3 *The Service Star* 1.


management to evidence of a drive toward unionization and organization in the 1970's was "crude and heavy-handed, extending, it is rumoured, to the use of electronic surveillance against meetings of activists in the ranks."\textsuperscript{71}

In response to growing dissatisfaction with the grievance process, internal discipline, and other employment issues in the R.C.M.P., the Commissioner created the Division Staff Relations Representative Program in which member representatives ("DSRRs") were initially \textit{selected and appointed by Commanding Officers} to present the concerns of the rank-and-file to management.\textsuperscript{72} The DSRR Program was initially struck in order to provide better "communication," but the Commissioner eventually granted authority to DSRRs to assist with individual grievances.\textsuperscript{73} Reed concludes that the DSRR Program and other attempts to respond to discord were co-opted from the start because "The command structure and rank structure are still intact, and the antagonisms between rank and expertise continues to exist."\textsuperscript{74} In 1974 a meeting was called between the Commanding Officers and DSRRs to deal with new militant tones from members, and one of the primary problems identified was that members still feared reprisals over grievances.\textsuperscript{75}

While the DSRR Program is used as a "sensing and mediating mechanism within the

\textsuperscript{71} \textit{Supra}, note 1 at 48. Some of those who were there confirm that recording licence plate numbers, names and taking photographs of members attending meetings were actions taken by senior management of the R.C.M.P.

\textsuperscript{72} Hardy, \textit{supra}, note 68; Reed, \textit{supra}, note 20 at 151. It should be noted that DSRRs have their personnel assessments completed by the Commanding Officer.

\textsuperscript{73} Hardy, \textit{ibid.}; Marin Commission, \textit{supra}, note 47 at 38; Scott, note 56 at 167.

\textsuperscript{74} \textit{Supra}, note 20 at 186.

\textsuperscript{75} \textit{Ibid.} at 183. Management’s ineffectiveness in dealing with the Treasury Board was also raised.
Force," others would bluntly call it a legitimation tool. Mr. Justice Baudouin of the Quebec Court of Appeal recently stated, in an action to have the statutory provisions preventing collective bargaining in the R.C.M.P. struck down, that the:

Legislature has implemented, as a substitute [for collective bargaining] a system of internal representation, which has no real power in actual practice, as management exercises absolute and unquestionable authority over the members. The situation therefore represents a notable exception to the fundamental freedom universally recognized in all free and democratic societies to unionize and hence be able to negotiate one's working conditions without hindrance. Indeed, at the present time the only group structure that they may have [DSRRs] is the one imposed by law, a structure that is emptied of all effective power and, in the final analysis, wholly governed by management.

The member who instituted this action had been suspended without pay for over a year because it was alleged that he disobeyed an order to remove himself as a part-time mayor from a small village in Quebec in which he lived, and where neither he or the R.C.M.P. were responsible for any policing. Further, contrary to R.C.M.P. policy, and the Commissioner's officially stated position on suspensions without pay, this member was suspended without pay even though he was not alleged to have committed a crime or been

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76 Ibid. It cannot be automatically assumed that legitimation tools are bad. Societies and organizations need to have mechanisms to make it easier for people to understand and accept decisions that are made to deal with difficult issues, especially in situations where those decisions have a significant potential to be wrong. Legitimation mechanisms become problematic when they are corrupted (i.e. when they place constraints on the service of legitimate ends rather than facilitating them). Some members certainly perceive that the DSSRP is simply a tool to legitimate management practices and create the impression of feedback and input.


78 "C" Division Bulletin on Staff Relations within the RCMP, "Suspension Without Pay" (September 1996) Contrepoids at 1-3.
This member's sin, according to many, was that he has actively pursued unionization of the R.C.M.P. in Quebec, and it was widely believed that the suspension without pay for standing as mayor, particularly when other members have, or hold, political offices in other jurisdictions, was a blatant and unbridled attempt to force this member out of the R.C.M.P.  

Dissatisfaction with the DSRR process, internal representation, grievance, discipline, and compensation matters has recently prompted the formation of several charitable (non-union) associations in the R.C.M.P. by some members to try to promote employee issues. The reaction of the DSRRs and management to this new expression by members has been ill-tempered, ill-considered and confrontational to say the least. In fact, the actions of

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79 Ibid. It is reported that at a CO/DSRR Conference in 1994 the Commissioner stated that a member would not be suspended unless he/she had been found guilty of a criminal offence. R.C.M.P. Administration Manual ("A.M."), "Suspension" at XII.5.d.3. states that a decision to suspend may occur where the member a. "has been imprisoned", b. the "alleged misconduct is so reprehensible that he/she must be removed from duty" c. there are reasonable and probable ground to suspect the member has been involved in the commission of a [serious offence]", d. "the member has been absent without authority...for seven entire days or more", or e. "the member has refused or failed to report for duty..."

80 Contrepoids, ibid., in relation to this member's suspension reported the findings of the Arbitration Board of Human Resources Development Canada that the member "did not act unreasonably when he refused to follow the order received, especially considering the fact that the election process had begun and that he had previously received permission to run for office.....the real motive for the suspension is more the fact that Mr. Delisle wanted to establish an RCMPolice officers association than the fact that he was running for mayor." (unofficial translation) (emphasis added). Canadian Press, "Mountie-made-mayor disputes reason behind suspension from force" in The Vancouver Sun (November 10, 1995).

81 See, "E" Division [British Columbia] Members Association, (1995) 1:1 Service Star; Canadian Police Association, "Organizing the RCMP" (Spring 1995) CPA Express 10; "C" Division [Quebec] Members Association (1996) Special Edition, Action. There are also associations that have formed in "O" Division (Toronto area) and "A" Division (Ottawa).

82 Examples are found in the Delisle suspension, supra, note 78; previously, the DSRR caucus expelled Delisle, for unionization efforts, from meetings and he had to seek, and was given, an interim injunction: see, Delisle v. Royal Canadian Mounted Police Commissioner et
DSRRs, management, the Solicitor General, and the federal government show a complete intolerance for any program or initiative that is not internally based, internally organized, and management controlled.\textsuperscript{83} One of the measures utilized by the Force to prevent the

\textit{al.} (1991) 39 F.T.R. 217 (T.D.); it should also be noted the "E" Division DSRRs initiated a complaint against Mr. Delisle after his attendance at the inaugural meeting of the EDMA on the basis that as a DSRR he was supporting another form of representation contrary to the \textit{Commissioners Standing Orders, supra}; also DSRR Caucus, \textit{Bill C-58 - A DSRR Perspective} (n.d.) is nothing short of a diatribe against "unionist" association members, with inflammatory rhetoric, accusations and self-serving and misleading statements; Tim Kennedy (DSRR), "Negotiation or Confrontation?" (October 1996) \textit{Pacific Focus} (Pacific Region Quarterly Newsletter) at 3-4 provides further examples of bashing and misinformation; Reg Trowell (DSRR), "Hand Grenades From the C.P.A." (February 1996) \textit{Reps Report} 1; The Division Staff Relations Representatives' National Newsletter, "CPA Fires Another Round at RCMP" (May 1996) \textit{D.S.R.R. Perspective} 1; "E" Division DSRR Newsletter, "The RCMP Members Associations & "Back Door Politics"" (96-09-03, Special Edition) \textit{The Informer} 1.

\textsuperscript{83} Examples are: first, suspending Delisle without pay; second expelling Delisle from the DSRR Caucus which resulted in him obtaining an injunction; third, the DSRR Caucus submission on Bill C-58; fourth, the "formal complaint" and request for investigation to Ottawa H.Q. by two "E" Division DSRRs against Delisle and another DSRR and sub-DSRR from another division because they "were part of a "panel discussion" where collective bargaining was identified as a long term goal of the Association." \textit{ibid.}, Canadian Police Association article, \textit{supra}, note 81, also, "C" Division Members Association, "Reader's Corner - Complaint Regarding Alleged Violation of Commissioner's Standing Orders" (1995) \textit{Les Affaires De 'Association La Division "C"} at 2. It is also reported that the Force attempted to proceed with a hearing into the complaint against Mr. Delisle regarding his comments at the EDMA meeting even though it was told in advance by the Department of Justice regarding their serious reservations about the authority to proceed: Michael Niebudek, "The President of "A" Division & H.Q. members associations speaks out" (1996) 1:1 \textit{Action} at 2. Considerable expense arose from this affair, which it has been suggested, should have been avoided given the known legal issue raised in advance. It has also been indicated that the government flatly rejected the Sims Task Force recommendation, \textit{supra}, note 70, to allow collective bargaining. Recently, the Commanding Officer in "E" Division refused to allow the EDMA to use bulletin boards to post information, despite the fact that bulletin boards are used extensively in detachments to post material on everything from advertising, home and car sales, DSRR material and public service unions. From the moment that an association was formed in "E" Division, the DSRRs have engaged in campaigns of misinformation, intimidation and fear mongering (e.g. an association will cost each member personally thousands of dollars to finance). Personal and vindictive attacks in articles and verbally by DSRRs on association advocates, whether in the RCMP or externally, are frequently encountered; for example, Matt Kelly (Vancouver Police Union President), "Democracy: A Free Choice..." (1997) 3:1 \textit{The Service Star} 11 was impelled to respond to the "outrageous articles" written about specific association advocates that contain insulting and slanderous attacks. Given the historical use of the R.C.M.P. for "union busting"
formation of associations is found in the *Commissioner's Standing Orders* which state that a DSRR "shall not engage in activities that: ... (b) promote alternate programs in conflict with the non-union status of the DSRRP..." Contravention of this prohibition makes a DSRR subject to removal from his or her position.

There is no question that the DSRR Program has made contributions for members, and that most DSRRs work very hard and are dedicated members. The overall success and acceptance of the DSRR system, however, remain matters of debate, particularly in light of those who have dared to engage in association activities. During interviews of members, and as evidenced by the recent comments of a member in a newsletter, retribution from the Force for raising grievances or concerns is still considered to be a fact of life for many.

Further, management in the R.C.M.P. has recently undertaken several major and significant initiatives that affect members without consulting their elected representatives. Regardless in Canada, its reluctance to become unionized should not be surprising; see, Brown and Brown, Mann and Lee, *supra*, note 1.

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84 *Commissioner's Standing Orders (Division Staff Relations Representative Program), Purposes and Goals*, not published, signed by the Commissioner on June 9, 1993.


86 Marin Commission, *supra*, note 47 at 38 made this observation in 1976, and it is equally valid today; Association newsletters, *supra*, note 81 speak to the lack of acceptance. Currently, there are over 2500 members who have joined associations.

87 For example, see EDMA Newsletter, "Letters to The Editor - The Fear of Reprisal" (February 1997) *The Service Star* at 13 where a member's letter to an "E" Division DSRR was excerpted. It ended "You want to tell me how archaic it is in the RCMP - I can't even put my signature on this article, because I fear reprisal...but imagine that an RCMP member wanting to reply to your [DSRR] newsletter is too afraid to put his name down because it could affect his career. Who is fooling who?"

88 For example, the government introduced Bill C-58 An Act to Amend the *Public Service Staff Relations Act* and the *Royal Canadian Mounted Police Act*, which, *inter alia*, removes the R.C.M.P. from Part II (Occupational Health and Safety) of the *Canada Labour Code*. This
of one's views on unionization, it seems strange for any government (which has ratified Convention No. 87 of the International Labour Organization concerning the Freedom of Association and Protection of the Right to Organize) to deny members the choice whether or not to form a union. One thing is certain, the management of the R.C.M.P. is not faced with being compelled to deal with its employees on the same level as most other police managers (as reviewed in Chapter 2) in North America or Britain. As noted in earlier chapters, associations have often been an integral force in lurching police management measure was billed as a "housekeeping measure" to deal with the fallout from Gingras v. Canada (1994), 165 N.R. 101 (F.C.A.) where the Force was ordered to pay out millions of dollars in bilingual bonuses that the Commissioner had arbitrarily (without consultation) and illegally chosen not to pay to members. The connection between bilingual bonuses and health and safety is unclear; however, the Bill has far reaching implications and the DSRRs admitted not knowing about, or being consulted on, the Bill. Unbelievably, the Force claimed it was an oversight; see, DSRR Perspective on Bill C-58, supra, note 82 at 3. The Force is also actively considering moving to "Separate Employer Status" (SES), but as reported by "K" Division (Alberta), one of the more common observations that has arisen is that "Employees believe that management has a hidden agenda, and are not convinced that the decision has not already been made." The Division Staff Relations Representatives' National Newsletter, "Division Clips" (March 7, 1997) D.S.R.R. Perspective at 2. The author has been privately informed by reliable sources in Ottawa that the decision to become a separate employer has already been made and the consultation process is a "sham." One DSRR also recently complained about the fact that senior management of the Force did not properly consult members before making major organizational decisions at a meeting known as the "Aylmer Declaration". More recently, in the Spring of 1997, the author learned from certain DSRRs that they had not been consulted by (nor did they even know about) "E" Division executive about a decision to freeze 100 positions, which had enormous promotional, transfer, financial and career impacts for members. There have also been indications that the Force "rammed through" new Commissioners Standing Orders to suspend members without pay for loss of basic qualifications despite the reported non-agreement of DSRRs; see Reg Trowell and Pat Dauk, "Jerking The Chain Tighter: Loss of Basic Requirements" (1997) 1:5 Division Clips at 5-6.

practices towards fairness in employee matters. The author suggests that the current employee representation program in the R.C.M.P. strongly influences and explains the vulnerability factor that members feel.

The other point to be drawn from this discussion is that the R.C.M.P. continues to be tightly bound, despite the rhetoric, to rank, discipline, and absolute control of its members, which contributes significantly to members' views on how well they are represented, respected, and protected under the current accountability regime in the R.C.M.P. The R.C.M.P. continues to rely on and engage in displays or spectacles of power within the organization to maintain the culture of vulnerability and control over members. A dominant theme among the members interviewed is that a member can only afford professionally, personally, psychologically or financially to enter into a dispute with the Force as a last resort. It was also clear, however, that the more junior members, particularly the constables, are becoming more outspoken and dissatisfied with the way members' issues are being handled by the Force. This may be explained, in part, by the fact that recruits are older and more educated when they enter the R.C.M.P. than in the past (e.g. 18 years old and off the farm vs. 26 years old with a degree, work experience and possibly a family). It remains to be seen whether the Force will respond to these representation issues. The paradox for the R.C.M.P. is that as long as it denies its members the right to choose their form of employee representation, it cannot seriously talk about empowerment and new

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90 For example, when S/Sgt. Delisle was brought before the CO and suspended, his badge and service weapon were seized, and he was paraded out of the headquarters building under escort. Other members reported similar degradation ceremonies in which moral lectures and very public symbolic displays of their treatment occurred: M6, M26, M83, & M85. Members are also often required to report in when suspended, not attend the office without permission, attend only the front counter, and not call or speak to anyone at the office except a specific NCO. Occasionally members will be directed not to associate with a member that has been suspended or is being placed under pressure by management.
management philosophies.

5. A "New" Regime

As a result of the Marin Commission findings, and other inquiries into the conduct of the R.C.M.P., the legislation governing the R.C.M.P. was amended to create the external civilian R.C.M.P. Public Complaints Commission ("P.C.C.") and the E.R.C., each with its own statutory mandate to review certain affairs of the Force. The creation of the new legislative regime for R.C.M.P. accountability was a difficult and arduous task, with no fewer than five separate attempts to pass legislation enacting a new process.\(^91\) The process continues, since Bill C-39 was recently defeated, which would have amalgamated the P.C.C. and E.R.C.\(^92\) For individual members, the new regime is supposed to provide procedures which ensure protection, fairness, and due process in the accountability and discipline process.\(^93\)

As noted by Scorer, a member's conduct under the \textit{R.C.M.P. Act} can now become the subject of a complaint and investigation in several ways.\(^94\) First, a "public complaint" can be made by a citizen or the P.C.C. Chair regarding the "on-duty" conduct of a member.

\(^{91}\) E.R.C. Report, \textit{supra}, note 54 at 9-10 outlines the history of the Marin Commission and subsequent attempts to enact legislative amendments.

\(^{92}\) Scorer, \textit{supra}, note 70 at 3-4 and 6. The R.C.M.P. has also struck a legislative task force to review possible changes to the current statutory regime. The DSRRs, who represent members' interests, are participating in this process but they do not have competent and qualified advice in many areas and are certainly not on a level field in discussing these issues.


\(^{94}\) \textit{Supra}, note 70 at 9; at 13-14 there is also an overview of R.C.M.P. policy on complaints and the internal investigation section.
A Part VII public complaint must relate to on-duty conduct. If the public complaint relates to off-duty conduct it is handled solely by the R.C.M.P. and the P.C.C. does not have any jurisdiction. Second, a public complaint or a complaint from another member within the Force about the conduct of a member can lead to an "internal investigation"\(^95\) \((i.e. \text{ Part IV})\). In this instance, the Force is investigating whether the member's conduct as alleged in the public complaint or internal complaint breached the \textit{Code of Conduct}. Third, a complaint of misconduct can lead to a "statutory investigation" to determine whether or not a criminal or regulatory offence has been committed by the member. The member's conduct can also be, depending on the nature of the activity, the subject of a myriad of other investigations/hearings such as a Coroner's Inquest \((i.e. \text{ deaths in police custody})\), Canadian Human Rights Commission proceedings \((i.e. \text{ discrimination or harassment})\), Corrections Service of Canada inquiries \((i.e. \text{ parolee breaches})\), Privacy Commissioner matters \((i.e. \text{ privacy breaches})\), Official Languages Commissioner matters \((i.e. \text{ official language breaches})\), not to mention public inquiries and civil proceedings \((e.g. \text{ discovery and testimony})\).\(^96\) While the conduct of any public official may be subject to these latter mechanisms to a limited extent, the nature of police work makes the frequency and intensity of external examination of police conduct qualitatively different from that of other public officials.

\(^95\) Section 46(1) of the R.C.M.P. \textit{Regulations} requires members to report misconduct.

\(^96\) Such complaints and investigations do occur, see Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1994-95} (Minister of Supply and Services, 1995) at 50 to find a reference by the P.C.C. to a report from the Privacy Commissioner into an alleged release of information. The risk of civil suits is very real: Tom Zytaruk, "Man launches lawsuit, claims police negligent" (unknown paper or date); Neal Hall, "Girls win suit against RCMP in case of the missing teddies" \textit{The Vancouver Sun} (18 March 1997) A1; Paul Ceyssens, "Liability in Tort," chp. 3 in \textit{Legal Aspects of Policing} (Scarborough: Thomson Canada Ltd., 1994) sets out numerous situations and cases of police liability.
Aside from the above investigations and hearings, a member's action may also be the subject of examination before a "Board of Inquiry" struck by the Commissioner or Solicitor General under the *R.C.M.P. Act* 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 a member may have a "grievance" relating to the investigation or actions of the Force, which may ultimately have to be resolved by a hearing before the E.R.C. In all instances, testimony before the Board of Inquiry, E.R.C., and P.C.C. is required, regardless of any incrimination that may arise, although varying levels of protection are offered for testimony.

A formal investigation is undertaken when there is an alleged statute violation, serious breach of conduct, a refusal to resolve a public complaint informally, or if the P.C.C. has become involved. However, it should also be understood that there does not necessarily have to be a "formal complaint" to initiate an investigation into a member's conduct. For example, a police shooting will automatically lead to an "investigation" of the circumstances, which may ultimately become the basis for a criminal, public complaint, or internal investigation. The R.C.M.P. may also engage in operational incident and/or critical

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99 *Ibid.*, ss. 24.1(7) and (8), 35(8) and (9), 45.45(8) and (9) respectively.

100 Scorer, *supra*, note 70 at 40; also R.C.M.P. A.M., "Internal Investigations" at XII.4.D.1.b.

101 Duncan Chappell and Linda P. Graham, *Police Use of Deadly Force: Canadian Perspectives* (Univ. of Toronto: Centre of Criminology, 1985) at 81-2 in an analysis of police shootings reported that the police automatically conduct a criminal investigation and forward it
incident psychological "debriefings," "administrative reviews" or an "independent officer review" of a serious incident. The members involved are expected to attend and discuss their actions, even though it may significantly impact on subsequent steps taken to deal with the member. Last, the R.C.M.P. has instituted a practice wherein a retired jurist or other distinguished citizen can be retained to conduct an "independent case review" and members are expected to attend interviews with the reviewer.\textsuperscript{102} The most notable example of an independent case review is that of former British Columbia Court of Appeal Justice Josiah Wood into the "Vernon Massacre" where several family members were gunned down by an estranged husband in Vernon, British Columbia. Mr. Wood's role is to examine the actions of the R.C.M.P. in relation to events that led up to this mass murder.

For a member, issues of incrimination can arise immediately following an incident, since the involved member is expected, formally and informally, to report the details of the incident in writing (e.g. notebook and/or reports) or verbally (e.g. supervisor, debriefings), but the member may not recognize, or be advised of, the gravity of the issues at stake. As a preliminary matter, it must be recognized exactly how complicated and complex the new regime of accountability is that governs the R.C.M.P. internally and externally. It was frequently reported by members, and observed by the author, that there is a remarkable lack of clarity about the exact purpose and intent behind gathering information from members in the immediate aftermath of an incident. Moreover, the purpose for gathering information is also likely to evolve as more is learned about what transpired. Diagram 1 sets out in detail to the Crown for a decision on charges. The departments examined also conducted an internal review to see if policy was followed.

\textsuperscript{102} Scorer, supra, note 70; R.C.M.P. A.M. XII; R.C.M.P. "E" Division Operations Manual at II.6.E.44.g.7. and R.C.M.P. "E" Div. A.M., "Internal Investigations" at XII.4 and App. XII-4-1.
the types and forms of investigations that may arise. In the case of a fatal shooting, for example, it is not improbable to have five to seven different investigations being undertaken at the same time.

6. Public Complaints Commission

Prior to September 30, 1988, public complaints about the conduct of R.C.M.P. members had to be made to the Force. Public complaints of R.C.M.P. conduct were either dealt with by the Force or under one of the other accountability mechanisms canvassed earlier (e.g. civil action, complaint to politician, etc.). Thus, even prior to the changes in the late 1980s to provide some civilian oversight, the actions of individuals members were, and still are, subject to the external review mechanisms discussed in Chapter 4.

The new regime has considerably altered the accountability landscape. The P.C.C. is an external civilian entity that was given powers to deal with public complaints against members of the R.C.M.P. Transparency and accountability are reported to be the key principles informing the P.C.C. process. According to the P.C.C., the underlying rationale for its existence is to ensure: first, that individual members of the public will have their complaints fairly and impartially dealt with; and second, in examining complaints, ensuring that the public interest in fair and proper enforcement of the law is taken into

103 Royal Canadian Mounted Police Public Complaints Commission, Annual Report 1991-92 (Minister of Supply and Services, 1992) at 11; McDonald Commission, supra, note 32 vol. 2 at 968 outlines the process for internals and complaints at the time.

account.\textsuperscript{105} The provisions of the \textit{R.C.M.P. Act} and P.C.C. are committed to protecting the public against improper police conduct and providing a fair and appropriate remedy. It is also reported that the new public complaint process contains provisions to ensure the fair treatment of members against whom allegations have been made.\textsuperscript{106} However, the P.C.C. itself confesses that the public complaint process is, to say the least, "quite complex."\textsuperscript{107} Thus, it is important to determine whether members are in fact being treated fairly under the current accountability regime.

The province has potential input into the accountability of the federal R.C.M.P. in two ways: first, the \textit{R.C.M.P. Act} requires that the federal government consult the provincial minister for policing prior to the appointment of part-time members of the P.C.C. for that region; and second, Part VII permits public complaints to be made to the provincial policing oversight body (\textit{e.g.} Nova Scotia Police Commission) which forwards the complaint to the Force and P.C.C. for determination.\textsuperscript{108}

A public complaint can be filed with the Force or the P.C.C. As noted by the P.C.C., a person does \textit{not} have to be personally or directly involved in a matter to allege misconduct on the part of a member, so anonymous complaints, complaints by someone who

\textsuperscript{105} Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1988-89} (Minister of Supply and Services, 1989) at 5.

\textsuperscript{106} \textit{Ibid.}; also Ceyssens, \textit{supra}, note 96 at 7-2; In \textit{Re RCMP Act (Canada)}, [1991] 1 F.C. 529 (C.A.) at 556, it was noted that the civilian or independent complaints process is to avoid "pillorying of members of the Force."

\textsuperscript{107} P.C.C., \textit{ibid.} at 77.

\textsuperscript{108} Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1990-91} (Minister of Supply and Services, 1991) at 144. As noted by Scorer, \textit{supra}, note 70 at 8, there is no legislative requirements or qualities for the P.C.C. Chair or Vice-Chair. It is a 5 year appointment made after consulting with the province.
"heard" about an incident, or a complaint by the P.C.C. Chair are acceptable vehicles to initiate the process. A public complaint may create the need for investigations by the Force for three different purposes: first, to determine the possible need for disciplinary action or hearing under Part IV of the R.C.M.P. Act for a Code of Conduct/internal breach; second, to determine the validity of the public complaint under Part VII of the R.C.M.P. Act; and third, to determine whether charges should be laid for a violation of the law.

If attempts to resolve informally the public complaint fail, an investigation will be undertaken and interim/status reports will be provided to the complainant and member. The Commissioner has a discretion not to investigate a complaint or terminate an investigation in certain circumstances. Upon completing the investigation, a final report is forwarded to the complainant and member outlining the findings.

If the complainant is not satisfied with the results of the R.C.M.P. investigation the complainant can refer it to the P.C.C. for review. The P.C.C. can conduct a review and can take any number of steps: first, it can ask the R.C.M.P. to investigate further; second, the P.C.C. can investigate further; third, a public hearing can be held by the P.C.C.; and fourth, the P.C.C. can issue a report and recommendations to the Solicitor General and

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109 Supra, note 105 at 78-9.


111 The P.C.C., supra, note 108 at 39 has defined the following terms in these circumstances under s. 45.36(5) of the R.C.M.P. Act as: 1) trivial means on its face, it is of no consequence; 2) frivolous means on its face, it is devoid of substance; 3) vexatious involves a repetition of unsubstantiated complaints from the same person; and 4) bad faith means dishonestly for an improper purpose (and has two elements: a) desire to achieve improper purpose, and b) act of improper nature to further improper purpose).
Commissioner.\textsuperscript{112} In fact, the P.C.C. can institute a hearing without a Force investigation or report, and witnesses are compellable to testify. At a public hearing, the "parties" are the complainant, member(s) involved, and an officer designated by the Commissioner as the Appropriate Officer to represent the Force\textsuperscript{113} \textit{(i.e. not necessarily the interests of the member).}

After the completion of a review or hearing, the Chair or P.C.C. issues reports and recommendations to the R.C.M.P. Commissioner. Depending on the nature of the review or hearing, the P.C.C. can potentially complete five types of "reports" under the \textit{R.C.M.P. Act} which are disclosed to persons depending on their status: Report No. 1 is prepared by the Chair when the Chair is satisfied with the Force's disposition of a complaint and a copy is sent to the Minister \textit{(i.e. Solicitor General), Commissioner, complainant, and member (s. 45.42(2))}; Report No. 2 is prepared by the Chair when the Chair is not satisfied with the Force's disposition of the complaint and a copy is sent to the Minister and Commissioner (s. 45.42(3)); Report No. 3 is prepared by the Chair following an investigation by the P.C.C. if the Chair was not satisfied with the Force's disposition of the complaint, or alternatively, after an investigation that is deemed advisable in the public interest, and the report is sent to the Minister and Commissioner (s. 45.43(3)); Report No. 4 is prepared by the P.C.C. sitting as a hearing panel after inquiring into a complaint following the institution of a hearing by the Chair and a copy is sent to the Minister and Commissioner (s. 45.46(2)); and Report No. 5, which is prepared by the Chair as a final report following notice by the Commissioner of any further action that has been or will be taken with respect to the complaint, and a copy is

\textsuperscript{112} Scorer, \textit{supra}, note 70 at 15.

\textsuperscript{113} \textit{Supra}, note 105 at 97.
sent to the Minister, Commissioner, and "parties" (excluding intervenors at public
hearings)(s. 45.46(3)). The P.C.C. can only review and recommend, it cannot enforce its position, which
means that only the Commissioner can institute recourse, or the Solicitor General can take
steps to deal with the recommendations (e.g. direct implementation or make legislative
changes). However, it would be a mistake to underplay the impact that formal and
informal pressure from the Solicitor General can have on the Commissioner. It should also
be noted that Regulations affecting the R.C.M.P. can be implemented by the government
without going through Parliament, which can legislatively address issues that the
Commissioner fails to address to the satisfaction of the Solicitor General. Experience has
shown, however, that the notion of responsive or expedited Regulation amendments is not
very successful or common. The bottom line is that once the P.C.C.'s report or
recommendations are made (as it is with the E.R.C.), if the Force does not respond, take
action, or rejects the P.C.C. position, it can take no further action and there is no appeal
process. On the other hand, the public nature of the P.C.C. process enables
complainants to bring other pressure to bear on the Commissioner (e.g. media). If the
Commissioner is too unreasonable in dealing with a public complaint there are attending
risks, which does not appear to be as much the case with the E.R.C. process.

114 *Supra*, note 110 at 52-56.
115 Either party could ask for the report under the Privacy Act, R.S.C. 1985, c. P-21 (as amended), but s. 12(1) limits access to personal information, and s. 26 requires everything else be edited out (i.e. no real disclosure). The Access to Information Act, R.S.C. 1985, c. A-1 (as amended) has the same limitations; see *ibid.* at 52-56.
Although public complaints (Part VII) and internal complaints/discipline (Part IV) are two separate processes, the P.C.C. notes there are linkages between the two sub-regimes to the extent that: first, the timing of the complaints and investigations can be concurrent; second, a public complainant should know the discipline imposed on a member; third, the P.C.C. can both make findings or recommendations on appropriate discipline; and fourth, there is a limited role for the P.C.C. in the discipline process. The result is that the E.R.C. and P.C.C. functionally and pragmatically have overlapping jurisdictions in dealing with internal matters of the Force.

The first Chair of the P.C.C. did not seem to appreciate fully that individual members have interests that may be different from the organization in this investigative and accountability process. His major concern regarding the independence of the P.C.C. was that it not be "captured" by the R.C.M.P., and that "Care must be taken that the elephant does not roll over or swallow the little watchdog!" It is a mistake to consider the issue of accountability to be entirely organizationally based. There should also be concern that the organization does not roll over on the individual member as well. Although relations appear to be cordial between the R.C.M.P. and P.C.C., this has not always been the case.

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118 Supra, note 105 at 70.

119 Ibid. at 7; for example, supra, note 96 at 51 the P.C.C. recommended considering whether disciplinary action should be taken against a member.

120 Supra, note 108 at 150-51.

121 For example, ibid. at 65-6, it was acknowledged that some news stories said the P.C.C. Chair used the term "cowboy escapade" to describe an incident in Thailand in which a member was killed, and the P.C.C. used its Annual Report to deny such a comment. At 32, it was admitted that a different tone may be required in reports because "Commission findings have sometimes been unnecessarily blunt."
Some interesting features arise from the Annual Reports of the P.C.C. First, as reported by the P.C.C., there are three main, and ongoing, areas of contention between the R.C.M.P. and P.C.C. The first source of conflict between the Force and the P.C.C. has been the issue of disclosing the specific discipline imposed upon a member as a result of a public complaint. The Force asserts that privacy legislation prevents it from disclosing the specific discipline imposed upon a member, while the P.C.C. asserts that public confidence necessitates identifying the discipline imposed.

A second area of contention is whether the R.C.M.P., after it deems that a complaint is not a Part VII public complaint, can refuse to cooperate with the P.C.C. It is the Force’s position that if a complaint is a "non-Part VII" (i.e. off-duty conduct) the P.C.C. has no further jurisdiction. The P.C.C., of course, objects to this stand, and asserts that the Force should not be the arbiter of jurisdiction. A complaint dismissed by the Commissioner as vexatious, malicious or not made in good faith (s. 45.36(5)) may also be

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122 The author observed that the P.C.C. Annual Reports were prepared in such a way as to highlight cases where it disagreed with the findings of the Force, when cases where they agreed logically should have come first. For example, supra, note 104, and Royal Canadian Mounted Police Public Complaints Commission, Annual Report 1993-94 (Minister of Supply and Services, 1994).

123 Supra, note 110 at 80-81 and note 103 at 111. The British Columbia, Cariboo-Chilcotin Justice Inquiry, A Report on the Cariboo-Chilcotin Justice Inquiry (Victoria, 1993) (Commissioner: Judge Anthony Sarich) ("Chilcotin Inquiry") at 12 also expressed a strong dislike for the R.C.M.P. policy of refusing to disclose the discipline imposed on members. An article by Kim Pemberton, "Penalties for teddy-bear arrest to be secret" in The Vancouver Sun March 19, 1997 at B2 reveals non-disclosure is still the position of "E" Division. However, the R.C.M.P. Commissioner recently seems prepared to abandon this position in one prominent case where it appeared rather expedient to do so, see Jim Brown, "RCMP changes mind on probe of Airbus leak" in The Vancouver Sun (15 January 1997) at A5.

124 Supra, note 103 at 111.

125 Ibid. at 112.
interpreted as no longer being a Part VII complaint. In such scenarios, the matter is investigated by the R.C.M.P. and the complainant must apply for review to the Commanding Officer of the Division and not the P.C.C.\textsuperscript{126}

The third area of disagreement is over the meaning of "conduct."\textsuperscript{127} It is not defined in the legislation and the Force refers to the \textit{Code of Conduct} as part of the determination of whether the complaint is valid. On this basis it can be asserted that certain conduct does not fall within the parameters of a "complaint" for the purposes of Part VII.\textsuperscript{128} For example, off-duty conduct is not captured by the complaint definition.\textsuperscript{129} Further, if the complaint involves a matter that does not relate to the \textit{performance of a duty and conduct} of a member, the Force may assert it is not a public complaint.\textsuperscript{130}

The total number of R.C.M.P. personnel in "E" Division is approximately 5,019 (4,731 Regular Members; 15 Special Constables; 273 Civilian Members), who handled just over 1,000,000 files (\textit{i.e.} hardcopy and paperless records) in each year between 1992 and

\textsuperscript{126} Scorer, \textit{supra}, note 70 at 12. Royal Canadian Mounted Police Public Complaints Commission, \textit{Annual Report 1995-96} (Minister of Supply and Services, 1996) at 53-55 highlights a "sharp increase" in the use of s. 45.36(5) of the \textit{R.C.M.P. Act} by the Force to refuse to investigate a complaint.

\textsuperscript{127} \textit{Supra}, note 103 at 111.

\textsuperscript{128} Scorer, \textit{supra}, note 70 at 12. Section 45.35(1) defines a complaint as follows: "Any member of the public having a complaint concerning the \textit{conduct}, in the \textit{performance of any duty or function} under this Act, of any member or other person appointed or employed under the authority of this act may, whether or not that member of the public is affected by the subject-matter of the complaint, make the complaint to..." (emphasis added).

\textsuperscript{129} \textit{Ibid.}

\textsuperscript{130} \textit{Ibid.;} see also, R.C.M.P. A.M., "Public Complaints" at XII.2.E.2.
In 1995, 1066 public complaints lead to 73 concurrent internal investigations. Public complaints data is reflected in Chart 1. The data indicated is the number of complaints against members nationally and in "E" Division. According to data provided by the P.C.C., even after the length of time to conduct the initial investigation, it can take anywhere from 8 to 14 months for it to conduct a review of a complaint. As early as 1989-90, the P.C.C. admitted that "...complainants and members of the Force can readily become exasperated at the time it takes to resolve complaints." The time taken to provide oversight is complicated by the number of steps

This data only reflects incidents where a record was created, it would not be unreasonable to also note that tens of thousands of contacts also occur with the public that are never documented (e.g. public inquiry or assistance where no file is generated). This data also does not reflect the number of contacts that occurred within the record or file (e.g. interviewed 27 witnesses in one file), but only the gross number of files generated, not person contacts. The number of R.C.M.P. contacts with the public nationally is approaching 10,000,000 a year: "E" Division DSRR Bulletin, The Informer at 10. The number of regular members nationally is around 18,000 (e.g. 1988-89 - 17,904; 1990-91 - 17,742; 1992-93 - 17,969).

This data was obtained or extrapolated from the various P.C.C. Reports, supra, notes 96, 103, 104, 105 108, 110, 122, Royal Canadian Mounted Police Public Complaints Commission, Annual Report 1995-96 (Minister of Supply and Services, 1996) and "E" Division data, note 131. Approximately 50% of public complaints are resolved informally: Informer article, ibid.; Gerry Ferguson and Marli Rusen, Discipline of Municipal Police In British Columbia (Report To The Commission Of Inquiry Into Policing in British Columbia, 1993) at 157 found that British Columbia Police Commission data shows that in 1991 and 1992 approximately 250 internal or public complaints occurred for approximately 1,800 municipal police officers which amounts to 1 incident for every 7 municipal officers.

Supra, note 96 at 4. Further, at 37 the P.C.C. stated "The average turnaround time for [review] reports in the past year was approximately 200 days."

Supra, note 110; supra, note 104 at 5 the P.C.C. discusses reducing time to deal with complaints, but is vague on time frames.
* Data considered inaccurate due to the introduction of a computer system
+ RCMP Data Unavailable
in the process and the need for thoroughness of reviews. Given the number of "unfounded" or "unsubstantiated" allegations identified in 1993-94, it is not surprising members may have a dubious view of the process.\textsuperscript{135} For example, the P.C.C. reported the following R.C.M.P. statistics: only 22\% of complaints were substantiated in 1987 and 1988; in 1987, 24\% were unsubstantiated and in 1988, 21\% were unsubstantiated; further, in 1987, 54\% \textit{were unfounded} (i.e. did not happen) and in 1988, 57\% \textit{were unfounded}.\textsuperscript{136} Interestingly, substantiation and foundation rates are not highlighted by the P.C.C. Clearly the number of "unfounded" complaints reported by the R.C.M.P. reflects the vulnerability of members to improper accusations.

"E" Division reports that in 1994 and 1995, 72 and 250 complaints, respectively, were disposed of by the R.C.M.P. as frivolous, malicious, vexatious or not made in good faith.\textsuperscript{137} Of the members surveyed in a recent report for the P.C.C., 18\% felt that there should be repercussions for false or trivial complaints.\textsuperscript{138} A further 13\% reported that they felt a public complaint had adversely affected their careers.\textsuperscript{139} As for satisfaction with the public complaint process, 33\% of members were very (15\%) or somewhat (18\%)

\begin{thebibliography}{9}
\bibitem{135} Supra, note 122 at 39, 45, 49, 59, 60, 63 and 80 outlines some cases.
\bibitem{136} Supra, note 105 at 23.
\bibitem{137} "E" Division correspondence, \textit{supra}, note 131. One explanation for the significant rise in the frivolous, malicious, vexatious or bad faith classification was a change in the commissioned officer responsible for making these decisions.
\bibitem{138} Statistics Canada (Special Surveys Division), \textit{RCMP Public Complaints Commission Survey Analytical Report} (June, 1995) at 22.
\bibitem{139} \textit{Ibid.} at 20; but 82\% also said the review was fair by the P.C.C.
\end{thebibliography}
dissatisfied, while 51% were very (23%) or somewhat (28%) satisfied.\footnote{Ibid. at 19; for a municipal comparison see Karen A. Ryan, Municipal Police Officer Survey: Opinions Regarding Citizen Complaints Procedures (Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994); Koenig, supra, note 67 at 23 reports that the perception of public evaluations of police officers declines as the formal education of the officer increases.} Even more critical are the survey findings of the Oppal Commission that "54 per cent [of R.C.M.P. members] believed that the RCMP complaints process was not fair and impartial, and 50 per cent believed that the process did not even meet the agency's needs"\footnote{Supra, note 43 at J-23.} (emphasis added). Of the general comments by members in the P.C.C. survey (202 out of 363 members or 56%): 54% of members felt inappropriate complaints (trivial/false) were made to the P.C.C. (not allowed to go as far as they do); 41% indicated that the process for dealing with complaints is not satisfactory (not kept informed or interviewed, P.C.C. not knowledgeable enough about R.C.M.P. procedures); 38% felt it was a waste of time, money, and redundant; 26% commented on the impact on morale, the process was very stressful, and the increase that resulted on an already heavy workload; and 25% felt it took too long to deal with complaints.\footnote{Ibid. at 22.} In sum, there still seems to be a lot of dissatisfaction. Of the members interviewed by the author, five expressed dissatisfaction with the process because they were never served the proper notice forms required for each investigation.\footnote{M15, M9, M25, M56 & M67.} In several cases members also reported not receiving interim reporting letters.

Member concerns over false complaints seem justified given the number of no evidence, unfounded and fabrication incidents recounted in the 1994-95 Annual Report of the
P.C.C.\textsuperscript{143} Further, consistent with the assertions of Perez in Chapter 5 on police misconduct, the P.C.C. observes that:

Commission reports confirm that RCMP members have seldom failed to act with professional restraint when dealing with extremely difficult, unreasonable or outright abusive people.\textsuperscript{144}

Yet, the P.C.C. took the position in one case that the respondent members acted improperly by requesting that public mischief charges be laid against a complainant.\textsuperscript{145} Members are also reported to have, on occasion, expressed dissatisfaction with the fact that some of the complaints sent to the members by the P.C.C. are extremely minor in nature.\textsuperscript{146} However, the P.C.C. reports that it has no power to distinguish between major and minor incidents and must proceed with or forward all complaints. Another problem, as acknowledged by the P.C.C., is that a member who is the subject of a public complaint may find it very difficult to continue working in a community, particularly a small rural community, where it may quickly become common knowledge that a complaint has been made.\textsuperscript{147}

One feature of the public complaints process that has been the subject of criticism, even by the P.C.C., is that there is \textit{no limitation period} for the making of a public complaint (Part VII).\textsuperscript{148} The P.C.C. itself indicates that it is self-evident that there should be a

\begin{itemize}
\item \textsuperscript{143} \textit{Supra}, note 96 at 19 (did not hit with gun butt), 20, 21, 22, 26, 41 (fabrication), 43.
\item \textsuperscript{144} \textit{Supra}, note 108 at 34.
\item \textsuperscript{145} \textit{Supra}, note 110 at 42. A former Crown prosecutor interviewed by the author expressed the view that is not only inappropriate for review bodies to make such statements, but such conduct, in some circumstances, may amount to criminal obstruction.
\item \textsuperscript{146} \textit{Ibid.} at 19.
\item \textsuperscript{147} \textit{Supra}, note 103 at 4.
\item \textsuperscript{148} \textit{Supra}, note 110.
\end{itemize}
limitation period to file complaints "for all the reasons that limitations periods are considered desirable."\textsuperscript{149} It was recommended in 1994-95 by the P.C.C. that a 6 month limit be imposed for a complainant to seek a review of a complaint.\textsuperscript{150}

One case highlights the issue of whether civilian agencies can properly judge police actions. In this case, a member was charged with, and acquitted of, aggravated assault and careless use of a firearm arising from a police pursuit and shooting. An Interim P.C.C. Report found that the officer did not discharge his weapon to protect life and property, contrary to policy. The Commissioner disagreed with this finding and the Chair of the P.C.C., in a Final Report, admitted that the judge in the criminal case specifically said (using the same test and threshold) that the officer was not negligent and acted properly (on a balance of probabilities).\textsuperscript{151} It appears the P.C.C. did not understand the law that applies to the use of force by police in this case. One does get the sense, when reading some of the reported cases, and the format of Annual Reports, that the perspective of the P.C.C. is somewhat self-serving.\textsuperscript{152}

Concern about how knowledgeable the P.C.C. can be about the manner in which the R.C.M.P. handles matters is found in the fact that it reported in 1991-92 that each Division (K, D, G, M, & F) has its own Complaints and Internal Investigation Section ("CIIS") (now Internal Affairs Unit) "which investigates the [public] complaints and drafts reporting letters

\textsuperscript{149} \textit{Ibid.} at 82.

\textsuperscript{150} \textit{Supra,} note 96 at 86.

\textsuperscript{151} \textit{Supra,} note 122 at 31-33.

\textsuperscript{152} \textit{Supra,} note 103, especially at 90-1. The recommendations sometimes seem parochial, unrealistic and uninformed, particularly when making Force-wide recommendations for one incident.
of the results to the complainants". The problem is that this is not entirely accurate, since most complaint investigations, public or internal, are conducted at the local level, and CIIS only becomes involved in certain circumstances, although the section does draft reporting letters. The fact that CIIS does not conduct all investigations was confirmed with CIIS personnel in "E" Division. Members report having the same concern about the knowledge level of the P.C.C., with 41% indicating that the P.C.C. is not knowledgeable about R.C.M.P. procedures.

The P.C.C. also appears to be strongly wedded to the idea that most police matters can be dealt with by policy, and has no real appreciation for the reality of discretion, the impact of subjecting every action to policy, or how unrealistic it is to amend reams of policy and expect to keep all members abreast of the changes. For example, it must be appreciated that the Force currently has over 41 binders containing administrative and operational policies from the national, divisional, sub-divisional (soon to be district), detachment, and unit level. This does not include the recent trend by the Attorney General’s office in British Columbia to issue detailed policy statements on how certain matters will be handled.

\footnote{153} Ib\textit{id.} at 15.

\footnote{154} Scorer, \textit{supra}, note 70 at 13. Primarily where the case is very complicated, beyond the resources of the detachment, or the allegations were particularly sensitive or serious.

\footnote{155} Also, Scorer, \textit{ibid.}

\footnote{156} \textit{Supra}, note 138 at 22.

\footnote{157} The manuals/binders are currently broken into the following: 8 Operations Manuals; 20 Administration Manuals; 3 Career Management Manuals; 1 Forensic Identification Manual; 1 Lab Services Manual; 1 Tactical Operations Manual; 1 Security Manual; 6 Informatics Manuals (this does not include Property Services Manuals, Financial Administration Manuals or Public Service Personnel Manuals); These manuals are three ring binders that range from 3 to 6 inches in size.
(e.g. violence against women and hate/bias crimes). This also does not include policy issued from provincial and federal bodies that can impact on the police (e.g. provincial firearms policy, enforcement of family court orders). Aside from the impossibility of having an intimate knowledge of all this policy, any notion of maintaining an ongoing knowledge of amendments and changes is unrealistic. Members must rely on common sense in many instances, and certainly do not have policy at their fingertips on every occasion to guide decisions. While it is not objectionable to put forth policy direction, it must be acknowledged just how complicated and detailed such policy has become. Problems arise when members are expected to "know" and apply every policy that exists. Interest groups often focus on one policy statement and sometimes forget that their issue is only one of many the police are being directed to implement. Recently, the author, in consultation with stakeholders, has encountered demands that members be severely disciplined for failing to comply with new mandatory policy direction.

Interestingly, the P.C.C. does not believe there is any reason for the Force to conduct a concurrent investigation when the P.C.C. has initiated an investigation or hearing. This observation seems limited for several reasons. First, any agency must conduct inquiries before attending a hearing to prepare its case, respond to allegations, and obtain the facts to represent itself properly. Second, the Force has internal mechanisms of accountability that must be addressed. Third, the Force must be accountable for the actions of its members and

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158 In 1989, the author conducted an informal time study in which all policy amendments, communications and correspondence from the various levels in the Force that was required reading was maintained for a one month period. It took on average four hours a week just to keep up on this material and that time period did not include any time to read the other material already in the manuals.

159 Supra, note 110 at 95.
take steps to ensure there are no interim measures that must be taken in relation to a complaint \(i.e.\) suspend member). This is particularly so when, as reported in 1990-91, the P.C.C. will normally await the outcome of criminal trials since "the Commission will have the benefit of evidence given under oath and judicial findings."\(^{160}\) It can be inferred that the P.C.C. is looking for derivative evidence or disclosures that may advance an investigation or hearing. Further, criminal evidence and thresholds are not always amenable to the civilian tests for evidence and findings.

Of particular interest to this thesis is the position of the P.C.C. that the R.C.M.P. must review and improve its policies and procedures with regard to the relationship and coordination of criminal, internal, and public complaint investigations of its members to ensure that all members \textit{properly understand} the different procedures that apply to each type of investigation.\(^{161}\) This is of interest because a central concern regarding ordered statements is that they are being improperly used in other investigations and members are not properly aware of the procedures. The Force has not been very successful in coordinating investigations and educating members. During interviews, the author repeatedly found that investigating NCOs and subject members were ignorant of even the most basic differences between the investigations, and many conceded they had no idea how the process worked.\(^{162}\) For example, in the course of 88 interviews of members from the rank of

\(^{160}\) \textit{Supra}, note 108 at 146. This also adds considerable time to deal with a matter; for example, there was a police involved shooting in Alberta in September 1990, the member was charged and found not guilty on January 27, 1992, yet the P.C.C. reactivated its investigation even though the test for whether the member appropriately discharged a weapon was the same.

\(^{161}\) \textit{Supra}, note 110 at 36.

\(^{162}\) For instance, M92, an NCO, admitted that he had no idea how the internal and public complaint process worked and just "bumbled along." \textit{Ibid}. at 86 corroborates the finding that the Force needs to clarify investigations and procedures by quoting a memo from a Staff
constable to staff sergeant, not one respondent was aware that statements or answers made
during an attempt to informally dispose of a public complaint cannot be used in criminal,
civil, or administrative proceedings.\textsuperscript{163}

"E" Division reports that it has taken several steps to deal with the knowledge level of
members.\textsuperscript{164} First, the Officer in Charge of CIIS, over the past year and half (1994-1996),
has travelled extensively to speak to investigators and managers. The author spoke
informally with several NCOs that attended this training and the comments were not very
complimentary. For example, one NCO advised the author that he "came out [of the
seminar] more f.....g confused than when [he] went in." Second, a guidebook has been
prepared for investigators to assist "in understanding this very confusing area." Third, a
training presentation about the process is made on the Detachment Commanders Course.
Fourth, policy has been completely rewritten and updated to streamline the process. The
problem, however, as will become evident, is that this new policy runs counter to the
recommendations of the E.R.C., P.C.C. and the direction of the law on investigations. It
remains to be seen whether these initiatives will assist, but it seems rather late that such steps
should be taken 8-10 years into the process. Moreover, based on cases that the author has
been involved in and research interviews, the purported education mechanism is incomplete
since investigators are still confused. The author frequently encounters investigators who
express frustration about the process, proclaiming "no one knows what to do." Further,

Sergeant to the Officer in Charge of Administration and Personnel: "I still have some confusion
as to the procedure to be followed in these cases under investigation and I would suggest others
are confused as well. I would suggest some form of flow chart for these types of matters."

\textsuperscript{163} \textit{R.C.M.P. Act}, s. 45.36(2).

\textsuperscript{164} \textit{Supra}, note 131.
little is being done to educate the street level operational members who are most often the
subject of an investigation. Noticeably lacking is any training for the operational members.
Attention to this issue is limited to the minimal training offered investigators and detachment
commanders. The Force seems unconcerned that the members at the bottom are not formally
educated about the process. The representation provided to members internally is also
questionable and will be examined in Chapter 7.

A recent survey regarding the P.C.C. also indicated that the public complaint process
is not meeting with the results that were expected. For example, it was found that a large
majority of complainants (81%) were either very (71%) or somewhat (10%) dissatisfied with
the P.C.C. review.¹⁶⁵ This is probably not surprising since 46% of complainants stated
that they wanted to prove the complaint was true.¹⁶⁶ A further 35% of complainants
wanted the officer punished.¹⁶⁷ Not surprisingly, 10% of complainants wanted charges
dropped (18% wanted money).¹⁶⁸ In fact, only 8% of complainants claimed to have

¹⁶⁵ *Supra*, note 138 at 2-19. During a meeting with the author, a P.C.C. Regional Director
tried to justify these findings on the basis that the Survey did not ask the right question or
sample the right group. In other words, individuals who called to make an inquiry, even for the
most inconsequential reason, or who did not have a complaint, should have been sampled and
the satisfaction rate would be higher. This would hardly address the dismal findings on the core

¹⁶⁶ P.C.C. Survey, *ibid*.


¹⁶⁸ *Ibid.* at 15; see also, Tammy Landau, *Public Complaints Against the Police: A View from Complainants* (Toronto: Centre of Criminology, University of Toronto, 1994).
obtained the results they wanted.\textsuperscript{169} As for independence, 70\% of complainants were aware that the P.C.C. was separate from the R.C.M.P., but only 21\% stated, in their opinion, that the P.C.C. was independent from the R.C.M.P.\textsuperscript{170} Such findings are noteworthy, and endorse the findings in Chapter 5 that it is wrong to assume that civilian review necessarily leads to greater public confidence and/or greater accountability. The unfortunate aspect of such results is that it may lead to further bureaucratic responses to be seen as "doing something." As identified in Chapter 1, the P.C.C. is now unabashedly committed to demanding statements from members and/or drawing adverse inferences when subject members decline, as is their right, to assist the P.C.C. in an investigation.\textsuperscript{171} It is easy to see how mechanisms such as an ordered statements could be perceived as a basis to exert greater control and responsiveness in the accountability process at the expense of member’s interests in fairness and balance.

7. External Review Committee

The E.R.C. essentially performs the role of an external civilian ombudsman as envisioned by the Marin Commission by overseeing limited grievance and discipline aspects

\textsuperscript{169} P.C.C., \textit{ibid.} While such a low rate does not necessarily mean the system is working badly (or that the system is working well if 92\% of complainants got what they wanted). More detailed research is required about whether the concerns are about outcomes, the way the complaint was handled or a variety of other matters. It does seem clear though that the P.C.C. is not attaining a satisfaction rate that was probably expected.

\textsuperscript{170} \textit{Ibid.} at 17.

\textsuperscript{171} \textit{Woods v. Cross} (1993), 92 Man. R. (2d) 94 (C.A.) was an unsuccessful appeal against the decision of the Manitoba Law Enforcement Review Board on the basis that it drew an adverse inference from the police officer’s failure to give testimony despite wording which provided that he was not compellable as a witness. \textit{Leach v. RCMP PCC}, [1991] 3 F.C. 560 (T.D.) found s. 7 of the \textit{Charter} was not violated by the P.C.C. model.
of the internal affairs of the R.C.M.P.  

Although there are hundreds, even thousands of grievances in a year in the R.C.M.P. ("E" Division alone had 508 in 1994), the E.R.C. only deals with a small fraction of grievances. As the E.R.C. has acknowledged, its grievance jurisdiction is severely limited for several reasons. First, the R.C.M.P.

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173 Data provided by "E" Division indicated that in "E" Division alone there were 1,436 grievances submitted between 1990-96 as follows:

- 1990 - 16
- 1994 - 508
- 1991 - 73
- 1995 - 252
- 1992 - 188

The R.C.M.P. provided the following data on the E.R.C. workload since its inception (Figure 3):

<table>
<thead>
<tr>
<th>Year</th>
<th>Grievances</th>
<th>Discipline</th>
<th>Discharges</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988-89</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>1989-90</td>
<td>6</td>
<td>7</td>
<td>0</td>
<td>13</td>
</tr>
<tr>
<td>1990-91</td>
<td>33</td>
<td>11</td>
<td>0</td>
<td>44</td>
</tr>
<tr>
<td>1991-92</td>
<td>32</td>
<td>3</td>
<td>0</td>
<td>35</td>
</tr>
<tr>
<td>1992-93</td>
<td>19</td>
<td>2</td>
<td>1</td>
<td>22</td>
</tr>
<tr>
<td>1993-94</td>
<td>55</td>
<td>6</td>
<td>0</td>
<td>61</td>
</tr>
<tr>
<td>1994-95</td>
<td>52</td>
<td>7</td>
<td>1</td>
<td>60</td>
</tr>
<tr>
<td>1995-96</td>
<td>18</td>
<td>13</td>
<td>1</td>
<td>32</td>
</tr>
<tr>
<td>1996-97</td>
<td>30</td>
<td>5</td>
<td>1</td>
<td>36</td>
</tr>
<tr>
<td>1997-98</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
</tbody>
</table>

(to May 2/97)

Total 248 56 4 308

174 Ibid. at 3.
decides how a matter is to be interpreted jurisdictionally. Second, commissioned officers of the Force determine whether a particular grievance falls within the jurisdiction of the E.R.C. Third, the E.R.C. has been told of matters that might have been referred but were not referred. Even more specifically, the E.R.C. notes that its jurisdiction is determined by the Force because it is the Force that amends the regulations setting out the E.R.C.'s mandate. Further, the Force determines what types of grievances are covered, and it decides in each case whether the matter falls within the referrable list.\textsuperscript{175} It is of particular concern that under the \textit{R.C.M.P. Act} and \textit{Regulations} the Force completely controls the grievance referral process.\textsuperscript{176} The E.R.C. does not determine whether a matter is referrable and will not even be aware of a case if it is deemed non-referrable by the Force.\textsuperscript{177} It is clear that the Force should not have the authority to determine the jurisdiction of the external civilian oversight and reviewing body. The E.R.C. has noted that with grievances, which is probably equally applicable to discipline:

\begin{quote}
...there is still an unfortunate sentiment of unfairness among members of the Force generated by the fact that the Force will often hold members strictly to their time limits while not putting the same emphasis on the timeliness of its own responses.\textsuperscript{178}
\end{quote}

\textsuperscript{175} \textit{Supra}, note 172 at 2-3. Royal Canadian Mounted Police External Review Committee, \textit{Annual Report 1995-1996} (Minister of Supply and Services, 1996) at 7 comments that "not all grievances are referrable to the Committee. In fact, the Committee is not involved in the decision as to whether a matter should be referred to it, neither is it possible for the Committee to monitor, of its own motion, whether certain grievances were not referred to it which ought to have been."

\textsuperscript{176} Royal Canadian Mounted Police External Review Committee, \textit{Annual Report 1988-1989} (Minister of Supply and Services, 1989) at 5.

\textsuperscript{177} \textit{Ibid.}

\textsuperscript{178} Royal Canadian Mounted Police External Review Committee, \textit{Annual Report 1990-1991} (Minister of Supply and Services, 1991) at 14-15. This refers to the fact that the Force strictly enforces the 30 day statutory limit for members to file a grievance. The Force is not bound by such a limit statutorily, and it does not necessarily move quickly to respond to grievance requests
Moreover, although members have a statutory right under s. 31(4) to "such written or documentary information under control of the Force and relevant to the grievance as the member reasonably requires", it was the view of one commissioned officer in Administration Services in "E" Division that the decision-maker whose decision is being grieved will decide what is relevant. On this basis, the Force unilaterally denies information to members submitting grievances. The author confirmed one case through interviews in which an officer denied disclosing the very correspondence that established that the officer had improperly exercised his authority. One has to wonder how seriously the E.R.C. and the grievance process are really taken by the Force or members if its grasp, authority, and ability are so severely limited. The low frequency of review also does not indicate that an effective process is present. In fact, during interviews the author was advised by four members (and two other members who did not form part of the interview group) that they were trying to take their complaints to the P.C.C. because the E.R.C. did not provide an effective avenue of redress. The problem is that the Force denies that the P.C.C. has jurisdiction to deal with member complaints because its authority relates to "public" for disclosure. M82 at the time of interview had been waiting over 2.5 years for disclosure of basic documents in a grievance. A one to two year wait for disclosure was not an uncommon complaint from the members interviewed. E.R.C. Case G-138 demonstrates the Force's strict reliance on statutory time limits.

M28 & M82 specifically had this stated in correspondence filed in a grievance. It is common knowledge that the Force decides what is relevant. E.R.C. Case G-147 amply demonstrates the lengths the Force can go to deny access to material. The Force usually denies access because the member has requested documents (which he or she has usually never seen) that the member has not proven are relevant. As the E.R.C. notes though, it is impossible to make any detailed relevancy argument when you have never had the document.

M28.

M32, M40, M59 & M85.
complaints and R.C.M.P. members are not "Any member of the public having a complaint...".\textsuperscript{182} As a result, members are starting to have their spouses, family members or other citizens make complaints on their behalf or separately.

In relation to discipline, the E.R.C. has jurisdiction to review "formal" discipline, but it cannot review "informal" discipline taken by an Adjudication Board or certain informal discipline imposed by a member in command.\textsuperscript{183} As a result, Scorer rather optimistically states:

The E.R.C. provides an independent body whose role it is to oversee internal disciplinary appeals in attempts to ensure equitable treatment for members, protection of their rights, and to heighten the RCMP's accountability to the public.\textsuperscript{184}

The amendments pertaining to discipline in the R.C.M.P. seem to have been geared towards a number of objectives: first, to institute remedial and corrective disciplinary processes; second, a right to a fair hearing; third, alleviate inherent inequities; fourth, firmly entrench the rights of members of the Force; and last, guarantee the fair treatment of members.\textsuperscript{185}

What has been the result? First, the E.R.C. itself concedes that the discipline process is complicated and can "take years."\textsuperscript{186} It was reported in 1990-91 that no complete and accurate statistics are available, but based on information available to the E.R.C., it was

\textsuperscript{182} Section 45.35(1) of the \textit{R.C.M. P. Act}. The Force's position was confirmed in discussions with P.C.C. staff.

\textsuperscript{183} \textit{Supra}, note 173 at 2-3. Section 45.15(2) (also s. 41(9)) states informal discipline under subsection (1) (a)-(d) cannot be grieved or appealed).

\textsuperscript{184} \textit{Supra}, note 70 at 35.

\textsuperscript{185} \textit{Supra}, note 54 at 1-2; 1991-92 Report, note 70 at 18-20 provides a good overview of the R.C.M.P. disciplinary process internally.

estimated that the overall average time between an incident and its ultimate resolution is slightly less than two years in the case of both discipline and grievances. Based on research interviews, discussions with other personnel, and experience, this is probably an underestimate currently. Even more disturbing, after nine years of operation, it was found that despite members giving it a fairly high rating, the E.R.C.'s role was not well understood by a majority of the members of the Force. In fact, in the initial stages, the E.R.C. noted that an internal Staff Relations Branch Newsletter erroneously described the process of referral to the E.R.C., and it took several months of examination by the Force before it amended its release.

Even if the E.R.C. does manage to exert jurisdiction over a matter, it does not have the power to reverse adjudication, discharge, or grievance findings; it can only make findings and recommendations because the Commissioner is not bound (the same as with the P.C.C.) to implement any recommendations. There are instances in which the Commissioner has, despite very strong statements about the actions of the Force or adjudication boards, rejected the recommendations of the E.R.C. on disciplinary matters, which certainly raises

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187 *Supra*, note 178 at 23. E.R.C. Case G-144 dealt with a minor grievance regarding meal claims while on training and it took six years to deal with it; see, *Annual Report 1995-96*, note 175 at 22.

188 The author was apprised of, and is personally aware of, grievances and discipline matters that are over three years old. M37 referred to a discipline case that was over 5 years old.

189 *Supra*, note 186 at 3.

190 *Supra*, note 176 at 17; R.C.M.P., (August, 1988) *Pony Express*. In the E.R.C.'s view, this erroneous information was unfortunate and should not have occurred.

191 Scorer, *supra*, note 70 at 35; see ss. 32(2) and 45.16(6).
questions about the independence and accountability of the process. Moreover, status and rank continue to rear their heads in the R.C.M.P., as the E.R.C. referred to a grievance in which the grieving commissioned officer asserted that the situation had not been properly reviewed because all of the decision-makers were lower in rank than him.

The E.R.C. has also noted that unlike the case with public complaints (Part VII at s. 45.47) which requires that a "record" of all public complaints be kept, there is no requirement for a similar record to be maintained in relation to grievances, discipline, discharge, or demotion cases that are dealt with by the Force.

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192 The R.C.M.P. provided data (as of May 2, 1997) indicating that in 206 grievance cases where the E.R.C. issued findings and recommendations the R.C.M.P. Commissioner has reached a decision in 178 cases (25 were awaiting the Commissioners decision) and in 88% (157) cases he agreed, 12% (21) he disagreed, and in 2 he asserted the E.R.C. had no jurisdiction. With respect to discipline cases the E.R.C. has issued findings and recommendations in 49 cases and the Commissioner has made a decision in 40 cases (4 awaiting decision, 5 withdrawn by member) and in 73% (29) of the cases he agreed, but in 27% (11) of the cases he disagreed. In the case of discharge/demotion cases the E.R.C. has issued findings in 2 cases and the Commissioner has agreed 50% (1) and disagreed 50% (1) with the findings. As an example, the E.R.C. supra, note 173 at 10-11, cites case G-85 in which, despite the E.R.C. finding that a Medical Discharge Board had acted improperly, asked wrong questions, and used wrong procedures, the Commissioner still discharged the member, rejecting the position of the E.R.C. to make a new decision; at 29-31, case D-25 is cited in which the E.R.C. recommended demotion (in the circumstances) in an alleged $5 shoplifting of sports cards and the Commissioner rejected this course and accepted the Adjudication Boards sanction of dismissal. Supra, note 172 at 5-6 the E.R.C. reviews Case No. 1 in which the E.R.C. recommended no dismissal for a $1.79 theft based on the extenuating facts, but the Commissioner rejected this view and dismissed the member. Even more recently, in E.R.C. File No. 3200-96-003, the Acting Chair found the Adjudication Board made "serious errors" and "a [had a] serious misappreciation of vital evidence" (at 53), yet the Commissioner ignored the recommendation to drop the allegation against the member and confirmed the dismissal sanction. See also the decision of the Commissioner, dated December, 1996, to dismiss a member in a case where the Acting Chair of the E.R.C. found several notable errors by the Board in its treatment of the evidence on sanctioning, and that the sanction was fundamentally unfair in the circumstances.

193 Supra, note 173 at 17.

194 Supra, note 176 at 20.
these types of actions means there is no reference point from which the accountability of the organization can be measured. This fact also limits external scrutiny and leads to unnecessary speculation about internal processes.\(^\text{195}\)

When conducting a review of Force action, the E.R.C. states it is attempting to achieve a balance among the different interests, while ensuring the principles of administrative law are respected, and the remedial approach to discipline is followed.\(^\text{196}\) Thus, a member's interests are balanced against the Force's management interest, other members' interests, the interests of the public/clients, and the public interest as represented by the Attorney General.\(^\text{197}\) Many members during interviews did not appear to be aware of this balancing, and if they were, it was only after they had been unexpectedly informed by subsequent events.

The E.R.C. also, rather naively in the author's view, operates on the premise that members have the obligation to, and can, be familiar with all the policy, statutes, regulations, standing orders and information relative to grievances and discipline.\(^\text{198}\) Setting aside that members are never given any training in this subject, this is unrealistic in many detachments due to time, availability and access restrictions. Achieving and maintaining a working knowledge of the grievance process is extremely difficult, and the effort to submit and argue a grievance is very time consuming. The Force relies on limitation periods and technical arguments to defeat grievances, and in some instances

\(^{195}\) Ibid.

\(^{196}\) Supra, note 186 at 3.

\(^{197}\) Ibid.

\(^{198}\) Supra, note 178 at 14-15.
grievances drag on for years. One respondent asserted that the Force deliberately allows backlogs of grievances in the hopes that members will simply give up.\textsuperscript{199}

The E.R.C. states members are to be treated with dignity and understanding and members are "to have the same protection that the Courts enforce with respect to those who are alleged to have breached the law" (emphasis added).\textsuperscript{200} It is rather paradoxical that members are to have the same rights, but the fundamental right of silence or non-incrimination is repeatedly ignored under the regime. A further difficulty is that the self-incrimination rule is not consistent across the civil-criminal divide and people have understandable difficulty figuring out on which side of the line internal police matters fall.

The E.R.C. has on occasion been very critical of the manner in which internal disciplinary cases are handled at the adjudication stage. For instance, it was noted that in more than one case the formal allegations against members had to be amended, sometimes to correct numerous errors, which led to questions of poor quality work and lack of expertise by the prosecuting members.\textsuperscript{201} The E.R.C. has also noted that the Force uses testimony of witnesses to prove the effects of a member's action on morale, but this is only an opinion not based on any expertise or special knowledge, which improperly forces the Adjudication Board to extrapolate.\textsuperscript{202} Interestingly, the E.R.C. also found that the criminal rules of disclosure are not directly applicable to R.C.M.P. proceedings and that the \textit{R.C.M.P. Act} and supplemental policy statements, which provide much more limited access to material, set

\textsuperscript{199} M43. This view was repeated by many of those familiar with the grievance process, particularly in relation to promotion grievances.

\textsuperscript{200} \textit{Supra}, note 186 at 1.

\textsuperscript{201} \textit{Supra}, note 178 at 20.

\textsuperscript{202} \textit{Ibid.} at 19.
out the relevant disclosure requirements.\textsuperscript{203} The author was informed during interviews that the position of the Force is that the only material that must be disclosed before a formal disciplinary hearing is that material which the Force will rely on in its prosecution.\textsuperscript{204}

The E.R.C. has pointed out that, although the new disciplinary regime under the\textit{R.C.M.P. Act} may use remedial terminology and informal processes, it does not direct that correction and education measures should precede the need to assign blame and impose punishment.\textsuperscript{205} In fact there is no remedial approach in the sense that the regime does not require the Force to consider systemic or operational factors that may have contributed to the allegation (\textit{e.g.} conditions beyond control of the member such as a lack of personnel).\textsuperscript{206} Although the\textit{R.C.M.P. Act} lists types of misconduct and sanctions, there is no legislative guidance on the appropriate aims and purpose of disciplinary sanctions.\textsuperscript{207} The\textit{R.C.M.P. Act} does very little to promote its remedial emphasis, and unfortunately, seems to endorse, or at least enable, the essentially disciplinary/punishment conception of police management.\textsuperscript{208}

If there is any doubt about the inconsistency of the objectives for discipline in policing, it is only necessary to review the views reported by an E.R.C. study on

\begin{itemize}
\item \textsuperscript{203} Report 1992-93, \textit{supra}, note 70 at 17.
\item \textsuperscript{204} M18, M37, M40, M43, M88 & M107.
\item \textsuperscript{205} \textit{Supra}, note 49 at 5.
\item \textsuperscript{206} \textit{Ibid}.
\item \textsuperscript{207} \textit{Ibid.} at 13.
\item \textsuperscript{208} \textit{Supra}, Royal Canadian Mounted Police External Review Committee, \textit{Post-Complaint Management: The Impact of Complaint Procedures in Police Discipline} (Discussion Paper 4 by Clifford D. Shearing) (Minister of Supply and Services Canada, 1990) at 32-3. This theme was repeated frequently in interviews.
\end{itemize}
sanctioning.\textsuperscript{209} For example, "cooperation" in an investigation was reported by 31\% of the discipliners polled to be always or usually important when considering a sanction.\textsuperscript{210} The difficulty is that an officer may decline to provide a statement or not assist the investigator for a number of reasons, none of which have to do with being obstructive or not wanting to be forthright. For example, a member may not provide a statement based on advice from a lawyer or because of reliance on inappropriate advice from another member, DSRR, or supervisor.

This study also found that 7.4\% of R.C.M.P. respondents (i.e. discipline officers and DSRRs) believed there is "a lot" of unwarranted disparity in discipline within the Force, and another 48\% felt there is "some" disparity.\textsuperscript{211} To have 55.4\% of those involved in disciplining members saying there is a lot or some disparity in sanctioning is not encouraging. Of this group, slightly more than 22.5\% of DSRRs felt there was a lot of disparity.\textsuperscript{212} Further, it was found that 60\% of DSRR's felt they did not have access to previous decisions in order to ensure consistency in sanctions, yet DSRRs are considered by the Force to be the frontline in internal representation.\textsuperscript{213} It was also found that the formal discipline process was too long, drawn out, and cumbersome.\textsuperscript{214}

\textsuperscript{209} Supra, note 49 at 15-17.

\textsuperscript{210} Ibid. at 25; at 27-30 the factors for sanctions are set out in more detail.

\textsuperscript{211} Ibid. at 35-6; Ferguson and Rusen, supra, note 132 at 77.

\textsuperscript{212} Ferguson and Rusen, ibid. at 77-78.

\textsuperscript{213} Ibid. at 78-9, footnote 174. Only 15\% of officers and members involved in discipline felt they did not have access to previous decisions. If DSRRs report such a difficulty, how is an individual member, who is not familiar with this process, expected to know if he or she is being sanctioned fairly?

\textsuperscript{214} Supra, note 49 at 34.
As for internal adjudication hearings, the E.R.C. concluded that they are expensive, time-consuming, can harm labour-management relations, and may lead to the entrenchment of positions from which officials have difficulty retreating. Moreover, if disciplinary proceedings are supposed to be utilizing administrative law principles and are conducted so as to be fair to members, one wonders why there are so many cases in which the courts have had to step in to ensure basic rights for members (e.g. right to counsel). Based on the comments of members that had dealings with the formal discipline process, the author has concluded that the internal disciplinary process will never have credibility with the rank-and-file until such time as Adjudication Boards are no longer comprised solely of commissioned officers. Perhaps incorporating the use of constables and NCOs on Boards would lead them to do a better job, better reflect the experience and skills of the Force (there are many legally trained or lawyer NCOs and constables), and be more in touch with operational issues, less expensive, and fairer because there would be a mix of values. A move away from management based disciplinary hearings to a peer review adjudication format would constitute both a substantive and symbolic move towards breaking down hierarchical and status bound management practices.

Recently, the executive of several associations formed by R.C.M.P. members identified that the Acting Chair of the E.R.C. had entered a very substantial and lucrative private contract with the R.C.M.P./Commissioner to develop an alternate dispute resolution

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model for the Force. The perception of an independent civilian review model has been jeopardized by such action (i.e. the independent Chair is receiving substantial financial remuneration from the body she also reviews). The goal of such a program is certainly laudable, but as one member point out, it is difficult to believe in independence when the Chair is "working for the Commissioner." 

The only source for independent review of members concerns about the conduct of the Force is through the E.R.C. or the courts, and neither seems completely viable. As shown, the jurisdiction of the E.R.C. is extremely narrow and not truly independent or binding. In any event, although the author interviewed numerous members who had experience with the E.R.C., none of whom believed the E.R.C. provided authoritative and independent review of the Force’s actions, the process was considered to be an improvement. As one respondent stated, "Thank god for some civilian review."

8. Internal Process

As noted above, an "internal investigation" (Code of Conduct) under Part IV can be initiated as a result of a public complaint or internal complaint by a member. Surprisingly, in light of the number of public complaints noted in Chart 1, in 1995, "E" Division only conducted 139 internal investigations. Of the 139 internal investigations, 73 arose from

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217 Rebecca Johnson, "ADR Goes National" (May 1996) Pony Express at 12 confirms that the contract was with the Acting Chair of the E.R.C.

218 M67.

219 Supra, note 186 at 1.

220 M43.

221 Supra, note 131.
public complaints, and 66 arose from internally generated complaints.\textsuperscript{222}

Under the \textit{R.C.M.P. Act} and/or the \textit{Code of Conduct}, there are 27 sections or categories of possible conduct offences. Some conduct matters are explicit (\textit{e.g.} absent without authority) while others are broad in nature (\textit{e.g.} disgraceful or disorderly conduct). Moreover, s. 47 of the \textit{Code of Conduct} exponentially increases a member’s potential liability by making it an infraction to "knowingly neglect or give insufficient attention to any duty the member is required to perform" (emphasis added).\textsuperscript{223} It should not be assumed that the \textit{Code of Conduct} is explicit in what conduct may or may not be actionable. The Force has a panoply of infractions that can be conveniently used to institute proceedings against a member.\textsuperscript{224}

The Force has two options to deal with a breach of the \textit{Code of Conduct}: first, it can take "informal disciplinary action" which can consist of (a) counselling, (b) recommendation for special training, (c) recommendation for professional counselling, (d) recommendation for transfer, (e) direction to work under close supervision, (f) forfeiture of regular time off for any period not exceeding one work day, and (g) reprimand; and second, the Force can take "formal disciplinary action" which makes a hearing before an Adjudication Board (comprised of three commissioned officers, one of whom must hold a law degree) mandatory and it can

\textsuperscript{222} \textit{Ibid.}

\textsuperscript{223} For example, the \textit{R.C.M.P. Act, Regulations, Commissioner’s Standing Orders, Charter}, policy, other statutes and regulations, the common law, and/or tort all create potential duty infractions. If the argument that "policy" is the equivalent of a "Standing Order" is accepted, then the number of potential conflicts increases even more; see, McDonald Commission, vol. 1, \textit{supra} note 32 at 329 which considered this issue.

\textsuperscript{224} For example, s. 41 of the \textit{Code of Conduct} prohibits members from publicly criticizing, ridiculing, petitioning or complaining about the administration, operation, objectives or policies of the Force.
impose any of the informal discipline sanctions, and/or (a) recommend dismissal of a commissioned officer or dismiss a member, (b) issue a direction to a member to resign within 14 days, in default dismiss the member or recommend dismissal if a commissioned officer, (c) recommend demotion of an officer or demote a member, and (d) order forfeiture of pay not exceeding ten work days. The limitation period for formal disciplinary action is one year from the date the contravention and identity of the member is known to the Appropriate Officer. It has been suggested that this limitation period can be extended by simply not telling the Appropriate Officer the identity of the suspect member for a given period of time. Moreover, there is no limitation period on informal discipline, but policy states it will be one year. The standard of proof under the old regime was proof beyond a reasonable doubt, however, under the new process the standard is a balance of probabilities.

One comment that unexpectedly arose during the course of discussions with a member with considerable experience in the discipline process was that senior officers frequently do not read internal investigation reports or files before deciding on a course of action. Several members who have experience in the discipline process were of the view that management frequently relies on "gut reactions" to allegations when making decisions about

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225 See Part IV, ss. 41-45.17.

226 Section 43(8); supra, note 49 at 38; Scorer, note 70 at 41.

227 M40, M88 & M107 indicated this argument has been asserted by the Force to avoid the limitation period.

228 Since policy is not law, it can be amended or ignored without repercussion.

229 Supra, note 49 at 38; McDonald Commission, vol. 2, supra 32 at 968 outlines the process for internal complaints at the time.

230 M107.
what disciplinary path to follow, and little consideration, if any, is given to the evidence, or what can, or has been, legally proven.\textsuperscript{231} It is this failure to assess cases and investigative actions critically that led some members to comment on the perception of abuse that can surround the conduct of the Force when dealing with discipline. The belief of rank-and-file members that their agency will not support them was also confirmed by the P.C.C. when it observed that the R.C.M.P. also seems to give the impression of separating itself from the conduct of its members when an allegation of misconduct is filed.\textsuperscript{232}

As already noted, members cannot grieve or appeal counselling, recommendations for special training, professional counselling, or transfers imposed by commanding members.\textsuperscript{233} Further, none of the informal discipline imposed by an Adjudication Board is reviewable by the E.R.C.\textsuperscript{234} The only recourse is to the Commissioner as the final level of appeal, or judicial review. Otherwise, the remaining discipline can be reviewed by the E.R.C. The grounds of appeal internally for R.C.M.P. discipline may also be more restricted or less clear as compared to other jurisdictions.\textsuperscript{235} The legislation governing the R.C.M.P. is supposed to promote "managerial accountability" by allowing the review or scrutiny of the decisions of the Commissioner and commissioned officers.\textsuperscript{236} Based on the

\footnotesize{\textsuperscript{231} M18, M37, M40, M44, M88, M93 & M107.}

\footnotesize{\textsuperscript{232} Supra, note 110 at 67.}

\footnotesize{\textsuperscript{233} Section 41(9).}

\footnotesize{\textsuperscript{234} Section 45.15(2).}

\footnotesize{\textsuperscript{235} Section 45.14(3) states an appeal to the Commissioner can be "on any ground of appeal" but does not particularize the grounds. On the other hand, the Police Act, S.B.C. 1988, c. 53 provides the following grounds of appeal: 1) no evidence on element; 2) unfair trial; 3) facts do not amount to a default; 4) new evidence; and 5) unreasonable punishment.}

\footnotesize{\textsuperscript{236} Supra, note 172 at 31.}
review of the E.R.C.'s jurisdictional restriction and the limits on discipline review/appeal, it is open to question whether or not this has been fully achieved.

During attendance at a Discipline Seminar in 1995 held by the R.C.M.P. the author learned that there has been a marked increase in the number of formal disciplinary hearings. The explanation for this increase by some of those in attendance was that the Commanding Officers who decide whether to institute formal discipline proceedings were worried that the Commissioner would take a dim view of them (and their careers) if they did not take a hard line on discipline. The reported result was that conduct matters that should properly have been dealt with informally were being subjected to a formal hearing because the decision-makers were reluctant to act against the actual or perceived wishes of the Commissioner.

More recently, the author was informed that during a recent meeting with the Commissioner, Commanding Officers in the various Divisions/Regions were told in no uncertain terms that certain forms of misconduct were to result in formal/dismissal proceedings. More recently, DSRRs have reported that Ottawa has chastised Divisions for not suspending members without pay pursuant to new Commissioners Standing Orders when they temporarily lost basic qualifications of employment.

It is reported that in approximately 90% of R.C.M.P. internal cases, informal discipline is taken and in the remaining 10%, formal discipline is sought. Since 1990,

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237 M43. Since October 3, 1994, pursuant to Bulletin AM-2060, the Commissioner has stated that certain misconduct, such as drinking and driving and theft is "unacceptable and will be treated with the utmost seriousness." It is common knowledge in discipline circles that theft, impaired driving, and domestic violence will lead to dismissal, regardless of the circumstances. See also, "Fettering a CO's discretion" (June 19, 1997) Pony Express Communiqué 1 where the DSRRs voiced concern that Ottawa was improperly influencing COs regarding disciplinary matters.

238 Supra, note 49 at 22, no source is cited for this data; Scorer, note 70 at 34.
"E" Division has proceeded with 133 cases of formal discipline before an Adjudication Board.\textsuperscript{239} Of course, this data does not reflect "unofficial" discipline measures or "harassment" by the Force in the form of transfers, duty restrictions, or supervision restrictions. It also does not provide any insight into cases in which members left the R.C.M.P. before discipline was instituted or proceedings were completed. In the author's experience there are "disciplinary" measures instituted against members that are never recorded or properly documented.

There is very little data on police investigations and suspensions.\textsuperscript{240} The author did determine that in "E" Division 9 members were suspended with pay in 1995, and the average length of a suspension is 19 months.\textsuperscript{241} However, the author is familiar with two cases in which suspensions have been in place between two and three years. In the case of suspensions a member is generally required to attend the office every day to sign-in, or in exceptional circumstances permission to report by phone may be granted.\textsuperscript{242} More recently, it was reported during interviews, and personal observation by the author, that suspensions without pay ("SWOP") were being utilized by the Force to intimidate members into agreeing to certain discipline, accepting a "resignation" proposal, or cooperating during

\textsuperscript{239} "E" Div. correspondence, \textit{supra}, note 131.

\textsuperscript{240} For example, Royal Canadian Mounted Police External Review Committee, \textit{Suspensions-A Balanced View} (Discussion Paper 1) (Minister of Supply and Services Canada, 1988) at 26 reports that 27 R.C.M.P. members were under suspension for varying periods of time.

\textsuperscript{241} \textit{Supra}, note 131.

\textsuperscript{242} R.C.M.P. A.M., "Suspension" at XII.5.D.4.c. Three members interviewed, M6, M79 & M85, reported having to report daily to the office or by phone.
investigations. Suspense without pay is a powerful tool, and the members interviewed who are involved in discipline were extremely concerned about the recent trend towards SWOP. The view was expressed by several members that SWOP had become a tool "to push members out because the internal process is too long." The author has encountered complaints from managers that greater fairness, more disclosure and thoroughness conflicts with demands for speed in such matters. One surmises that this is a problem experienced in most labour settings.

The E.R.C. has also found that the length of time required by the R.C.M.P. to internally process cases is reaching questionable limits. For example: it takes an average of four months from the date of occurrence before disciplinary charges are laid; it takes an average of a further 11 months before the case will be referred to the E.R.C., creating an average 15 month lapse between the occurrence and E.R.C. referral; and, it also takes a further seven months from date of referral request to receipt by the Commissioner.

243 M6 & M59 reported that SWOP was raised to try to force them to make deals. M22, M40, M43, M67, M68, M83, M88 & M93 all concurred that SWOP was being utilized to intimidate members and avoid what management perceived as unnecessary and expensive due process. From 1990 to April 22, 1996, "E" Div. reports 13 voluntary resignations arising from allegations of misconduct, supra, note 131.

244 This may be valid when one looks at the apparent disparity between the suspension of four members as a result of the break-in at the Prime Minister's residence, yet the more senior commissioned officers were not required to defend themselves against being SWOP'd: see Canadian Press, "Junior officers bear brunt of blame" in The Vancouver Sun (17 November 1995) at A3; and Canadian Press, "Break-in officer's pay to continue" in The Vancouver Sun (2 December 1995).

245 M107, also M22, M40, M43, M68, M88 & M93.

246 Supra, note 176 at 22.

247 Ibid. for the foregoing data. The author was also advised of an internal matter that has been underway for over 6 years, and at the time had been before the E.R.C. for one year.
fact, the excessive delay and backlog has recently prompted the Force to adopt an "Expedited Resolution" plan to try to reduce the number of outstanding cases. The author is personally familiar with formal adjudication proceedings that have taken one to two years to be instituted. Systemic time delays were referred to as a cause of concern by subject members and those who act on behalf of members, either civilian lawyers or internal representatives. However, in some instances the time delay was considered a measure to delay the inevitable and it simply permitted members to be compensated and/or arrange their affairs.

On the statutory side, in 1995, "E" Division instituted 102 statutory/criminal investigations against members, and of these: 47 were not forwarded to Crown for a decision as to charges; 55 were forwarded to Crown for a decision on whether to charge; and 9 actually led to charges (it was unknown how many led to convictions). In no instance were public mischief (i.e. false or misleading complaint) charges laid against a complainant, despite the fact that the R.C.M.P. disposed of 322 public complaints as frivolous, vexatious, malicious or made in bad faith between 1994 and 1995; unless of course, which the author does not believe based on P.C.C. Reports, none of the 322 complaints alleged criminal misconduct on the part of the member. One also wonders what is happening to complainants making criminal allegations against members when the Force found over 50% of public complaints to be unfounded in 1987 and 1988. As noted, the P.C.C. Reports document numerous cases where the criminal allegation against the member was clearly unfounded.

Author unknown, "The faster way" (November 1996) Pony Express at 26.

Supra, note 131; EDMA, (1996) 2:1 Service Star at 6 reports slightly higher numbers, however, the data relates to the time period of 1994-95, which accounts for the difference: 193 statutory investigations (73 forwarded to Crown Counsel, 52 not forwarded to Crown Counsel, 68 pending).
Scorer reported that the R.C.M.P. was implementing a new Independent Case Review mechanism whereby a retired jurist or distinguished citizen will inquire into cases in which deaths or injuries arose from contact with the R.C.M.P.²⁵⁰ Moreover, the Force has started utilizing "administrative inquiries" "independent officer reviews" and/or "debriefings" (operationally and/or psychologically based) in the aftermath of an incident which has definite implications for members.²⁵¹ For instance, during an independent officer review a commissioned officer is assigned to review a serious incident and determine whether the investigation and follow-up has been properly completed, and to make findings about the actions of the members.²⁵² Similarly, "operational debriefings" are held after serious incidents to review what transpired and "critical incident debriefings" are held to ensure members are given post-trauma support. These mechanisms are frequently implemented, but the members are not being told of the risks that are undertaken when they discuss their activities. Recently, further investigative and disciplinary actions have been taken against members as a result of disclosures during these processes.²⁵³ In one instance, a commissioned officer advised the participants in a debriefing that what would be said would not leave the room and was confidential, and the officer and members subsequently provided statements about what was said in the debriefing that were placed in a Report to Crown.

²⁵⁰ Supra, note 70 at 17.


²⁵² M66 was involved in a fatal police pursuit and the independent officer’s report was part of the Coroner’s case at the subsequent inquest. The members involved were not told that this material could be disclosed.

²⁵³ M26.
Counsel as part of the case to charge one of the members.\textsuperscript{254} In fact, the investigators were waiting outside the room for the debriefing to finish so they could interview the members! There was also considerable ambiguity on whether the debriefing was to be operationally or psychologically based. Such actions are destructive of the accountability process and only further engender ill-will and mistrust between the ranks.

Although there is recourse individually for a member to the Federal Court of Canada, the E.R.C. notes that "members have never been given the opportunity to take grievances, disciplinary actions or other complaints outside the Force as a right, and without taking substantial personal financial risk."\textsuperscript{255} If the E.R.C. cannot act in many instances, the member, having no other independent and effective review, is left with the courts as the only redress mechanism. The difficulty is that when a member seeks judicial review in the Federal Court of a disciplinary or grievance matter, even if successful, costs are only awarded in exceptional cases.\textsuperscript{256} So the members must have the financial ability (not to mention the psychological fortitude) to finance a judicial review application, knowing that they will not usually have their costs reimbursed. The bottom line is that most members do not have the financial ability to take such a measure.\textsuperscript{257} Although the DSRR's have built

\textsuperscript{254} M26. The author confirmed this information.

\textsuperscript{255} \textit{Supra}, note 54 at 23.

\textsuperscript{256} Rule 1618 of the \textit{Federal Court Rules}, C.R.C. 1978, c. 663 (as amended), states "No costs shall be payable in respect of an application for judicial review unless the Court, for special reasons, so orders."

\textsuperscript{257} In the author's experience, even a basic judicial review application at the trial division level will cost between \$7,000.00 to \$15,000.00 dollars. A visit to the court of appeal will raise the cost to \$20,000.00 to \$50,000.00 dollars. The problem is that, in the author's experience, few applications for judicial review are basic in that the R.C.M.P. generally contests them and relies on every possible technical argument.
up a limited legal fund to conduct litigation, they will not use it to finance an individual case for a member. During the author’s discussions with several members involved in the discipline process, it became apparent that the Force relies on, and takes comfort from, the fact that members cannot afford to seek judicial review.\textsuperscript{258} As succinctly noted by one respondent, "management is able to get away with abuses because the average member cannot afford to go to Federal Court."\textsuperscript{259} Participants in the discipline process interviewed by the author were consistent in their advice that officers consciously make decisions and take action based on the fact that the likelihood of being taken to court is extremely remote. It was reported that many officers knew they were virtually unaccountable to the courts because of the inability of members to finance such a course, and their treatment of members reflected this attitude.\textsuperscript{260}

As documented by French and Beliveau, there is a precept of self-abnegation in the R.C.M.P. where, in the interests of the organization, members are expected to go quickly and quietly when implicated in misconduct—\textit{in fact it is a novelty to find a member who resists}.\textsuperscript{261} The author was able to confirm that since 1990, there have been a total of 13 "voluntary" resignations that arose from allegations of misconduct in "E" Division.\textsuperscript{262} Although a resignation may be an appropriate and equitable measure to deal with misconduct in some cases, based on research interviews, the author’s experience, and a review of cases

\begin{itemize}
\item \textsuperscript{258} M22, M37, M40, M43, M44, M75, M93, M99, M102 & M107.
\item \textsuperscript{259} M97.
\item \textsuperscript{260} M18, M21, M20, M40, M43, M48, M73, M83, M93, M97, M99, & M107.
\item \textsuperscript{261} Supra, note 1 at 48.
\item \textsuperscript{262} Supra, note 131.
\end{itemize}
dealing with police misconduct resignations, it is clear that the potential for intimidation and abuse of members in these situations is very high. An extreme example is found in one case in which the Force was alleged to have extracted a "voluntary resignation" from a member accused of minor misconduct who was, on the day of the purported resignation, diagnosed with a "severe psychotic depressive disorder", "serious suicide risk" and immediately admitted to a psychiatric facility. This member eventually received electroconvulsive shock therapy when pharmaceutical treatment proved unsuccessful after several weeks. The Force remained unmoved and refused to re-visit the resignation despite two medical opinions from a psychiatrist and psychologist that the member did not have the ability to make a rational and informed decision to resign. The author was also informed that the threat of a press release is sometimes used by the R.C.M.P. to try and extract resignations from members or force the member into leaving without challenging the


264 See the Originating Notice of Motion and related material in A.R.L. v. Commissioner of the RCMP et al. (1996) Federal Court Reg. T-313-96 (T.D.). The Force’s general response to this situation was that the member was faking, despite the severity of the treatment, changes noticed in the member by other employees, his own reported psychological troubles to the investigators and the previous documentation of stress related difficulties. This is one of those instances when the investigators waited to arrest and interview the member until his last night shift. Even more disturbing is the fact that one of the investigators was a sub-DSRR.
allegations.\textsuperscript{265}

Referrals to the E.R.C. also "revealed the use of administrative measures, such as isolating members from peers, as an adjunct to discipline."\textsuperscript{266} These types of informal measures were found to be more prevalent in situations in which the Force can more closely monitor the activities of members.\textsuperscript{267} The R.C.M.P. is well known for using transfers and other isolationist tactics to silence and intimidate members.\textsuperscript{268} During interviews, three members specifically reported being unofficially transferred internally within a detachment as

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\textsuperscript{265} \textit{Ibid.}, also, M59, M93, \& M107. The R.C.M.P. typically tells members that a press release must be made to avoid the perception of preferential treatment, but the problem is that press releases are made in the case of members when one would not usually be made for many of the same run-of-the-mill criminal allegations for a civilian (\textit{e.g.} shoplifting). Clearly more research is required in the area of resignations and the use of pressure tactics in policing to deal with misconduct.

\textsuperscript{266} \textit{Supra}, note 178 at 18. The author confirmed this tactic in several interviews: M26, M47, M83, M85, \& M107.

\textsuperscript{267} \textit{Ibid.}

\textsuperscript{268} Reed, \textit{supra}, note 20 at 3-4; Marin Commission, \textit{supra}, note 47; E.R.C., \textit{supra}, note 49; see also, Stenning, \textit{supra}, note 3 at 128-9 where he discusses \textit{Wool v. The Queen \& Nixon} (1981), 28 Crim. L.Q. 162 (Fed. T.D.) involving a Staff Sergeant who was ordered by the Commanding Officer to discontinue an investigation, was transferred from plainclothes to uniform, and a recommendation for a transfer out of the province was also taken. The author was informed by M47 and M26 that in separate incidents they were threatened with a transfer when they questioned a commissioned officer’s action. Several respondents at an interior detachment advised that they were routinely threatened with transfers if they raised any concerns about staff shortages or other operational issues. M61 advised that a commissioned officer linked support for an internal transfer to the fact that he had spoken out about the treatment of another member at a watch briefing. M67 related a situation where it was believed that detachment management was using claims of shortcomings to intimidate members they suspected were disclosing information to the media about working conditions. In another instance, M16 caught a senior NCO ridiculing M16’s leave for medical reasons and when confronted, management ordered M16 not to come to the office without permission and only then he would be permitted to attend the front counter. M83 reported having to seek permission to leave the building or office.
\end{flushright}
punishment. One member specifically reported being required to attend the NCO’s office every three hours during a shift to advise the NCO exactly where the member had been and what work had been completed. In an attempt to try and "break" this member, which the author was able to confirm, the NCO had also directed other members/friends not to associate with this member on- or off-duty.

It has also been found that the R.C.M.P. appeared to be using character, personal, and service file material indiscriminately at grievance and/or disciplinary hearings purportedly to obtain a complete picture. In one instance, the author was informed of, and confirmed, that an NCO had somehow accessed a member’s discipline file, which is supposed to be sealed, and used certain information against the member. Even more troubling, is the allegation that a senior NCO improperly disclosed internal file material regarding a member during the member’s criminal trial.

Although the discipline process under previous R.C.M.P. legislation was purely punitive, there are still problems with the purported remedial approach under the new regime. First, sanctions such as recommendation for training or close supervision are rarely utilized. Second, there is no priorization of sanctions, leaving little guidance on what sanction is appropriate for certain situations. Third, the principles of restitution and

\[269\] M26, M28 & M47. Those members involved in the accountability process confirmed that this is a common tactic.

\[270\] M47.

\[271\] Supra, note 172 at 25.

\[272\] M28 & M93.

\[273\] Supra, note 49 at 31.

\[274\] Ibid.
reparation, which are constituent parts of a remedial format, have been ignored.\textsuperscript{275} Fourth, the legislative sanctions are unduly narrow and restricted (\textit{e.g.} 10 days suspension and then dismissal)\textsuperscript{276} Further, there are also the jurisdictional restrictions and statutory limitation on grievances and appeals that affect a member's ability to attain external review within the regime.

The reader should not underestimate the harsh and untempered manner in which internal investigations and discipline can still be applied in the R.C.M.P. As one member who is directly involved in discipline stated, "the system still operates on punishment" and "witch hunts" are still common.\textsuperscript{277} For example, the E.R.C., in its Annual Report for 1990-91, outlined the following action taken by the R.C.M.P. against a recruit in training who, it was alleged, falsely claimed he had completed some physical exercises: first, the recruit was suspended for six months; second, the recruit was segregated in a special barracks reserved for recruits facing discipline; and third, an official memo directed other recruits and instructors not to associate with the recruit.\textsuperscript{278} After a review of this "minor case" by the E.R.C. (which recommended reprimand), the sanction ultimately imposed by the Commissioner for the recruit's conduct was three days forfeiture of pay and a reprimand (narrowly escaping dismissal). The prior interim action was clearly disproportionate. However, such measures amply display to recruits the control and vulnerability that surrounds them.

\textsuperscript{275} \textit{Ibid.}

\textsuperscript{276} \textit{Ibid.}

\textsuperscript{277} \textit{M22.} This same theme was echoed by 12 of the 15 members interviewed that are directly involved in this process.

\textsuperscript{278} \textit{Supra,} note 178 at 21.
Consistent with the findings in Chapters 2, 3 and 5 regarding the police response to misconduct, the R.C.M.P.’s application of disciplinary measures has also been inconsistent with the remedial and corrective approach. For example, regardless of the circumstances (e.g. severe stress or psychological disorders), the R.C.M.P. has a history of treating theft convictions (or any integrity case) as an automatic basis for dismissal. The R.C.M.P. it seems, despite representations to the contrary, has been unable to embrace the notion that misconduct must be viewed from the perspective of a reasonable person, and in some circumstances dismissal may not be necessary. For example, in the Fedoriuk case, the Federal Court had to instruct the R.C.M.P. that a blanket rule to dismiss anyone convicted of a criminal offence would not pass judicial scrutiny, since the Force must consider each case on its merits, based on all the relevant facts. Despite this judicial direction to consider all the circumstances, and purported commitment to correction, an E.R.C. paper has concluded that the "results tend to be the same" (i.e. dismissal). For example, off-duty shoplifting, even where there are compelling mitigating factors that suggest other courses, will result in dismissal.

279 Ferguson and Rusen, supra, note 132 at 136.

280 Ibid.; also, Discussion Paper 8, supra, note 49 at 59-62. While integrity matters are dealt with strongly in other employment contexts, consideration of mitigating factors is frequently taken into account.


283 Ibid. at 58-61. Based on interviews and E.R.C. reports, management in the R.C.M.P. can be counted on to rely on several assumptions when dealing with theft allegations: 1) once a thief always a thief, regardless of the circumstances; 2) member acted wilfully; 3) if not wilfully, member was weak; 4) no possibility of rehabilitation; 5) not isolated or impulsive action; 6) dismissal the only basis to maintain public confidence; 7) other acts of dishonesty not
The author also has experience in representing members of the Force alleged to have engaged in trivial misconduct, entirely explicable on the basis of compelling medical evidence. The R.C.M.P. refused to consider the matter to be anything other than a dismissal matter. The R.C.M.P. seems to have considerable problem distinguishing between discipline, performance or medical issues in its handling of misconduct situations. The harsh and uncompromising attitudes of commissioned officers in the area of discipline was also amply displayed during a two day R.C.M.P. Discipline Seminar attended by the author in 1995. As one example, during this course the author and a constable (both holding law degrees and either currently or previously called to a Bar to practice law) were placed with three senior commissioned officers (who have acted as adjudicators) to discuss the sanctions to be imposed in a variety of scenarios (e.g. Case #1 involved removal of coins from a brass container in an office). Despite extremely compelling and mitigating factors in all the scenarios (e.g. Case #1 presented expert diagnosis of impulse control disorder brought on by severe stress factors including PMS, marital problems and menopause), the commissioned officers recommended dismissal in every case with no discussion of the facts. The author and constable found this experience to be frightening to say the least, since it was apparent that the result in each case was a foregone conclusion (based on the type of allegation) for these officers. Any notion of remedial or corrective action was completely absent, and the perspective was entirely and inflexibly punishment and dismissal oriented. Harkenings for summary military justice were undeniably in the air! Shortly after this seminar the author spoke with several senior and experienced members who also attended the seminar and they treated this way (e.g. not disclosing improper investigation activity); and 8) use good record and/or one time incident to mitigate for other serious allegations (e.g. assault), but not for theft.

284 Supra, note 178 at 17-18.
all agreed that one of the underlying messages for the adjudicators from the seminar was to "hammer" or take a "hardline" with members accused of misconduct. Those members with experience in the discipline process at the seminar privately confirmed that unduly harsh sanctions are the norm when dealing with commissioned officers at the formal level.

As for disciplinary proceedings, the E.R.C. noted that sanctions imposed by Adjudication Boards sometimes related more closely to the original allegation than the findings of the Board. Those members interviewed who have dealt with Adjudication Boards report that most of the officers are completely and utterly "bamboozled" by even the most meagre legal analysis. As one member stated, the adjudication process is "amateur hour writ large." Members interviewed who are involved in the discipline process unanimously stated that referring to law, legal procedure or discrete points of evidence before Adjudication Boards was mostly a waste of time. The E.R.C. noted a case in which the disciplinary tribunal convicted a member despite there being no evidence on a substantive element to prove the allegation. Interviews with those members familiar with the discipline process revealed very little or no confidence in the adjudication process, and in particular, the commissioned officers. The theme was that most commissioned officers were either "incompetent" or overtly biased in their handling of adjudications. As one member noted, the commissioned officers on adjudication boards cannot be objective

285 M37, M40, M43, M73, M88 & M107.

286 Supra, note 178 at 18.

287 M37, M40, M43, M73, M88, M97 & M107.

288 M43.

289 Supra, note 176 at 8-9, Appeal No. 3; M40; also, infra, note 293.

290 M18, M22, M40, M44, M88, M93 M97, M99, & M107.
"because they are beholden" to the system and influenced by Force expectations. As most observed, the careers of the commissioned officers sitting on adjudication panels are directly controlled by the Commissioner. These comments were also echoed by private counsel who have dealt with internal and adjudication proceedings. In fact, during informal discussions with lawyers who frequently represent R.C.M.P. members there was very little in the way of positive comment about the handling of criminal and disciplinary/internal processes by the R.C.M.P.

An example in support of the strong comments made by members is found in a recent E.R.C. case in which the entire case depended on identification to prove the allegation. In its Findings and Recommendations, the E.R.C. was very concerned about several matters, including, but not limited to, instances in which the Board failed to provide a full account of vital evidence from the transcripts, said a witness made certain statements in testimony when she did not, did not fully address inconsistencies in the evidence, did not refer to several important inconsistencies and made findings on unsupported, non-existent or contradicted evidence. The Acting Chair of the E.R.C. concluded:

...I find that the Board made a number of serious errors in its assessment of the evidence. While the Board did recognize certain substantial weakness in the identification evidence, there were still substantial weaknesses that it failed to recognize. Notably, there were the inherent weaknesses of the show-up evidence and of the hearing identification; the significant inherent problems with this evidence ought to have been specifically recognized and weighed. Also, the Board failed to deal with a vital part of the evidence arising from the photo line-up session.

291 M43, also M37.

292 One lawyer, L114, indicated that the "RCMP is eating its young." Another experienced lawyer, L117, could not understand why the Force treats its members so poorly, and found the protection of rights and adjudication proceedings to be pretty "primitive litigation." The internal adjudication process is not very well regarded.

293 E.R.C. File No. 3200-96-003.
Furthermore, the Board's analysis of the descriptive identification evidence was inadequate and flawed. Also flawed was the Board's analysis of a central part of the circumstantial evidence; given the nature of the area as a downtown residential neighbourhood, its extreme proximity to a busy route and the generality of the supported description of the perpetrator, the Board's statement that the probability of another male matching the description is "slight" is not supported by the evidence.

... I find there are manifest errors of fact, which, perhaps individually, and certainly in combination, amount to a serious misappreciation of the vital evidence...

I make reference as well to the fairness to the Appellant caused by the Board's failure to address, in its account of the view read into the transcript, its stated observation contrary to a point of evidence adduced in the Appellant's testimony.

I must conclude that the evidence falls far short of the clear and cogent standard. The errors made by the board are determinative of the need to uphold this appeal. When properly assessed, the evidence cannot reasonably be taken to establish the allegation... I see no gain arising from a rehearing. I recommend that the appeal be upheld and the allegation against the Appellant be dismissed.294

The Board was also influenced by the fact that the accused member looked down at the table during some points in the proceeding (i.e. as if in guilt). Despite these strong findings and recommendations of the E.R.C., the Commissioner has reportedly upheld the Board and its dismissal sanction for the member.

Rumours abound about the influence that senior officers may overtly and covertly bring to bear on internal adjudication cases. One member involved in the discipline process reported being contacted by a very senior commissioned officer who became outraged and threatening when the member refused to disclose particulars about the case.295 In other instances it was reported that commissioned officers are reluctant to make decisions that were in violation of, or perceived conflict with, policy dictates from Ottawa about how certain

294 Ibid. at 53-55.

295 M18.
circumstances were to be handled.\textsuperscript{296} The members involved in the discipline process were very clear that despite having legislative discretion and responsibility to handle certain discipline matters, most commissioned officers simply did what was expected, or instructed, by Ottawa.

An even more interesting development is the internal practice of the R.C.M.P., under the umbrella of alternate dispute resolution ("ADR"), to step outside of the statutory discipline regime to settle misconduct cases.\textsuperscript{297} Although using ADR to deal with discipline may be a laudable goal, during the seminar attended by the author, it became apparent that no real consideration had been given to the point of whether it is legal or appropriate to step outside the legislative regime (\textit{e.g.} member agrees to informal discipline of twenty days suspension without pay when one day is the maximum that is statutorily available). Perhaps some consideration should be given to the admonitions of the McDonald Commission, albeit in a slightly different context, that R.C.M.P. policy and its application must unequivocally comply with the law, and if the Force does not believe the legislative requirements work, then it should seek amendment.\textsuperscript{298} The author also has concerns, as will become evident in the next chapter, as to whether members are adequately represented and may be "voluntarily" agreeing to action under duress and due to a lack of understanding.

One of the primary concerns surfaced regarding the R.C.M.P.'s handling of allegations of misconduct is the utilization of the \textit{same investigator} to conduct the various investigations that can arise from a complaint. For example, the E.R.C. has identified

\begin{footnotes}
\item[296] M40 & M43; "Fettering", \textit{supra}, note 237.
\item[297] M79, M28.; memo
\item[298] \textit{Supra}, note 32, vol. 2 at 963.
\end{footnotes}
serious concerns regarding the practice of using the same investigator to conduct the
criminal, public, and internal investigation. The P.C.C. is also concerned whether it is
appropriate for public complaints and internal complaints to proceed concurrently. The
author has frequently encountered investigators who are conducting the statutory, public
complaint, and internal investigations. When asked "how often is the public complaint,
statutory/criminal and/or internal investigator the same person," "E" Division responded
"Almost 100% of the time."

Although initially some effort was made to utilize separate criminal and
internal/public complaint investigators, "E" Division has recently ignored all these concerns
and formally put in policy that one investigator will be used for all investigations in "E"
Division. Recent amendments to "E" Division policy now result in a memo being
provided to subject members with little boxes that can be checked off to indicate that the
investigator has been authorized to conduct statutory, Part IV (Code of Conduct), Part VII
(Public Complaint) investigations and/or administrative review. Although investigators are
exhorted in policy to keep the investigations separate, it is difficult to believe this process is
seen as fair and unbiased by members. Even prior to this new policy initiative, the E.R.C.
found that a member will never be satisfied that criminal information will not be used in the
internal process or vice versa.

299 Supra, note 178 at 19.
300 Supra, note 105 at 71.
301 Supra, note 131.
XII-2-4 at page 2 (96-02-06).
303 Supra, note 178 at 20.
The P.C.C. has also commented on the fact that it is entirely inappropriate for investigations to be conducted by a subject member’s superior:

It is generally inappropriate for immediate superiors to conduct such [public complaint] investigations as they may be, or may be perceived to be, in too close a working relationship to carry out an unbiased investigation.\(^\text{304}\)

In its 1992-93 and 1993-94 Annual Reports, the P.C.C. continued to note that immediate superiors were doing complaint investigations which raised objectivity and conflict-of-interest concerns.\(^\text{305}\) The Chilcotin Inquiry went even further, asserting that complaints against the police, in particular the R.C.M.P., must be openly and competently investigated by a person not attached to the detachment or unit where the officer is employed.\(^\text{306}\) Aside from these obvious problems, there is the uncanvassed issue of the intimidation felt by subject members being investigated by an immediate or near superior.\(^\text{307}\) During interviews with members, it was reported that it was "routine" for their supervisors to conduct public complaint or internal investigations.\(^\text{308}\) One of the reasons apparently advanced for using immediate supervisors is that it avoided scheduling problems and made it more administratively convenient to have supervisors on the same shift conducting the investigations.

The basic problem is that the R.C.M.P. accountability regime requires, at a minimum, three investigations, which raises questions about the appropriate extent of

\(^{304}\) Supra, note 110 at 41.

\(^{305}\) Supra, note 104 at 124 and note 122 at 18.

\(^{306}\) Supra, note 123 at 35.

\(^{307}\) Supra, note 104 at 13 outlines a case where the member’s superior in the section conducted the investigation. M6, M7, M8, M14, M15, M17, M19, M25, M26, M28, M46, M54, M66, M72, M78, M83, M85, M91 all raised this issue.

\(^{308}\) For example, M14 & M54.
overlap; how, when, and how many statements should be taken; whether statements taken for
one purpose or during one investigation can be used in other investigations; whether one or
three separate investigators should conduct the investigation; and what the requirements are
for each investigation.\textsuperscript{309} Although the relevant facts may be the same, the P.C.C. is
correct when it points out that the purpose and procedure for each type of
complaint/investigation are not identical.\textsuperscript{310} For example, statutory/criminal investigations
are looking to prove a case beyond a reasonable doubt, while public and internal matters are
determined on a balance of probabilities. Further, the procedure for obtaining evidence
criminally is markedly different from that for an internal or public complaint, particularly as
it relates to obtaining and utilizing statements. This is what can make the internal or public
complaint investigation/hearing so compelling as a basis or tool to obtain evidence to conduct
or inform the criminal inquiry.

The context in which compelled statements from members is operating is not so
simple as many assume. In particular, it should be apparent that the Force exercises far-
reaching and, in some cases, questionable strategies to investigate members. For example,
five members from two different detachments were interviewed and expressed concerns about
the use of photographs from their personnel file, without their knowledge, in photographic
line-ups during the course of criminal, public complaint, and internal investigations.\textsuperscript{311}
Another tactic utilized during investigations, particularly criminal matters, is to wait until the
suspect member has finished his or her last night shift and then arrest the member and/or

\textsuperscript{309} Supra, note 110 at 85.

\textsuperscript{310} Ibid.

\textsuperscript{311} M23, M53, M95, M15 & M28.
conduct an interview. More disturbing was the report of "dirty tricks" by internal investigators when conducting investigations. For example, one member stated encountering "more times than I care to admit, where tape recorders have been turned off or no written record is made by investigators of exonerating evidence in favour of a member." Several cases were reported where the evidence showed that the internal investigator had turned off the tape when the witness denied the allegation was true or the witness provided a different version than expected. In other cases it was determined that the investigator had interviewed a witness extensively, in some cases coached a witness, before the tape recorder was turned on for the official version. This activity in itself troubled the members, but even more troubling for them was that this conduct only became known because of their own inquiries, since these details or action were not disclosed by the investigators or Force.

In 1976 the Marin Commission found that 25% of constables and NCO's surveyed indicated that they had no knowledge or only slight knowledge of an accountability system which at the time simply required a citizen to complain to the Force which investigated and determined disposition. Fewer than 50% of constables and NCO's felt that the public complaint procedures were fair to members (which is consistent with the more recent 54% not fair or impartial finding of the Oppal Commission, supra), while 70% of commissioned officers felt the procedures were fair. In the recent P.C.C. survey, 55% of members stated

312 The author has observed this tactic enough to consider it to be practice. The purpose of course, is to get the member at his or her weakest physically and mentally, and because the member is going off shift and is scheduled to be away from the office.

313 M43. Such tactics were confirmed by M40 & M88.

314 Supra, note 47 at 61; also, Royal Canadian Mounted Police (Pamphlet), You And The R.C.M.P. (n.d.).
that someone (usually the supervisor) explained the complaints process.\textsuperscript{315}

The author questions how knowledgeable and accurate supervisors are in fact about the process in that of the 16 "supervisors" interviewed for this thesis, none of them understood the basic differences between the types of investigations required, the different obligations held by members under the various processes to provide statements, or what forms were required. In fact, several "supervisors" (NCOs) responsible for these investigations, during interviews, openly conceded they "had no idea what is going on" or what the differences were under the new process.\textsuperscript{316} None of the 16 supervisors, with ranks from staff sergeant to corporal, were aware of the statutory protection extended to statements under the \textit{R.C.M.P. Act} during an informal resolution process for a public complaint.\textsuperscript{317}

Comments from the constables who were interviewed were consistent in reporting that they found the process "totally confusing," "very confusing," or "difficult to understand."\textsuperscript{318} Another theme that arose from the interviews with constables was that many complained that supervisors and senior members "kept giving different advice" or they were given "no explanation" or unhelpful direction from supervisors.\textsuperscript{319} One member with considerable experience directly in the discipline process reported being "amazed to see the

\textsuperscript{315} \textit{Supra}, note 138 at 13.

\textsuperscript{316} M9, M92, M83 & M102.

\textsuperscript{317} Section 45.36(2) states that "No answer or statement made, in the course of attempting to dispose of a complaint informally, by ... the member ... shall be used or receivable in any criminal, civil or administrative proceedings..."

\textsuperscript{318} M2, M10, M17, M19, M23, M25, M26, M31, M33, M34, M49, M51, M53, M54, M56, M65, M74, M76, M89, M91, M94, M95, M98, M101, & M106.

\textsuperscript{319} M25 & M56.
degree of ignorance by investigators and members under investigation."\textsuperscript{320} Another member involved in the discipline process echoed this sentiment stating it is constantly evident "every day how little members know [about]... the basic steps."\textsuperscript{321} The author interviewed one member whose sole job was to conduct public and internal complaint investigations and it became readily apparent that the investigator fundamentally misunderstood the different purposes behind the various investigations.\textsuperscript{322}

9. Observations

In light of the preceding analysis of the current R.C.M.P. accountability regime, the author is impelled to believed that the complexity of the process has made it very difficult for members to be knowledgeable of the regime. In interviews and discussions with members and investigators (who are not in routine contact with the process), it was apparent that, aside from knowing that public complaints and investigations can be undertaken against them, members were fundamentally ignorant of the process, the differences between complaints, the role of the P.C.C. and E.R.C., and more disturbingly, their basic rights and obligations under the various sub-regimes. The members interviewed were vaguely aware they had certain "rights", but either seemed to believe that they never had to give a statement or that they always had to give a statement. Misunderstandings and misinformation about obligations were widespread among the members and supervisors interviewed. A recent article by the DSRRs accurately summarizes the situation:

\textsuperscript{320} M88.

\textsuperscript{321} M22, also M20, M37, M40, M44, M75, M93 & M107.

\textsuperscript{322} M29.
...we have for some time, taken umbrage with administrative reviews, internal investigations, statutory investigations, harassment investigations wherein you are asked to give statements. There's so much confusion amongst members that you need a road map, compass and two lawyers sitting down to figure out when you are supposed to give a statement and when you are not...our concern [is over the] confusion that arises when members refer to the rules and become lost in an abyss. 323

Additionally, several very troubling incidents of apparently high handed and improper treatment by the Force were relayed to the author during interviews. Some of these incidents were independently confirmed, but cannot be reported here because it would in fact identify the member. The result is that many of the members interviewed were suspicious and outright mistrustful of the organization, especially those who perceived that they had "naively" cooperated or trusted the Force in the past and were "crucified." If anything, some of the premises upon which the new regime for the R.C.M.P. is based have not proven to be valid. The purported independent civilian review, although present, is in the view of many, crippled by its inability to take any action beyond recommendations. This is particularly so with the E.R.C., which by the residual and discretionary authority vested in senior R.C.M.P. managers to determine or control grievance jurisdiction and the discipline process, has left many members doubtful about its effectiveness. Despite the apparent contradiction it may pose for some when talking about police officers who deal with difficult situations all the time, the members interviewed were acutely aware of their vulnerability and the pervasive control the Force exercised over them, particularly as it relates to discipline matters. The notion that R.C.M.P. members are necessarily protected or treated fairly in the internal accountability process is also open to serious question. That the Force can be heavyhanded, and is largely punishment orientated, remains true. That this is so should not 323 "E" Division DSRR Newsletter, "Statements - Statements - Statements" (August, 1996) The Informer 2.
be surprising. The R.C.M.P. has very successfully relied upon paramilitary training, traditions, hierarchy and disciplinary measures to control its personnel. While it is always easy to criticize, it must be acknowledged that the R.C.M.P. has been successful in preventing certain misconduct that has plagued other police agencies such as corruption and systemic brutality. The proud tradition and heritage of the R.C.M.P., and the fact that the vast majority of serving members were raised within this system, however, makes it much more difficult to change or abandon these values and practices. Given the culture and nature of the R.C.M.P. discipline is a subject of special sensitivity that appears to provoke a greater degree of hostility or resistance (overtly and covertly) to the abandonment of traditional approaches than other subjects because it goes to the heart of everything members have been taught since their first morning on parade. As noted, historically, the recruitment, training and posting practices of the R.C.M.P. set it apart even from other police organizations. Making changes in disciplinary practices raises questions of loyalty to the organization that other changes do not. With the insight provided by this Chapter into the R.C.M.P. regime, and the background provided by Chapters 1-5 on policing generally, it is now possible to examine the issue of ordered statements in greater detail.
Chapter 7

ORDERED STATEMENTS

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 accuse me of, I know it is warrantable by the law of God, and I think the law of the land, that I may stand upon my just defence and not answer your interrogations.¹

John Lilburn (Before the Court of the Star Chamber, 1637)

1. Introduction

As indicated in Chapters 1 and 6, the Royal Canadian Mounted Police ("R.C.M.P.") has the statutory authority to compel statements from members.² The focus of this Chapter will be upon that authority, in particular, s. 40 of the R.C.M.P. Act (Part IV) which sets out the procedure for investigating an alleged contravention of the Code of Conduct.³ Section 40(1) of the R.C.M.P. Act directs an officer or member in charge of a detachment to institute an internal investigation where it "appears" that a member has contravened (or is contravening) the Code of Conduct. Pursuant to s. 40(2):

...no member shall be excused from answering any question relating to the matter

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

² Prior to 1986, the "authority" to order a member to provide a statement was based on policy and the chain of command; see, Canada, Commission of Inquiry Relating to Public Complaints, Internal Discipline, and Grievance Procedures within the Royal Canadian Mounted Police (Ottawa: Information Canada, 1976) (Chair: Rene Marin) ("Marin Commission") at 56-59; Ian Scott, "Rights Arbitration in Canadian Police Labour Relations" in Bryan M. Downie and Richard L. Jackson, eds., Conflict and Cooperation in Police Labour Relations (Ottawa: Minister of Supply and Services, 1980) at 157-169.

³ The Code of Conduct is found in the Royal Canadian Mounted Police Regulations, 1988, S.O.R./88-361. It sets out most of the standards of conduct and duties for members of the R.C.M.P.
being investigated when required to do so by the officer or other member conducting the investigation on the ground that the answer to such question may tend to criminate the member or subject the member to any proceeding or penalty. (emphasis added)

In other words, during an internal investigation, the suspect member may be required to answer any questions that relate to the investigation. Failure to comply with this demand can be an offence under s. 40 of the *R.C.M.P. Regulations* (Part III Discipline) *Code of Conduct* for refusing to comply with a lawful order. The duty of an R.C.M.P. member to obey a "lawful order" from a superior arises from the oath of office taken by every member.⁴ Further, pursuant to the *R.C.M.P. Act* (i.e. s. 40), the *R.C.M.P. Regulations*, and the *Commissioner's Standing Orders*, it can also be asserted that members have a duty to provide a statement when lawfully ordered.⁵ The "internal" investigation is purportedly distinct from statutory/criminal and public complaint investigations wherein the members can exercise the "right" not to provide a statement. The fact that a member can be ordered to answer questions during an internal investigation may make this "right" somewhat

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⁴ Pursuant to s. 14(1) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 as am. by R.S.C. 1985, c. 8 (2nd Supp.) ("R.C.M.P. Act") "Every member shall, before entering on the duties of the member's office, take the oath of allegiance and the oaths set out in the schedule." The Schedule outlines the following Oath of Office: "I, ..........., solemnly swear that I will faithfully, diligently and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police, and will well and truly obey and perform all lawful orders and instruction that I receive as such, without fear, favour or affection of or toward any person. So help me God." (emphasis added)

⁵ Section 18(d) of the *R.C.M.P. Act* indicates that it is the duty of members "to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner." Further, the *Commissioner's Standing Orders (Duties of Members)* (not published) signed by the Commissioner on June 7, 1991 state that "In addition to the duties prescribed by the Act and Regulations, members of the RCMP must perform those functions of an administrative...or other support nature, as required for the efficient operation of the RCMP." Members "must also perform operational functions as are required for the efficient operation of the RCMP." Section 40 of the *Code of Conduct* states that "A member shall obey every lawful order, oral or written, of any member who is superior in rank or who has authority over that member." Last, s. 50 of the *Code of Conduct* states that "A member shall not knowingly contravene or otherwise breach any oath taken by the member pursuant to section 14 of the Act."
meaningless.

Subsection 40(3) of the *R.C.M.P. Act* purports to protect ordered disclosures by stating that:

No 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*... (emphasis added)

This measure is intended to protect the member by preventing the formal introduction of the ordered statement into evidence in any subsequent proceeding. It remains to be seen just how effective this protection is in practice and in law.

While the author does not conclusively accept that the structure of police organizations will dictate function (*i.e.* if wide powers are given they will be abused), there are issues, as outlined in Chapter 6, that may make structural abuse more likely in the case of R.C.M.P. internal investigations. Internal disciplinary powers which are too extensive can create insurmountable and systemic hostilities to an effective and fair accountability process. This is particularly true if internal disciplinary measures such as ordered statements can be used intimidatingly and unnecessarily applied without proper accountability.

The purpose of this Chapter, based on the context provided by the preceding chapters, is to outline and examine a number of issues surrounding internal investigations, ordered statements, and the accountability process in the R.C.M.P. In particular, are members informed and trained about the accountability process? Are members adequately represented

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6 R.C. MacLeod, *The NWMP and Law Enforcement, 1873-1905* (Toronto: University of Toronto Press, 1976) at 5 discusses this concept.

during the investigative stage? Are there issues or practices which make the authority to compel statements suspect? Is it investigatively necessary to have ordered statements? Are ordered statements necessary for accountability? Is the protection for ordered statements effective? Essentially, four main points about the ordered statements regime will be asserted. First, there is the abstract concern that ordered statements will be used for illegitimate purposes, in particular to defeat the rights of members to silence and against self-incrimination. Second, there is evidence to indicate that the R.C.M.P. uses ordered statements for incriminatory purposes and the protections afforded ordered statements, the employment context, and the representation provided members are ineffective in preventing such consequences. Third, it is implausible to assert that members have voluntarily accepted this regime as a condition of employment because they are not informed about the rules protecting them. Moreover, members do not have effective access to legal counsel to protect their rights. Last, the R.C.M.P. does not really need ordered statements to conduct effective investigations into misconduct and hold members accountable. It is important that these underlying issues be identified and discussed to ensure that mistaken views about ordered statements are not operating. As a prelude to the legal analysis in Chapter 8, this Chapter will also begin to examine whether the employment context of members, internal investigative practices, and the privacy/dignity of members requires that the right to silence and non-incrimination be afforded to members.

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8 Kenneth Culp Davis, Police Discretion (St. Paul, Minnesota: West Publishing Co., 1975) at 37-8 notes that mistaken assumptions and misapprehensions about the police and their practices often lead to mistaken views.
2. Rationales

a. Management

Management in the R.C.M.P. asserts a functional justification for ordered statements claiming a right to demand explanations from employees in order to find out what they did and hold them accountable. Former R.C.M.P. Commissioner Simmonds testified before the Legislative Committee 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."\(^9\) This correlates with the general position of employers that they have a right to obtain an accounting from an employee.\(^10\) Fortunately, Commissioner Simmonds also provided some further insight into the motives of the Force:

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.\(^11\) (emphasis added)

In other words, the Force's motive in obtaining compelled statements is not merely to obtain


\(^11\) *Supra*, note 9, Issue no. 7 (27 November 1985) at 7:16.
"an accounting," but to obtain independent or "derivative evidence" to further an investigation and/or found charges against members for statutory or internal offences.\textsuperscript{12} The direct inference from Commissioner Simmonds' testimony is that s. 40 permits the Force to expedite criminal or statutory investigations under the guise of an internal investigation. One must also wonder whether an ordered statement is not also an instrument for a management that is compromised of commissioned officers devoted to maintaining control over, and ensuring the vulnerability of, members. While maintaining control over subordinates is clearly valid, the deeper issue is whether ordered statements are being illegitimately employed to advance causes unrelated to their stated purpose.

b. Public Employees

Another rationale encountered in support of compelled statements is that forcing public employees to answer for their conduct under pain of losing their job is not essentially different from the problem confronting a private employee in a similar predicament.\textsuperscript{13} In some instances, however, this position has also been taken one step further by endorsing the

\begin{footnotesize}
\begin{enumerate}
\item The Marin Commission, \textit{supra}, note 2 at 59; see also, the concerns of Svend Robinson (Member of Parliament) as a legislative committee member, Canada, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65, \textit{An Act to Amend The Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof}, Issue no. 11 at 11:113-15; and Svend Robinson, Member of Parliament, Canada, House of Commons Debates, 1st Session 33rd Parliament, vol. VII, 1985 at 10511.
\item Henry J. Friendly, "The Fifth Amendment Tomorrow: The Case For Constitutional Change" (1968) 37 \textit{University of Cincinnati Law Review} 671 at 707. For the "same position" view, see Akhil Reed Amar and Rennee B. Lettow, "Fifth Amendment First Principles: The Self-Incrimination Clause" (1995) 93 \textit{Michigan Law Review} 857 at 905-6; Joel M. Flaum and Jayne A. Carr, "Public Service: Self-Incrimination vs. The Public's Right To An Accounting" (1972) 63 \textit{Journal of Criminal Law, Criminology and Police Science} 325. A. Alan Borovoy, \textit{When Freedoms Collide: The Case For Our Civil Liberties} (Toronto: Lester & Orpen Dennys, 1988) at Chp. 4 is also of the view that police officers should not be exempt from providing a "reasonable account" of their conduct.
\end{enumerate}
\end{footnotesize}
argument that the particular occupational community (i.e. police) and public employment support a narrower reading or elimination of the protection that private/other employees enjoy\textsuperscript{14} (e.g. no rights against self-incrimination and silence). Although it is conceded that public employees may have every right to protect themselves from criminal charges by not providing statements, they should not expect job tenure when they refuse to cooperate in their employer's legitimate investigation.\textsuperscript{15} The concern is that a government agency should not have to rely on the investigation of an outside authority when the agency's credibility and accountability to the public are at stake.\textsuperscript{16}

It has also been argued that public employees accept the duties and encumbrances of being a public servant when they accept employment. As previously noted, in \textit{R. and Archer v. White}, the Supreme Court of Canada asserted that an R.C.M.P. member, by "voluntarily" joining the Force, has entered into special conditions and submitted to certain restrictions in matters of discipline.\textsuperscript{17} This analysis may fail to acknowledge that the voluntary

\textsuperscript{14} Thomas R. Folk, "Use of Compelled Testimony in Military Administrative Proceedings" (August, 1983) \textit{The Army Lawyer} 1 at 12 notes the narrower rights view for public employees. Historically, in some jurisdictions police officers were denied any employment or due process protections; see Andrew Herzig, "To Serve And Yet To Be Protected: The Unconstitutional Use of Coerced Statements in Subsequent Criminal Proceedings Against Law Enforcement Officers" (1993-94) 35 \textit{William & Mary Law Review} 401; Bryon L. Warnken, "The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination" (1987) 16 \textit{University of Baltimore Law Review} 452. As a corollary, it is also accepted that the police are more deserving of punishment than others because officers assume a higher level of responsibility to operate within the law by joining a profession charged with enforcing the law; see, Wesley A. Carrol Pomeroy, "The Sources of Police Legitimacy and a Model for Police Misconduct Review: A response to Wayne Kerstetter" in William A. Geller, ed., \textit{Police Leadership in America: Crises and Opportunity} (New York: Praeger, 1985) at 183 at 183-4.

\textsuperscript{15} Hill and Wright, \textit{supra}, note 10 at 925.

\textsuperscript{16} \textit{Ibid.} at 887-88.

employment conditions in the R.C.M.P. can be unilaterally changed by amending legislation pertaining to codes of conduct and how members will be held accountable. For example, in 1986 (to 1988), the enactment of new legislation dealing with complaints and investigations in the R.C.M.P. fundamentally altered conditions of employment for members. While such changes can occur in other public employment contexts, as asserted in earlier chapters, policing places officers in an environment that is much different from most other occupations (e.g. conflict, use of force and exposure to allegations) which may affect the analysis.

There is also an assumption that when R.C.M.P. members "voluntarily" join they are fully apprized of the conditions of employment regarding discipline and accountability. It is also assumed that members are knowledgeable about the accountability process. While not knowing about certain obligations and conditions of a job may not invalidate a person’s voluntary decision to accept employment, it would seem that the fundamental nature of ordered statements is something that goes to the heart of deciding to accept a police job. The very nature of policing makes the issue of self-incrimination considerably more important than in other employment contexts. Some may assert that it is the prospective candidate’s responsibility to inform him or herself about such matters. In light of the complexity of the R.C.M.P. accountability regime, it is doubtful the average person would be able to identify or appreciate the significance of the ordered statement authority.

c. Public Accountability

The R.C.M.P. Public Complaints Commission ("P.C.C.") represents a variation of

C.A.) at 577 where the court stated "The police officer has voluntarily accepted a vocation entailing duties which are peculiar to it and essential to its proper performance, duties to which ordinary citizen are not subject."; Royal Canadian Mounted Police External Review Committee, Sanctioning Police Misconduct-General Principles (Discussion Paper 8) (1991) at 50.
the public employee position in that public confidence is asserted as a justification for compelling statements from police officers. This rationale has two aspects: first, public confidence requires some form of independent and external civilian review; and second, because police officers can operate in "low visibility" situations (or alternatively, have considerable authority), they must be subject to providing answers upon demand. This second aspect is similar to the functional approach of employers for ordered statements, but it is broader in nature because police employers see the member's responsibility flowing to them first, and then to the public.

The P.C.C. is clearly on record as endorsing compelled statements from R.C.M.P. members and is dissatisfied with the fact that it cannot compel members to provide statements. The P.C.C. has declared two shortcomings under Part VII of the R.C.M.P. Act relative to public complaints: first, there is no requirement for suspect members to provide an explanation of the circumstances to the Force or a P.C.C. investigator; and second, even if a statement is ordered pursuant to s. 40(3), it cannot be used in civil or administrative proceedings (i.e. P.C.C. hearings). In the P.C.C.'s view, a member's

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20 Ibid.; see, s. 45.45(8); see also s. 45.45(10) which prevents P.C.C. hearing testimony from being used in internal disciplinary hearing.
failure to account or provide a statement under Part VII "brings the police into disrepute." 21 Since the P.C.C. cannot do what it wants under the legislation, it has turned to the R.C.M.P. and indicated that policy should be developed that requires members under investigation for public complaints to provide statements when requested by Force investigators. 22 The P.C.C. asserts policy should also be put in place by the R.C.M.P. to require that its members make themselves available for questioning by the P.C.C. 23 These suggestions are open to criticism in the face of the complete lack of legislative jurisdiction to take such action. Based on a plain reading of s. 40(3) of the R.C.M.P. Act, it seems apparent that the P.C.C. proposals to compel members to provide statements for the purpose of a public complaint are inconsistent with the protection sought for ordered statements/members. The P.C.C. is trying improperly to avoid the clear distinction drawn in the R.C.M.P. Act between internal investigations where members can be compelled to provide statements and public complaint investigations where members cannot be compelled to provide statements.

A recent initiative by the P.C.C. is to make adverse findings against members who do not speak or provide statements to the Force or the P.C.C. 24 Such a course could be criticized for three reasons. First, as noted above, members are not required under the R.C.M.P. Act to provide statements during a public complaint investigation. The drafters of the legislation clearly contemplated the different expectations of a member during internal investigations.

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21 Ibid. at 87.

22 Ibid. at 41.


and public complaint investigations. Second, drawing adverse inferences when a member does not provide a statement during a public complaint investigation may not adequately recognize the contradictory demands that confront a member during an investigation (e.g. provide an account, report or statements to supervisor, detachment commander, investigator, public complaints investigator, other regulatory investigator and adhere to statutory obligations to provide information, answer questions and attend hearings, civil actions, criminal investigations). Third, in some cases members may be concurrently under criminal investigation and they have a right to silence. To draw an adverse inference against a member in such a situation may be unfair.

Almost unnoticed is the fact that the P.C.C. has now injected public accountability and not employee-employer responsibilities as the key element. This is significant in that the traditional management purpose for ordered statements is being substituted, as is the real purpose for a compelled statement. The position of the P.C.C. on the issue of statements from members is being put forward without sufficient evidence to show that its investigations or investigators are facing obstacles without such statements. The P.C.C. arguably has less difficulty in conducting investigations by having "uncooperative" members compelled to public hearing. In light of the literature on civilian investigations reviewed in Chapter 5, and the approval rating of the P.C.C. specifically (Chapter 6), it is hard to believe that extracting statements from members will have an appreciable impact on the success of the P.C.C. Further, forcing members to answer questions is not going to engender the type of conciliatory environment the public complaint and accountability process is supposed to inculcate. In isolation the notion that one can make adverse findings when one does not have any other evidence to consider may be endorsable. However, the P.C.C. appears to have gone one step further and wants to exact consequences on members for not cooperating by
providing statements. The issue is whether or not ordered statements would make any difference when dealing with public complaints, not whether it would address perceived investigative complications. In fact, the P.C.C. acknowledges that it holds investigations in abeyance until criminal matters are concluded, which weakens the argument for compelled statements from members to deal with a public complaint. It may be that the P.C.C., in seeking a requirement for compelled responses from police officers is out of step with public sentiment. A recent American survey found that 88% of the civilians surveyed felt that law enforcement officers should have the right to silence during an investigation.

d. Critics

Critics of "ordered statements" argue that such a measure is both unnecessary and violates a member's right to be free from self-incrimination, the right to silence, and is unfair. Concerns have also surfaced that the authority to compel statements is subject to abuse by empowering the Force to use such statements as a means to obtain from members (to use former R.C.M.P. Commissioner Simmonds' term) "independent evidence" that would otherwise be unavailable to further investigations and/or institute proceedings. The author posits that compelled statements can represent an instrument of actual or potential oppression.

25 See the review in Chp. 6 of the P.C.C. process.

26 (a.u.) "Survey of police "bread-and-butter" issues finds broad public support" in Law Enforcement News (15 October 1996) at 1 and 14. The author recognizes that this is an American study, and does not necessarily reflect Canadian opinion.

27 Robinson, Committee Minutes and Hansard Debates, supra, note 12 reported being advised of instances of abuse by the Force's use of ordered statements; Lewis et al., note 10 discuss the concerns of officers in this regard.

28 Robinson, ibid.; Simmonds, supra, note 9; Marin Commission, note 2 at 59.
that is more consistent with maintaining power, control and status relations in the Force than effecting meaningful accountability. Further, the ordered statement authority permits sloppy investigating, improper shortcuts and violates the privacy and personal dignity of a member. The vulnerability of members under the current regime is a cause for concern when considering ordered statements.

Many observers seem to assume that internal investigations are strictly related to proving or disproving an allegation. Like any investigation, however, there may be other objectives motivating the Force, such as exhorting the member to resign, protecting the organization, or breaching the member's ability or desire to fend off the allegations. The goal may be to create suspicion, confirm pre-conceived views, validate a course of action, or provide leverage, and not necessarily to establish the facts. Any statement or confession, even if inadmissible, is a valuable vehicle to police: first, statements provide an important bargaining chip (perhaps more psychologically than judicially) to get a suspect, police or otherwise, to adopt a course of action (e.g. resign quietly); second, the statement can be used to solve other crimes or acts of misconduct; third, a statement can provide valuable information to further an investigation; and fourth, statements can prove invaluable in preparing a case for hearing. As Reed notes, historically, although an ordered statement in the R.C.M.P. could not necessarily be used as "evidence" (i.e. admissible criminally) it

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29 Michael McConville and Jacqueline Hodgson, *Custodial Legal Advice and the Right to Silence* (The Royal Commission on Criminal Justice Research Study No. 16) (London: H.M.S.O., 1993) at 188 point out that it cannot be assumed that police investigations are not driven by other factors unrelated to proof.

could be used to further the investigation.  

As with police interviewing in general, ordered statements pose a danger because they occur in private with only the police investigator and suspect member present. There is also little effective external supervision of ordered statements, by the R.C.M.P. External Review Committee ("E.R.C."), or otherwise. As is argued in other contexts, there is certainly some doubt about the effectiveness of the courts in general in monitoring police interrogations.

The conditions under which ordered statements can be sought are not necessarily conducive to fairness or evenhanded treatment. One of the problems with ordered statements is that they can be obtained before there is a proper presentation of the allegations and facts. In some instances the allegation may be vaguely stated, but the member may not know the exact infractions being alleged or what supporting evidence is present. Further, it need only "appear" that a member is contravening the Code of Conduct to bring this conscriptive authority to bear. There is no minimum threshold of reasonable and probable grounds or an actual charge before this conscription authority is invoked. If a member provides a

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31 Gary E. Reed, Organizational Change In The RCMP: A Longitudinal Study (M.A. thesis, Simon Fraser University, Political Science, 1984)(unpublished) at 162.


34 Leonard W. Levy, Origins of the Fifth Amendment - The Right Against Self-Incrimination (New York: Oxford Univ. Press, 1968) at 259 reports that Sir Edward Coke was of the view that an accused should be given a copy of the particulars of allegations. The case-to-meet principle is also central to Ratushny's work, supra, note 32.
statement under such circumstances, there is a risk of providing unintentionally an "inaccurate" response or having a response interpreted/reported incorrectly (i.e. interviewer misunderstands or incorrectly applies response based on facts known to interviewer, but not interviewee). The risks of being inaccurate, misinterpreted or misreported decline if a response is not provided.\textsuperscript{35} It must also be noted that there is no limitation period to start a criminal or internal investigation, which means a member can be subjected to providing an ordered statement at almost anytime.\textsuperscript{36} If the internal process goes ahead before the criminal process, it can put the member in an awkward position because he or she may be required to disclose incriminating evidence or possible defences during the internal process that go to the criminal case.\textsuperscript{37} The R.C.M.P. does not feel restrained from proceeding with an internal investigation or hearing before the criminal proceeding is completed.\textsuperscript{38} Once obtained, the use of an ordered statement can no longer be regulated or supervised effectively.

\textsuperscript{35} Brian MacKenna, "The Compellability of the Accused and Reverse Onus Statutes" in Walter S. Tarnopolsky, ed., \textit{Some Civil Liberties Issues of the Seventies} (York University: Osgoode Hall Law School, 1975) at 54. For example, an interviewee can provide an account which the interviewer considers evasive simply because the interviewee did not appreciate the significance or relevance of the facts that they did not provide.

\textsuperscript{36} Even if a criminal summary conviction period has expired, it does not prevent the police from conducting an investigation, only laying a charge. Further, as discussed in Chapter 6, under the R.C.M.P. public complaints process there is no time limit to file a complaint or institute an investigation. Internally, while a one year statutory limitation may exist with which to proceed by formal discipline (and by policy for informal discipline) this does not prevent an investigation. In addition, the Force can assert that the misconduct and identity of the member were not known to the Appropriate Office until the complaint was filed/reported which means the limitation period did not start to run.

\textsuperscript{37} M79.

\textsuperscript{38} Several interview examples were encountered where the Force proceeded with internal proceedings before the criminal aspect had been dealt with: M40, M79, M88, & M93; see also, \textit{R. v. Wigglesworth}, [1987] 2 S.C.R. 541 where the R.C.M.P. member was "convicted" internally before the criminal charge was heard.
by the R.C.M.P. or member.

A member ordered to provide a statement as part of an internal investigation, who is not well informed about the specifics of the allegation that prompted the investigation and who is concerned about civil or criminal ramifications of his or her conduct can face a difficult trilemma:

1) provide a harmful response (to a defence, confirm part or all of allegation, unintentionally provide inaccurate response, unknowingly provide insufficient or partial response that is misconstrued, misinterpreted or misreported),

2) make no response and face further formal and informal allegations/sanctions (e.g. disobey order or dismissal; must be guilty because did not provide a statement) and adverse consequences (e.g. suspension), or

3) purposefully provide an incomplete response to protect numerous other interests and be subjected to sanctions for being misleading.

It is natural for members who find themselves in such circumstances to feel pressured, become adversarial, alienated, and evasive. This does little to assist with morale or create an environment of corrective accountability. No member, based on the current accountability regime, demands of the occupation, and the rights and Charter orientation of society is, regardless of the circumstances, ever going to feel fairly treated when placed in the position of providing a compelled statement. As discussed in previous chapters, statements in police employment operate in a context that does not exist in other situations. Those advocating compelled statements, in light of current employment relations theory and policing philosophy, must also reflect on the message being sent by such a measure.

e. The Clash

Accountability in public employment of individuals and agencies can involve the clash of several interests: first, the interests of the public employer in receiving information
regarding the performance and conduct of an employee; second, the requirement of
accountability by the agency and employees to the public (e.g. the minister responsible);
third, accountability of the agency and employees to external agencies (e.g. Coroner); and
fourth, the interests of the public employee throughout in self-preservation, being protected
against improper incrimination, and being treated fairly. Clearly there are conflicting
interests that can arise between the organization, employee and other interested parties over
accountability.

In this context, there is a philosophical clash concerning the balance that should exist
between individual rights and effective enforcement and between individual rights and
effective public/internal investigations. Some form of utilitarian argument is usually
adopted, wherein it is asserted that the interference with individual liberty can be justified
because it is necessary in the interests of the employer or society to obtain ordered
statements. This thesis, however, questions whether the individual R.C.M.P. members
must be subjected to ordered statements to meet employer and public interests.

39 Luther G. Jones III, "The Privilege Against Self-Incrimination of the Public Employee in
an Investigative Interview" (November, 1985) The Army Lawyer 6 at 10 identifies some of these
issues.

40 C. Granger, "Crime Inquiries and Coroners Inquests: Individual Protection In Inquisitorial

41 For example, the Ouimet Commission, supra, note 7 at 48 outlines this fundamental
proposition and that the interference is only justified if necessary for society; see also, Jeremy
Bentham, Rationale of Judicial Evidence, vol. 5, Book 9, Part IV, c. 1-4 and Part V (London:
Hunst & Clarke, 1827). For a more general discussion of utilitarianism see; J. Murphy and J.L.
Coleman, Philosophy of Law: An Introduction to Jurisprudence Rev’d ed. (Boulder: Westview
545; Frank P. Williams III and Marilyn D. McShane, Criminological Theory (Englewood Cliffs,
Pioneers in Criminology 2nd ed. (Montclair, N.J.: Patterson Smith, 1972) at 1-68.
The unavoidable paradox for accountability investigations, as with any criminal investigation by the police, is that the department and investigator are faced with the dual functions of substantiating allegations against the suspect member while at the same time safeguarding the suspect member's rights.\textsuperscript{42} There are several potential problems then with compelling statements from police officers, regardless of whether the statement is protected: first, ordering statements contributes to the tension between police officers, management and the public which does little to foster "trust and integrity" in the process; second, if officers believe that the departments and investigators will violate rights (\textit{e.g.} deny counsel) as a reward for dealing with internal complaints (\textit{e.g.} getting a statement, charge, resignation or dismissal), they will be less inclined to assist any investigator, making the task of accountability more rather than less difficult; third, officers will become more isolated, marginalized, defiant and/or unified if they believe they are not being treated fairly;\textsuperscript{43} and fourth, it leaves officers open to abuse by the organization, which perpetuates cultural and organizational values that are patently inconsistent with the philosophies purportedly guiding current managerial and operational police practices (\textit{e.g.} fair treatment, act within the law). Permitting such organizational abuse is also inconsistent with the underlying social value of due process.

Herzig outlines some of the policy and social concerns over the use, abuse, or disclosure of ordered statements from police officers: first, officers will stop giving

\textsuperscript{42} A. Alan Borovoy, "Comment" in Walter S. Tarnopolsky, ed., \textit{Some Civil Liberties Issues of the Seventies} (York University: Osgoode Hall Law School, 1975) at 118 notes this dilemma generally confronts the police wherein they are required to seek a conviction of the accused and at the same time protect the accused's rights.

\textsuperscript{43} Herzig, \textit{supra}, note 14 at 442-3; Jackson, note 33 at 56 observes that the law is also effective in keeping lower orders subjected (\textit{i.e.} in this case police rank-and-file).
statements or reporting misconduct as a matter of course; second, the rights of officers who give statements under expectations that the department will, or can, protect them are jeopardized; and third, it is rather "frightening" (and contradictory) that protection against incrimination or silence are denied to those who assume a career protecting (and are expected to abide) the rights of others. The concern is that suspect officers will be discouraged from complying with internal investigations when it becomes apparent that coerced statements or information from internal investigations is being utilized in other forums. For example, accessing ordered statements through the discovery process, for harassment complaints, or for the purposes of mediation and conciliation, can impact on the disposition of police officers towards cooperating. Like Herzig, the author asserts that the courts should equate statements derived from the coercive techniques of an internal investigation with any state ordered conscription and provide use and derivative-use immunity. Prior to addressing this issue in Chapter 8, however, it is necessary to examine in greater detail some of the fundamental assumptions informing the employment context that impact on ordered statements.

44 Ibid. at 440-41; also, Douglas W. Perez, Common Sense About Police Review (Philadelphia: Temple University Press, 1994) at 62 notes the chilling effect disclosure can pose for reporting misconduct.

45 Herzig, ibid. at 404; (a.u.) "Some complaints will disappear from California cops' personnel folders" in Law Enforcement News (15 September 1996) at 1 outlines some of the concerns that arise from accessing police abuse files.

46 Ibid.; Perez, supra, note 44 at 61 and 221. This supports the argument for erecting effective barriers around information that may be obtained in different ways for a variety of different purposes.

47 Supra, note 14 at 402.
3. Notice and Training

a. Theory

One of the basic theoretical premises of employment law is that an applicant for a job is given prior notice of the rules of conduct and obligations to be undertaken in the prospective employment situation. It is generally stated that police employers should provide initial and ongoing instruction, manuals, and materials to police employees explaining the disciplinary process, potential sanctions, obligations, rights, and provide clear notice of required or prohibited behaviour. A recurring theme of commentators is that it is imperative to create an ethos in the police to prevent misconduct by training officers regarding their responsibilities. In addition to pre-employment notice, training and

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48 At least from the perspective of affirmative or corrective discipline as outlined by James R. Redeker, *Discipline: Policies And Procedures* (U.S.A.: The Bureau of National Affairs, 1983) at 24, 35 and 47; endorsed in E.R.C. Discussion Paper 8, *supra*, note 17 at 7; and noted by Gerry Ferguson and Marli Rusen, *Discipline of Municipal Police In British Columbia* (Report To The Commission Of Inquiry Into Policing in British Columbia, 1993) at 53-4. The author confirmed that the Canadian military now requires all applicants to read and sign the conditions under which they will be employed. The expectations for conduct are clearly set out in the document.


instruction are methods of professionally instilling the standards of performance expected by the department.\textsuperscript{51} Police departments must take the lead in inculcating the values of responsibility and integrity in their members in relation to misconduct.\textsuperscript{52}

The objective of the "modern" disciplinary system is to adopt the most appropriate means to instill in officers the positive attitude to comply and conform with policies, rules, and procedures regarding behaviour.\textsuperscript{53} As MacDonald \textit{et al.} posit:

The only effective control system for the management of a complex, evolving social function such as policing is a mutual understanding of police roles, aims and priorities, combined with clear and definite responsibilities and personal commitment.\textsuperscript{54}

The express purpose of induction information and training, therefore, is to provide and promote compliance with the ethical codes and inform officers \textit{in advance} of the consequences of misconduct.\textsuperscript{55} The sources of police ideology are considered to be within the control of management and should be moulded to reflect acceptable standards of behaviour from day one.\textsuperscript{56}

To accomplish the positive approach to accountability, Alderson noted that ethical

\textsuperscript{51} \textit{Ibid.}; Albert J. Reiss Jr., \textit{The Police And The Public} (New Haven: Yale University Press, 1971) at 201-2; Rene J. Marin, "Professionalization of the Canadian Policeman - Through Education and Training - Myth or Reality" (Ottawa, Ont.: n.d.).


\textsuperscript{55} Royal Canadian Mounted Police External Review Committee, \textit{Conflict of Interest} (Discussion Paper 10) (Minister of Supply and Services, 1992) at 32-33.

\textsuperscript{56} MacDonald \textit{et al.}, \textit{supra}, note 54 at 298.
standards must be inculcated from the start of a police officer's career and routinely re-enforced throughout. Ferguson and Rusen concur, noting that police educators and senior police managers have an "obligation to ensure that all officers under their direction have been adequately instructed on their duties." In fact, such instruction is normally required in arbitral jurisprudence as a pre-condition to any disciplinary action.

Further, as sensibly pointed out by McNamara, providing officers with training and knowledge about the rules and regulations on discipline will protect officers in two ways: first, the officer will be able, or more likely, to avoid violating the rules; and second, it will ensure the officer is better prepared to defend him or herself against what might be perceived as the arbitrary use of authority by a supervisor. del Carmen also notes that, given the prominence of accountability and law suits against police officers, it is imperative that officers have, or be given, ample knowledge of the process and procedures.

As pointed out by Grant, however, it is doubtful that police education is creating an

57 John Alderson, *Policing Freedom: A Commentary On The Dilemmas of Policing Western Democracies* (Plymouth: MacDonald and Evans, 1979) at 23. Applicant background checks should also be geared to ensuring that prospective members have conducted themselves ethically in school and at work.

58 *Supra*, note 48 at 119.


60 *Supra*, note 49 at 240.

atmosphere in which officers can thoroughly internalize beliefs in fairness and justice when some departments fail utterly to provide this atmosphere in relation to discipline and their treatment of members. Unfortunately, instead of inculcating a positive and reciprocal view of accountability, police departments tend to obfuscate and engage in techniques that undermine officer rights. The result is certainly not a permeating ideology of fairness and responsibility. The author suspects that the notion of rank-and-file members being knowledgeable and trained about their rights is viewed negatively by managers because it makes the police officer less likely to succumb to or accept improper treatment from the department. This brings us to an examination of the reality about prior notice and training regarding the accountability regime in the R.C.M.P.

b. The Reality

It is a fundamental assumption that R.C.M.P. members are informed of the extensive conditions, duties, and obligations of employment before voluntarily joining. The author found this to be a misinformed assumption. R.C.M.P. members receive virtually no prospective, initial, or ongoing training on the accountability process, their duties, obligations, and rights pursuant to an allegation of misconduct. The measures taken by the R.C.M.P. to inform and educate members about the conditions of employment, the accountability process, and ordered statements, given the immense importance of this area, are nothing short of dismal.

First, in relation to the application process, the author found that potential candidates

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62 Alan Grant, "Some Reflections on Police Education and Training in Canada" (1975-76) 18 The Criminal Law Quarterly 218 at 228-9 asserts this as the third part of police education goals.
are given no detailed information on the accountability process or regime. During a phone interview with an R.C.M.P. recruiter, it was confirmed that applicants are not given any detailed information on the accountability regime. The author also found no reference to the accountability regime or expectations in the draft letter that offers enrolment in the R.C.M.P. to a prospective recruit/cadet. Upon reviewing the *Royal Canadian Mounted Police Cadet Training Agreement* (the document signed by joining applicants) the author found only one reference to accountability, in Clause F.2. ("Termination of Agreement"), which states that the employment contract may be terminated if the "Cadet is charged with a criminal or quasi-criminal offence." The *Cadet Training Handbook*, which is provided to all applicants who are offered employment, elaborates somewhat on the grounds for termination of employment in training by stating that a criminal or quasi-criminal charge, involvement in misconduct (*e.g.* threats, drugs, physical or psychological abuse), harassment, injury, and failure to meet performance standards are grounds for termination. The only policy reference to be located stated simply that a cadet "does not have the rights and benefits of a RCMP member during training." In its defence, the R.C.M.P. may respond that cadets are not subject to the accountability regime like a regular member. However, the principle is that cadets/employees should be advised *in advance* of the full rigour of the

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63 M81.

64 The author was provided a copy of the R.C.M.P. form letter by Recruiting on 96-03-05.


accountability process that will be applied should they graduate, not six months after they accepted employment. During interviews and discussions with members who joined the R.C.M.P. prior to the Cadet Program, the author found only one member who recalled being told at the official swearing-in ceremony that he would be subject to the R.C.M.P. Act, but at the time had no idea what this entailed. During the recruitment phase, prospective employees are not given any clear information or instruction about the accountability regime and expectations in the R.C.M.P.

Based on personal experience, the author was surprised to read the assertion by the E.R.C. in its Discussion Paper on police management practices that the rules for misconduct are taught as part of basic and ongoing police training. The author conducted a thorough review of his notes, handouts, binders, and lecture material obtained as a recruit in the R.C.M.P. Training Academy (a.k.a. "Depot Division") from 1986-87 and did not find one item on this subject. The closest topic that could be related to misconduct is that the driver training instructors repeatedly advised recruits not to make statements accepting liability or responsibility when involved in an accident. Lectures were also provided on the use of deadly force by the firearms instructors; however, no details or instructions were provided on the investigative, discipline, ordered statement, or grievance process. During interviews with members who had three to ten years service none of them could recall any specific recruit or

68 M61. This member also said that he was so happy to have found employment that, at the time of signing, such matters did not really concern him.

in-service training regarding the accountability process.\footnote{M2, M6, M10, M12, M14, M15, M23, M28, M31, M46, M52, M56, M63, M84, M87, & M94.}

To make the findings more current, the author also queried several recent recruits/cadets (\textit{i.e.} one day out of training to two years service) during interviews and none of them recalled any specific training or education on the public, internal, and/or criminal accountability process in relation to allegations of misconduct.\footnote{M3, M17, M19, M25, M38, M53, M62, M72, M74, M76, M89, M90, & M95.} One member recalled that a Division Staff Relations Representative ("DSRR") did attend a class and outline the role of DSRRs, but the member did not have any appreciation or understanding of what was being conveyed because of the lack of training on the subject.\footnote{M62.} It was further confirmed in a phone interview with a Training N.C.O. at the R.C.M.P. Academy in Regina that "very little, if any" training is provided regarding the accountability regime, in particular as it relates to the rights, duties, obligations, and responsibilities of members who are the subject of misconduct investigations.\footnote{M100.} A review of the \textit{Cadet Training Program, Program Training Standard}, did not reveal any training dedicated to this topic, although it appears that Cadets are given "statistics" from the P.C.C. to review on the use of force and attitude.\footnote{Royal Canadian Mounted Police, \textit{Cadet Training Program, Program Training Standard} (January, 1996). However, there was training on numerous other topics from how to answer a telephone, pursuit driving, arrests, and marching.} This conforms with the findings of Marin who notes that considerable technical training on policing is provided to recruits, but little, if any, training is provided on ethics or
discipline.75

The E.R.C. in its Report for 1987-88 found that the Training Academy spent less than 1% of training time familiarizing recruits with the rules of conduct, internal disciplinary procedures, and grievance systems, however, the above findings indicate this is currently a generous estimate.76 The E.R.C. properly asserts that greater prominence must be given to accountability since a better understanding of rules of conduct and enforcement may result in better compliance.77 The training provided to recruits at the Academy fundamentally fails to address the need for instruction, notice and training on the accountability process.

Not only the Force, but the P.C.C. and E.R.C. should also bear responsibility for the apparent failure to train and educate members about the accountability regime. The P.C.C. reports making two presentations to R.C.M.P. recruits in training in 1994-95, but that would hardly cover all the recruits passing through the training facility in a given year.78 Although pamphlets and handouts have been issued, this certainly does not demonstrate a

75 Supra, note 50 at 304.

76 Royal Canadian Mounted Police External Review Committee, Annual Report 1987-1988 (Minister of Supply and Services, 1988) at 9; Ferguson and Rusen, supra, note 48 at 35 also found that little time is spent in police training (recruit or in-service) familiarizing/inculcating officers with ethical standards, rules of police conduct and internal discipline matters.

77 Ibid.

78 Royal Canadian Mounted Police Public Complaints Commission, Annual Report 1994-95 (Minister of Supply and Services, 1995) at 5; Royal Canadian Mounted Police Public Complaints Commission, Annual Report 1993-94 (Minister of Supply and Services, 1994) also reports two visits (July 9, 1993 and February 15-16, 1994) to Depot to make presentations to recruits on the P.C.C. mandate. The author did speak to one member who was in training at the time and he recalled that the presentation focused on a proposed amalgamation of the P.C.C. and E.R.C. Attendance for recruits was mandatory. The member who attended one of these presentations indicated that it was clear that the significance of this proposal was lost on the recruits, particularly since they had no background or understanding of the topic. The Training NCO interviewed for this thesis did not recall any P.C.C. visits over the last several years. At best the Training NCO indicated the attendance of the P.C.C. was hit and miss.
systemic commitment to educating members about a very technical and complex process or instilling a sense of responsibility. Not surprisingly, in a recent P.C.C. survey, only 55% of members stated that someone explained the complaints process to them, while more than 76% of complainants stated that someone explained the process to them. In November, 1996, the Pony Express ("The RCMP's National Newsmagazine") started a section called "The Discipline Files." The purpose of this section, and a related section entitled "PCC Casebook," is to set out vetted case briefs of actual incidents involving public complaint and discipline matters. This is a move in the right direction, but one of the shortcomings is that many of the technical procedural details are not adequately addressed. There is no reason to believe that the general knowledge level of members regarding the accountability process has improved since the dismal findings of the Marin Commission in 1976.

As indicated in Chapter 6, the internal investigation unit in "E" Division is attempting to provide limited in-service training to detachment commanders on the accountability process, but the method adopted is meagre at best, and not indicative of the importance this topic has for management and members. This training was also not directed at educating the members most often subjected to the accountability regime; the rank-and-file. The author also questions whether members can be truly expected to maintain a working knowledge of the regime without proper and indepth training. These findings, do, however, explain some of the results noted by the author from the interview process about the apparent low

79 The Statistics Canada (Special Surveys Division), RCMP Public Complaints Commission Survey Analytical Report (June, 1995) at 13-14. When asked who explained the complaints process the members responded as follows: 46% (supervisor); 38% (PCC personnel or pamphlet); 23% (colleague); 25% (other: friend, policy manuals, experience, R.C.M.P. Act, training).

80 Rebecca Johnson, "The truth is out there..." (November 1996) Pony Express at 4 and also 26-7.
knowledge level of members about the accountability process. During interviews of those members not involved in the accountability process, not one member, investigator or NCO was aware of the fact that informal resolution discussions regarding public complaints are protected. This is not surprising, since Samuels found that the training of municipal police officers in British Columbia also needed to include notice of the statutory provision that statements made during an attempted informal resolution are inadmissible in disciplinary proceeding under the British Columbia Police Act. The foregoing findings also assist in explaining why the author found the members interviewed had no real accurate understanding of their obligations to provide answers during the various investigations. Many of the members interviewed were operating on patently false understandings of the law or their obligations to provide statements. Their understanding went from one pole (believing that no statement ever had to be provided, regardless of the circumstances) to the other (believing that a statement was required in every investigation, regardless of its type (i.e. public, internal, criminal, administrative, independent officer review, or other agency)).

It is clear that members are not formally told, before they join, or during training, about the conditions of employment relating to discipline and accountability. It has also been determined that no broad-based or ongoing training or instruction regarding the accountability process is provided to operational members after they are posted to the field. The absence of notice and instruction at the application, training or in-service stages raises important

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81 Section 45.36(2) of the R.C.M.P. Act states that "No answer or statement, made in the course of attempting to dispose of a complaint informally, by the...member...whose conduct is the subject-matter of the complaint shall be used or receivable in any criminal, civil or administrative proceedings..."

questions about the commitment of the R.C.M.P. to educating its members about the process. It also dislodges the assumption that members are voluntarily and knowingly undertaking the responsibilities that come with this form of public employment. It was the view of the members who are involved in the discipline process that the Force, either deliberately or through neglect, is not interested in educating its members about the details of the regime. It is certainly no answer, as some commissioned officers and others seem to assert, that members can simply read the provisions of the R.C.M.P. Act, Regulations, Commissioner's Standing Orders, and national and divisional policy to understand the process.

In order to bring theory in line with reality, the R.C.M.P. will have to implement a process that ensures applicants, cadets, recruits, and members are fully aware of their rights and responsibilities. The more difficult question is to what extent implications can be drawn from the lack of informed consent in terms of validly relying on voluntary acceptance of employment as the basis for the imposition of discipline. The lack of notice and training is even more troubling when the current state of affairs regarding representation during an investigation is considered.

4. Representation

a. Overview

In light of the findings on notice and training, another feature of the accountability process that takes on significance in the R.C.M.P. is the legal representation or assistance

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83 M22, M40, M43, M88, M93, & M107.

84 M21 & M60.
provided to members under investigation. The author found very little discussion on legal representation and the implications it has for the accountability process and ordered statements. It seems to be generally assumed that legal representation, especially during investigations, is either readily available or not an issue.

The general assumption is that police officers have adequate legal representation to deal with misconduct allegations. Surprisingly, del Carmen found that many police agencies have no articulated policy for providing representation for employees, and the matter is handled on a case-by-case basis. If policy does exist it usually requires that the officer acted within the scope of employment and in good faith before coverage will be granted. It is also clear that many departments have, or believe they have, absolute discretion whether or not to provide financial support to a police officer who is under investigation to retain a lawyer. Commentators who have considered the issue of counsel generally agree that a decision as to whether legal counsel will be provided should be made immediately at the very beginning of the process. If legal counsel is not provided by the organization, and there is no union or association in the employment situation, it falls to the individual officer to retain counsel at her or his own expense. It has been suggested that police agencies may be more motivated to provide counsel in civil matters than criminal matters because of the financial

85 Supra, note 61 at 415.

86 Ibid.

87 Alan Beckley, "Legal Protection Insurance For Police Officers" (1995) LXVIII The Police Journal 319 at 320 notes this is certainly the case in Britain, which is also applicable in Canada.

implications for the department. In other words, in a civil suit naming the officer and police department, it is in the best interests of the department to ensure the officer is properly represented.

As a general proposition, our legal system takes exception to the notion of custodial interrogation without the benefit of legal advice. Skolnick asserts that people cannot fully understand the implications of a legal warning (offered generally in a coercive situation such as arrest or detention) without legal consultation. It is also generally believed that individuals should not be required to testify or provide statements, especially when they are unfamiliar with the process. It was reported in the Yale Draft Study that even highly educated individuals may make incriminatory admissions simply because they fail to comprehend the legal significance of their remarks. This has even greater relevance in police misconduct, because unlike a civilian, the police officer needs to understand civil, criminal, public, and internal obligations and/or liabilities. It is hard to fathom any reason why police officers should not have the same opportunity to obtain legal advice as citizens,

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89 del Carmen, *supra*, note 61 at 415. While some may assert the situation is not dissimilar for other public or private sector employees two points must be made. First, virtually no other public or private sector employment exposes employees to the potential for conflict and use of force incidents faced by police officers. Second, R.C.M.P. members do not have financial (or moral) support from a union. The author acknowledges that the issue of conflict can arise when unions or employers provide counsel, but that issue will not be discussed here.

90 Borovoy, *supra*, note 13 at 113.


or conversely have access to legal counsel restricted.  

From several perspectives, legal assistance during interviews is important because: first, interviews can become very intense, there are numerous facts to consider, and most individuals are ignorant of the law and their rights; second, the skill and knowledge required by an interviewee to assess the situation may be in question; third, there is a need to protect and provide full answer and defence; and fourth, outside counsel can prevent interview abuses. One of the reasons for ensuring the right to counsel is that counsel will advise the person on how to best respond in a situation that is inherently intimidating when the person might be tempted to make statements that could prejudice his or her interests. The knowledge lawyers have about the system, procedures and authorities gives individuals represented by counsel a substantial advantage over someone who is without representation. The Ouimet Commission also asserted that legal representation will reduce the sense of injustice a person feels.

The early introduction of a lawyer also provides the subject person with intelligent strategy and psychological support in a setting devoid of emotional support. As Borovoy

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94 P.C.C. Annual Report 1994-95, supra, note 78 at 80-1 notes that the right to counsel cases are about ensuring that individuals obtain (proper) legal advice.

95 Ouimet Commission, supra, note 7 at 133.

96 Borovoy, supra, note 42 at 118.


98 Supra, note 7 at 132.

99 Supra, note 13 at 106.
notes, custodial statements make a lawyer’s involvement situationally significant, in that the real trial can occur as part of a "private interrogation conducted, in the absence of counsel, by the very partial police."\textsuperscript{100} Borovoy contends generally that having to deal with legal counsel may reduce any police propensity to abuse rights, and may eliminate the need for an interview, or even encourage the individual to maintain silence when appropriate.\textsuperscript{101} It is self-evident that a suspect police officer is in no less need of legal counsel than any other person under investigation or being interviewed. Indeed, 94\% of individuals recently polled in the United States agreed that police officers should have legal representation during an investigation.\textsuperscript{102}

Moglen asserts it is the presence of counsel, not constitutional language, that prevents improper police tactics.\textsuperscript{103} In fact, as a result of an examination of police interviews in Britain, a Royal Commission on Criminal Procedure study concluded that in relation to the powerful social, psychological, and manipulative forces operating in an interview (consciously or unconsciously):

The available evidence leads us to conclude that such manipulations can be detected by a trained observer but only when working with a complete visual and sound record (or actual observation) of the interrogation. The effectiveness of the manipulations can be substantially reduced, if not eliminated, by the presence of a third party who is perceived by the suspect as an ally. To be effective the ally must be known, trusted and well-informed.\textsuperscript{104} (footnotes omitted)

\textsuperscript{100} Supra, note 42 at 119.

\textsuperscript{101} Borovoy, supra, note 13 at 106.

\textsuperscript{102} Supra, note 26.


\textsuperscript{104} Barrie Irving and Linden Hilgendorf, Police Interrogation: The Psychological Approach (Royal Commission on Criminal Procedure ["RCCP"] Research Study No. 1) (H.M.S.O., 1980)
According to McConville and Hodgson, the modern provision of legal advice rests upon a number of principles: first, it will guard against the risk of innocent persons betraying themselves inadvertently (i.e. everyone is equally unable to know the law); and second, empowerment of suspects is necessary to counterbalance the increased powers of the police.\textsuperscript{105} As asserted by Grossman, if the right to counsel is delayed in an adversary system, it is so irreparably impaired as to be non-existent.\textsuperscript{106} It is imperative to recognize that the accusatorial process begins at the police station or when inculpatory questions are asked, and given the nature and context of ordered statements, it is not credible to claim the police member is not enmeshed in an adversarial process at the moment a conscriptive answer is demanded.

In general, one of the principal reasons that the police are reluctant to have counsel intervene for suspects, and by extension suspect police officers, is that they believe that counsel will advise the client not to answer questions which prevents further evidence from being obtained.\textsuperscript{107} McConville and Hodgson, although commenting in Britain, make an apt observation that is applicable in Canada:

Suspicion and mistrust of solicitors still lingers on in the police force [studied] and the

\begin{footnotesize}
\textsuperscript{105} Supra, note 29 at 5.

\textsuperscript{106} Brian A. Grosman, "The Right To Counsel In Canada" (1967) 10 Canadian Bar Journal 189 at 189-90.

\textsuperscript{107} William Kelly and Nora Kelly, Policing In Canada (Toronto: MacLean-Hunter Press, 1976) at 26; McConville and Hodgson, supra, note 29 at 67 and 152. The concern of police is that the suspect will be able to resist police blandishments. Conversely, police also believe that counsel only advise their client to cooperate when counsel knows the police have a strong case, and the cooperation will subsequently be utilized to plead for a lighter sentence.
\end{footnotesize}
presence of legal advisors in interrogations is often seen as an unwarranted invasion of the citadel of investigative policing.\footnote{Ibid. at 155.}

Most police officers believe that lawyers automatically tell their clients not to cooperate. In Britain, however, as reported by Baldwin, the "say nothing" approach is probably a myth, since it was found that most lawyers do not tell their clients to say nothing at all, in fact many saw their roles as one of cooperation and assistance.\footnote{John Baldwin, "The Role of Legal Representatives at the Police Station" [Research Study No. 2] in The Conduct of Police Investigations: Records of Interview, The Defence Lawyer's Role and Standards of Supervision (The Royal Commission on Criminal Justice Research Studies No. 2, 3 and 4) (London: H.M.S.O., 1992) at 43 and 51; McConville and Hodgson, ibid. at 68 also found that contrary to myth (legend and rhetoric) advice to cooperate with the police is far more frequent than advice to remain silent.} There may be a general tendency to advise criminal clients to say nothing in Canada, but in advising police clients the situation is much more complicated, since the officer has to consider internal, administrative (\textit{e.g.} suspension), civil, as well as criminal, implications. Police clients also have to consider the position of their co-workers and supervisors and any future relations with them when a serious incident occurs (\textit{e.g.} failure to provide a statement can alienate supervisor or cause all members at the scene to be treated as suspects). In the author's experience, as a police officer, as a civilian public complaints investigator of police, and as legal counsel in numerous police cases, most police officers want to provide statements to get their version of events on the record in some fashion. It is how and when such statements are made that is critical.\footnote{Depending on the nature of the investigation, the author has also found that other counsel who represent police officers are generally more "cooperative" with investigators than would be the case with non-police clients.}

The author found that it is wrong to assume that R.C.M.P. members are
automatically provided, or have access to, legal representation when an allegation of misconduct is being investigated. Given the complexity of the accountability regime and organizational structure of the R.C.M.P., obtaining legal representation is not a straightforward matter. The type of investigation or hearing will determine whether, how, and what form of representation is provided. As a general matter, with respect to criminal allegations private counsel may be retained at Force or private expense (DSRRs are also relied upon); for *Code of Conduct* matters DSRRs are available investigationally and in-house legally trained (i.e. law degree, but not admitted to a Bar) representation is provided ("Member Representatives") for *formal* discipline hearings; for civil matters and other proceedings Department of Justice counsel is usually provided; and for public complaint investigations it is not clear, since Force funded counsel is not applicable and Member Representatives do not have this mandate, which leaves DSRRs to provide assistance. However, for a formal public complaint interviews or hearings, Department of Justice or private counsel *may* be provided.111

111 See, R.C.M.P. H.Q. A.M., "Civil Actions and Statutory Offences" at VIII.4.; "Division Staff Relations Representative Program" at II.16.F.; H.Q. A.M., "Access To Member Representatives In Professional Standards Dir." at XII.9., Bulletin AM-2039 (94-05-10). Figure 4 provides a Chart on Legal Representation that may be of assistance:

<table>
<thead>
<tr>
<th>Type</th>
<th>Representation</th>
<th>Paid By</th>
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<tbody>
<tr>
<td>Criminal</td>
<td>Private Counsel</td>
<td>Force (within scope of duties)</td>
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<td></td>
<td>&quot;</td>
<td>Member (outside scope of duties)</td>
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<td></td>
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<td>EDMA (under investigation)</td>
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<tr>
<td></td>
<td>DSRR</td>
<td>Force</td>
</tr>
<tr>
<td>Internal Invest.</td>
<td>DSRR</td>
<td>Force</td>
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<tr>
<td></td>
<td>Private Counsel</td>
<td>Member</td>
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</tbody>
</table>
b. Criminal

In relation to criminal allegations, R.C.M.P. policy requires that members make a written request, through the chain-of-command, for authority to retain counsel at public expense (i.e. R.C.M.P. pays). However, funded legal counsel is provided at the sole discretion of the Force, in that policy states that the member must: first, have been acting within the scope of duties and employment; and second, was engaged in carrying out an act or function authorized, previously authorized, or previously carried out.\textsuperscript{112} The request for funded counsel is forwarded to the Department of Justice, which renders an opinion on whether the member qualifies for funded counsel. The fact that Department of Justice counsel act in the interests of the Government of Canada, and not the member’s (or necessarily the R.C.M.P.’s) interests when making this determination, is a problem that is

<table>
<thead>
<tr>
<th>Type</th>
<th>Representation</th>
<th>Paid By</th>
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<tbody>
<tr>
<td>Internal Hearing</td>
<td>Member Representative</td>
<td>Force (after formal charge)</td>
</tr>
<tr>
<td></td>
<td>Private Counsel</td>
<td>Member</td>
</tr>
<tr>
<td></td>
<td>Other Member</td>
<td>Force</td>
</tr>
<tr>
<td>P.C.C. Invest.</td>
<td>Private Counsel</td>
<td>Member</td>
</tr>
<tr>
<td>P.C.C. Hearing</td>
<td>Dept. of Justice</td>
<td>Force (within scope of duties)</td>
</tr>
<tr>
<td></td>
<td>Private Counsel</td>
<td>Force (within scope of duties)</td>
</tr>
<tr>
<td></td>
<td>Member (outside scope of duties)</td>
<td></td>
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<tr>
<td>Civil Action</td>
<td>Dept. of Justice</td>
<td>Force (within scope of duties)</td>
</tr>
<tr>
<td></td>
<td>Private Counsel</td>
<td>Force (within scope of duties)</td>
</tr>
<tr>
<td></td>
<td>Member (outside scope of duties)</td>
<td></td>
</tr>
<tr>
<td>Other Hearings</td>
<td>Dept. of Justice</td>
<td>Force (within scope of duties)</td>
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<tr>
<td></td>
<td>Private Counsel</td>
<td>Force (within scope of duties)</td>
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<td></td>
<td>Member (outside scope of duties)</td>
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\textsuperscript{112} Ibid. R.C.M.P. H.Q. A.M. VIII.4.D. to H. Technically the policy also requires that the member is actually "charged with an offence" before consideration will be given to providing counsel (D.2.b.).
not raised. Unfortunately, the author found through experience and research interviews that many members assume that legal counsel is automatically provided by the Force. Policy is explicit in stating that if the member obtains legal advice without prior approval, the member is personally responsible for legal fees. More importantly, from incrimination, privilege and liability points of view, the Force inappropriately requires that a member provide extensive details about his or her actions when making a request. The member is required to make a separate request for funded counsel at each stage of a criminal matter for consultation, preliminary inquiry, trial, and appeal. Each request can take weeks to months to get approved. The number of technical requirements and limitations the member and his or her lawyer must abide by to get approval for the lawyer to provide legal advice is overwhelming.¹¹³

Based on several years legal experience, interviews with members who have experience in the discipline process, and with members who have been the subject of a range of criminal allegations, the author found that sometimes the Force is not overly enthusiastic, committed to, or proactive in providing legal counsel for consultation. The Force is quick to

¹¹³ For example, the member must request prior authorization to consult counsel. The approval will only apply to the named/one lawyer unless permission is specifically obtained at the time of request to use specific named/junior counsel. If the lawyer wishes to use junior counsel (i.e. to save client money or conduct research) and does not have authority in advance, the member must consent in writing to use named junior counsel. The Administration Officer must also consent, in writing, to use junior counsel and the entire process must be approved again. The Force will not pay for counsel not approved in advance and it will generally not approve more than one senior and one junior counsel. The reality, since these files can go one for several months or years, is that several different lawyers work on a file at different times. The fees paid are considerably below standard billing rates, and the Force can easily take 6 months to years to pay (e.g. two years is not unheard of). The lawyer must also be intimately familiar with the detailed and non-customary reimbursement schedules (i.e. cannot bill for local faxes, only long distance faxes). The lawyer is also not allowed to go to the client for meetings, the client must travel to see the lawyer. It is also not unusual to encounter two to three inconsistent interpretations of payment policy and guidelines by the same office (e.g. only bill at end of file vs. bill at each stage).
try to disqualified or remove members from obtaining funded counsel. For example, while discussing the Force's responsibility to provide funded coverage for a member involved in an on-duty shooting, a senior NCO responsible for processing requests for funded counsel by members said that "we can't have members asking for legal counsel every time we ask them for a statement...we would have horrendous legal costs." While concerns over cost may be relevant, the fact that members work in an environment that makes them vulnerable to criminal allegations and investigations is precisely the reason that members should have fairly unrestricted access to legal consultation. That certain managers do not seem to recognize this fact is troubling.

The E.R.C. reports that legal fees at public expense were denied for a member alleged to have taken items from a locked cabinet because this was not within the range of duties. The scope of duties can be difficult to apply, but the Force sometimes improperly uses the actual allegation to deny counsel (e.g. no funded counsel when accused of assault because members are not within scope of duties if they allegedly use excessive force). In such cases the very issue of whether excessive force was used can be ambiguous and complicated and should not determine qualification for counsel at the investigative stage. It is clear that the scope of duties test is not properly understood or applied by the R.C.M.P. in some instances. In fact, the scope of duties test is used inappropriately by some officers to deny requests for counsel because they are prepared to pre-judge the member's actions.

114 Phone conversation on February 3, 1996.

More troubling is a recent case in the Lower Mainland of British Columbia in which a member retained counsel immediately after being involved in an on-duty shooting and a commissioned officer refused the request for funded counsel (days after the fact) because the member was "not a suspect in a criminal investigation." The author was also informed of a case in which a member was denied funded counsel in relation to an assault charge, despite a legal opinion from the Department of Justice that the member qualified for funded counsel, because the commissioned officer reviewing the request felt that the member was not acting "within the scope of his duties." The author was unable to distinguish the facts of this denial case from numerous other cases in which funded counsel was authorized. More recently, the author was informed that two NCOs were harshly criticized by detachment management and investigators for suggesting that members involved in a pursuit and arrest in which the suspect subsequently died in custody obtain legal advice before providing statements. The purported criticism was that this advice prevented the investigators from immediately getting statements from the members.

In 1994-95, the Force received 75 requests for funded legal counsel from members

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116 K. Derakhshan, "You Have The Right To...? (1995) 1:3 The Service Star 5. This member wrote that he "was devastated by the decision which compounded the stress [he] had undergone subsequent to the shooting incident." In this incident the member was assaulted by the suspect, pepper spray was completely ineffective, kicks and punches and then blows from a baton similarly had no impact on the suspect. When the suspect ended up in possession of the baton after a struggle, deadly force was utilized. These events were corroborated by an independent civilian witness.

117 M28 & M93.

118 M15, M26, M90 & M93.

119 Ibid.
and eight (or 10.6%) were refused while 67 received funded counsel. However, in 1994 and 1995 there were, respectively, 91 and 102 criminal investigations (total of 193) of members undertaken. If only 67 members received funded legal counsel, this means that only 34.7% actually received funded legal assistance during a criminal investigation. Although there a number of potential reasons for this low rate (e.g. investigation undertaken as a formality), one wonders what legal representation the other 65.3% of members who were criminally investigated obtained? In practice, the author can state that a number of these individuals, much to their chagrin, did not question their situation and blithely submitted a statement or cooperated with the investigator. The author confirmed one incident in which a member was severely chastised for contacting legal counsel as a result of a death in cells. It was the Force’s position that the member should have asked the supervisor first whether or not counsel was required. During another interview, a member recounted his experience as a very junior member when he had to use considerable force to subdue a subject during an arrest. Because of the known nature of the subject this member was concerned about and fully expected a complaint, and when he asked for direction the supervisor "nonchalantly told me to just write it up." Although this member was fully exonerated in the subsequent lengthy investigation, the member felt that the supervisor in order to ensure that a statement was obtained, deliberately or recklessly misled him as to the

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120 E.D.M.A., "Legal Counsel Indemnification Service Update" (1996) 2:1 The Service Star at 6 (data obtained through access to information request); and correspondence from R.C.M.P. CIIS, "E" Div., dated April 22, 1996.

121 Ibid.

122 M22.

123 M65.
seriousness of the matter, and the need for counsel. As remarkable as it may seem, members can, either through self-denial or inexperience, fail to appreciate the need for legal counsel.

In an even more curious twist, several members reported that the officer in command of their detachment, before approving or denying requests for counsel, asks the investigator whether the suspect member needs a lawyer.124 In other instances, members reported relying on advice from supervisors, co-workers, or DSRRs during a criminal investigation because they were told it was a minor incident and they did not need a lawyer. In several cases, these members were subsequently charged, disciplined or sued, and, unfortunately, they stated that they would "never give a statement again" or be "duped" into cooperating again.125 Some supervisors, investigators, and particularly senior managers, hold the view that "if a member has nothing to hide [or has done nothing wrong], they don’t need a lawyer."126 Conversely, they hold the view that it is only those members who have done something wrong who ask for lawyers.127 This view has immense influence on members. Many members are extremely anxious about consulting counsel because they feel it will make them look guilty, it will alienate the supervisor, investigator and/or detachment commander or they will look weak. One member advised that he would never again provide a statement without legal advice after he was involved in a late night on-duty shooting, interviewed

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124 M9, M25, M53, M56, & M89.

125 For example, M6, M8, M28, & M26.

126 M9, M44 & M68.

127 M69.
without legal advice, and "dumped off" on his "door step before he knew what happened." Several years later the civil suit is still ongoing.

A related factor that affects adversely the access of members to funded counsel is the amount of time it takes the Force to advise members whether or not they will be provided funded legal counsel. In the author's experience, a request for funded counsel can take, at a minimum, six to eight weeks, and a six month time delay has been experienced. In the shooting noted above in which funding was denied, the member, quite properly, retained counsel on the day of the incident and did not find out for approximately three weeks that counsel would not be covered. It was only because a response was requested on an expedited basis by the DSRRs that the delay was comparatively short. Some of the leading counsel in the area of police representation in British Columbia have recently expressed reluctance to represent R.C.M.P. members, even when publicly funded, because of the unnecessary hurdles and negative attitude of the Force towards providing funded counsel, the excessive time delays for approval and payment, as well as the low remuneration rates. As a result members may not obtain legal advice or will be relying on advice from lawyers who may not be as knowledgeable of the R.C.M.P. culture and accountability process.

To be effective, particularly in the criminal process, legal assistance must be provided at an early stage of an investigation. Interestingly, it was reported during interviews of

128 M8.

129 Supra, note 116.

130 L112, L113, L114, L115, & L117.

131 Ouimet Commission, supra, note 7 at 140; generally, Rene J. Marin, Police and Defence Counsel: Towards a Better Understanding (Police Education Series Paper II) (Ottawa, Ont.:
members who have experience in the discipline area that statements provided by suspect members during criminal investigations were posing more difficulties than ordered statements during internal adjudication proceedings.\textsuperscript{132} In many instances this was attributed to the fact that the member did not obtain competent legal advice, relied on inappropriate advice, or was misled as to the seriousness of the situation when providing a statement during the criminal investigation.\textsuperscript{133} However, the current process for obtaining representation in the R.C.M.P. is time consuming, unduly complicated, and creates an aura of uncertainty for members. The irony is that the process to obtain counsel is bureaucratically bound, yet members reported to the author that they were "harried" and "pressured" by supervisors and investigators immediately after a serious incident to provide statements.\textsuperscript{134} If statements are not provided immediately, investigators sometimes become very hostile towards the member. Requests or pressure from the investigator to make a decision to provide/produce a statement tends to intensify over time even when the member's request for counsel remains unaddressed. The author has observed situations in which the investigator has issued ultimatums to members to provide a statement in order to complete the investigation yet no response has been provided on the request for counsel. The author has also observed situations where the member who prudently waited for authorization, and informed the investigator of this fact, lost an opportunity to respond because the investigator tired of waiting and simply forwarded the report to Crown and/or appropriate individual. On the

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\textsuperscript{132} M88, M40 and M43.

\textsuperscript{133} M40, M88, M97, & M107.

\textsuperscript{134} M15, M25, M55 & M57.
other hand, if the member and counsel decide to proceed with consultation before authorization is provided the member is usually chastised and the Force refuses to pay or deducts any billing by the lawyer prior to the authorization being issued. The approval process for funded counsel in criminal matters bears no relationship to the circumstances under which members are called upon to provide statements. It cannot be said that the Force or supervisors proactively direct members towards legal counsel. Members also have difficulty retaining competent counsel at the moment the need materializes (e.g. 2:00 a.m. in northern British Columbia) and/or the member does not have the financial resources to risk retaining counsel privately.\(^{135}\) Leading counsel in British Columbia who practice in the field of police representation privately charge between $225.00 to $400.00 an hour. Anyone who harbours the view, especially given the economic circumstances of most members in the Lower Mainland, that a member can privately afford to pay for legal consultation is simply uninformed. It is worth repeating that in policing, unlike other private or public sector employment situations, the exposure to criminal allegations and investigations is an inherent part of the occupation.

In response to the apparent lack of access to legal counsel, the "E" Division Members Association recently developed a limited indemnification fund for its members that permits them to obtain legal advice 24 hours-a-day on a criminal matter from pre-approved counsel.

\(^{135}\) Because of geographic time location, limited number of counsel in the area with police representation experience, the few counsel that are trusted by the police, and lack of planning or prior arrangement, it can be very difficult to contact knowledgeable and effective counsel in this area. Counsel must be familiar with several areas of law to be effective, and must understand the internal pressures and culture of the R.C.M.P. In addition, because of the complexity of the accountability process and the need to address several areas, a straightforward investigative consultation with counsel where a statement is provided will usually run between $1,500.00 to $3,000.00 depending on the circumstances.
who are knowledgeable in this area.\textsuperscript{136} Within six months of the announcement of the Association's plan, the DSRRs were trying to attain a formal agreement with management that prior authorization would not be required for consultation in the immediate aftermath of a serious incident, but after a year there is still no agreement.\textsuperscript{137} Despite a purported new "informal" process in the R.C.M.P. to obtain legal consultation without prior authorization after a serious incident, the author can state that the same bureaucratic roadblocks of approval, time, and "no prior authorization" are still erected to prevent or dissuade members from obtaining funded counsel. The view of the Force and supervisors that only those who are guilty of something need legal advice also dissuades members from getting advice. Based on the data provided by "E" Division, it appears that the majority of members are not receiving legal advice during criminal investigations.

c. Internal

One of the more unsettling features of the R.C.M.P. accountability regime is that in relation to internal Code of Conduct matters, members are expected to rely on DSRRs or retain private counsel during an investigation. If a member contacts private counsel about an internal matter, the Force will not pay the fees. Member Representatives, pursuant to policy


\textsuperscript{137} "E" Div. DSRR Newsletter, "Legal Fees" (1996) 96:2 The Informer 2-3. The expectation was that members could call and consult counsel and then submit a request within 48 hours. Unfortunately, the clerks responsible for processing such requests have not altered their practices at all and sometimes continue to try and refuse to pay fees that were incurred prior to authorization being granted. As noted in the R.C.M.P., "Payment of Legal Fees" (June 19, 1997) Pony Express Communique 1, "DSSRs expressed their frustration that changes to the policy on the payment of legal fees have not been finalized, a full year after CO/DSRR Conference participants agreed to the changes in Charlottetown."
and practice, are not formally permitted to advise members during internal investigations.\textsuperscript{138} During interviews and discussions with members, it was found that there are very real concerns as to whether there is effective representation for members internally, particularly at the investigative stage.

Lawyers in British Columbia who represent police officers in misconduct matters frequently comment on how a police department's disposition towards a suspect officer seems to improve markedly when a lawyer is interjected. It was the experience of one prominent police defence lawyer that the R.C.M.P. tends to "savage" members internally.\textsuperscript{139} In fact, this lawyer felt the same as many members who were interviewed—that internal R.C.M.P. investigations and adjudications are based on a "gut reaction" as to whether the department can live with the actions of the member.\textsuperscript{140} It is the author's experience, which was confirmed during interviews, that members can no more afford private counsel internally than they can criminally.

It cannot be said that members have ready access to qualified legal advice during an internal investigation. Policy states that members under internal investigation are to contact DSRRs first regarding their rights and obligations before they can contact a Member Representative.\textsuperscript{141} It was confirmed that members routinely rely on DSRRs to assist them in internal investigations and Member Representatives seldom, if ever, receive calls during

\textsuperscript{138} Bulletin AM-2039 at 1.d.1., \textit{supra}, note 111. It was plain from interviews that Member Representatives are dissuaded from, and in practice do not, provide general legal advice for members prior to formal charges.

\textsuperscript{139} LI 14.

\textsuperscript{140} LI 17.

\textsuperscript{141} Bulletin AM-2039, \textit{supra}, note 111 at 2.a.
investigations.  

Despite the best intentions of the DSRRs, it seems a very dangerous practice and policy to allow non-legally trained or qualified DSRRs to give "legal" advice to members under investigation for misconduct. Setting aside the personal or civil liability this may pose for a DSRR, the primary problem is that they are not trained, educated or qualified to give legal advice. Although DSRRs may have a good understanding of the internal policy matters, rules and obligations, they are not in a position to give legal advice on statement matters that have potential ramifications well beyond the internal context. It was indicated that on one occasion a DSRR gave advice that turned out to be wrong and the Force is now seeking to dismiss the member who followed that advice. Those involved in the discipline process did express concerns over some DSRRs (and/or supervisors) providing inaccurate advice and "meddling" in the representation of members.

This is not to say that DSRRs do not have an important role in the discipline process, but it is improper for them to give advice of a legal nature (it is also not the role they were created to fill). It is also questionable for the Force to permit it to occur. Essentially,  

142 M37, M40, M43, M88, & M93.  
143 M44 & M88.  
144 M40, M88, M97 & M107. It is worth noting that unions very often use non-lawyers to deal with employment related situations up to and including grievance arbitration. This is done primarily to save money. One does get the impression that some unions are concerned with over-reliance on lawyers not only from a cost-effectiveness point of view. The problem is that making such judgements requires a certain amount of legal sophistication. Again, the nature of police work, complexity of the accountability regime and the overlapping and complicated legal/jurisdictional issues that an allegation can raise makes reliance on non-lawyers questionable. This is not the case in most other employment situations.

145 Robert Reiner, *The Blue-Coated Worker: A Sociological Study of Police Unionism* (Cambridge, England: Cambridge University Press, 1978) at 88 notes that rank-and-file officers felt more confident and secure when they were able to consult with police federation representatives, instead of constantly worrying about complaints and other accusations.
it appears the Force is compelling members to rely on advice and guidance from DSRRs to avoid providing comprehensive and informed legal advice to members on matters that can be complicated and contentious. McConville and Hodgson, in a study considering the use of non-qualified legal representatives in the criminal context, found it was not satisfactory to use non-legal representatives because they were not aware of the legal intricacies of the situation(s).\textsuperscript{146} Similarly, DSRRs cannot be expected to be aware of strategies (criminally, civilly and administratively), evidence rules (common law, criminal, administrative and civil), complex legal concepts, overlapping legal issues, and complicated defences when advising a member regarding his or her rights and obligations. For example, one former DSRR advised the author that if called for advice, the DSRR asks the member if he or she feels they did anything wrong, and if the member says no, the DSRR tells them to give a statement.\textsuperscript{147} On a related point, of the members interviewed who had, or were involved in the discipline process and relied upon DSRR representation, all complained about the lack of response from DSRRs when called immediately following a critical incident, that the DSRRs failed to return phone calls or were frequently unavailable for lengthy periods of time, did not do what they stated they would, had provided bad advice, or that they were generally neglectful of the member.\textsuperscript{148} These complaints are all indicative of an over-worked and understaffed DSRR program. On the other hand, DSRRs in some instances play key behind-

\textsuperscript{146} \textit{Supra}, note 29 at 31.

\textsuperscript{147} M99. This was also confirmed as the approach of M37.

\textsuperscript{148} M6, M11, M16, M26, M28, M48, & M83. In the author's experience as legal counsel to members they always expressed surprise when their phone calls, messages or pages were promptly returned. Many were grateful to have the opportunity to speak to counsel in a timely manner and felt more confident about the advice received. Other members were thankful that someone actually seemed interested in their particular situation, regardless of the scale.
the-scenes roles in protecting members by having direct access to senior commissioned officers in "E" Division and Ottawa. It cannot be ignored that some DSRRs have been able to provide very effective representation and deal with some very difficult cases.

Another concern identified is the apparent failure of some DSRRs to understand the complexity of their roles. By way of example, recently a detachment Sub-DSRR was assigned to, and participated in, the criminal investigation of another member in the office. While the author does not dispute that DSRRs must take action against a member who is found engaging in misconduct, the problem in this case is that the Sub-DSRR was assigned to investigate a member he also had a duty to represent. Thus, when the Sub-DSRR arrested and interviewed the suspect member, what is the member to believe is the role of the Sub-DSRR? When the issue of this conflict was raised, a DSRR responded that the Sub-DSRR is a police officer first (and by inference, the representation of the member as an employee representative is not a consideration). When the apparent conflict, and the way in which the suspect member was treated, were raised with the officer in charge by a concerned member, he reportedly responded that he had greater concerns about this member making statements at a patrol briefing on how the situation was handled. The officer in command brought this point up during a subsequent meeting in which the concerned member was seeking support from the officer for an inter-office transfer. Several NCOs and members interviewed recounted intimidation tactics from officers when they tried to

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149 M59, M61, & M72. This incident and role of the Sub-DSRR was widely confirmed, discussed and known in the detachment.

150 M61.

151 Ibid.

152 Ibid. The meaning and context of this statement by the officer was clear to the member.
intervene and assist a member during an internal investigation.\textsuperscript{153}

Turning to what assistance arises for members from Member Representatives during the investigative stage, this Unit indicates that:

Normally, when a Part IV Code of Conduct is being conducted, this office has very little contact with members (overall). Our policy has been that representation does not occur until such time that the member has been served \textit{[i.e. charged post-investigation]} with a package of formal discipline.\textsuperscript{154} (emphasis original)

Policy basically restricts internal representation by Member Representatives to a point \textit{after} the investigation is complete, an internal charge has been laid, and formal disciplinary proceedings instituted. In interviews, the author was informed that Member Representatives were to restrict themselves primarily to formal proceedings. Aside from policy, even if a Member Representative is contacted, the Unit is located in Ottawa, which for "E" Division, is over 3,000 kilometres and 3 time zones away.\textsuperscript{155} Aside from three or four members who had previously been involved in formal discipline, and the members involved in the discipline process, none of the members interviewed had heard of a Member Representative

\textsuperscript{153} M26, M83, M43, & M107. Such retaliation is not limited to the R.C.M.P.; see Canadian Police Association, "A unit commander who stood by his officers and paid the price" (Fall 1996) 37 \textit{CPA Express} 14 where it is noted that the Metropolitan Toronto police force charged a senior officer for trying to defuse a "tense" situation by not ordering his watch to go on the road. "The officers were upset and betrayed after it was learned that a deputy chief had ordered a public complaints hearing (later dismissed) against two 51 Division officers who had investigated a black motorist in what turned out to be a very public incident, despite two probes which cleared the officers of any wrongdoing." The unit commander contacted the senior executive who came to the Division, and when he pressed for a meeting with the Chief-Designate before sending his officers out, citing health and safety concerns, he was charged with neglect of duty and insubordination. The hearing officer found that the unit commander used his experience and great delicacy and creativity to diffuse a very hostile situation.

\textsuperscript{154} Correspondence from Member Representative Unit, dated 96-03-04 at 2.

\textsuperscript{155} In February, 1997, one Member Representative was placed in "E" Division. This member was transferred to this position without any understudy training. Prior to this time, all Member Representatives were posted in Ottawa.
or knew that such representation existed. It was not surprising then, that comments were made by members during interviews that they felt they were having to deal with internal investigations without proper advice or assistance.

It was determined that for a member to become a Member Representative, he or she only needs a law degree. It is not necessary that the Member Representative complete articles or be called to the Bar to practice law. Setting aside whether this could constitute the improper practice of law, this state of affairs is rather astonishing given the findings of the McDonald Commission that disciplinary proceedings raise serious issues requiring an advocate and there is legal advice to be given which requires, at minimum, the supervision of a qualified and experienced lawyer. The McDonald Commission concluded that the representation of members internally by law graduates is only appropriate if that member is a

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156 The R.C.M.P. uses "member" and "member representative" definitions in the R.C.M.P. Act to exclude representation by lawyers on grievances. For example, the Force will refuse to accept a grievance, documents or submissions filed directly by a lawyer on behalf of a member. It is the Force’s position that the member must personally sign and file all documents. Similarly, the Force will not forward material directly to a lawyer acting on behalf of a member. In one case, the Force refused to accept a pro forma grievance (to protect the 30 limitation period) from a lawyer acting on behalf of a member who was institutionalized with a serious psychological disorder. The Force insisted on having the institutionalized member sign the grievance.

157 M6, M11, M14, M17, M34, M41, M42, M50, M67, M70, M96, & M98. For example, M96 advised s/he could not get competent assistance internally to deal with a medical discharge and any internal representatives were too busy in any event.

158 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, vol. 2, Second Report: Freedom and Security under the Law (Minister of Supply and Services, 1981) ("McDonald Commission") at 1002. The Force has a pattern of refusing to acknowledge that members in certain positions are giving legal advice. It is rather ironic that the Force is prepared to pay for marine certification, airplanes and helicopter licences, but will not pay for law society fees for members providing legal advice. Particularly when the members are engaged in the "practice of law" as defined in s. 1 of the Legal Profession Act, R.S.B.C. 1996, c. 255; see also, Craig S. MacMillan and Stephen N.S. Thatcher, "Bridging the Gap - Who Provides Legal Advice to the Police?" (1997) 48 Issues of Interest 5.
law graduate acting under the general supervision of a Department of Justice counsel.\textsuperscript{159} Although a Member Representative may have taken leave without pay to article, it is not a rule that Member Representatives be lawyers, and the Force does not support members who seek to article after obtaining a law degree.

Stark found that in some instances the police will dig up dirt on defence lawyers who successfully defend accused individuals.\textsuperscript{160} In an interesting parallel, all the members interviewed by the author who are familiar with the role and function of Member Representatives and/or Appropriate Officer’s Representatives (i.e. legal advisors/prosecutors for the Force) noted that being a Member Representative, particularly if effective, did nothing to enhance, and could even ruin, a career.\textsuperscript{161} The members interviewed all strongly felt that if you are a successful advocate for a member your career will suffer adversely, but if you are a successful Appropriate Officer’s Representative, your career will take-off.\textsuperscript{162} Members interviewed who have contact with the senior officers responsible for making discipline decisions report that the officers cannot comprehend why Member Representatives would even try to defend a member when it was "not in the best interests of the Force."\textsuperscript{163} In fact, it is reported that the DSRRs recently endorsed civilianizing the

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\textsuperscript{159} Ibid. at 1002, para. 29. The other issue, at 1001-2, is that to be effective a lawyer must article, practice and work with other lawyers. The lack of litigation and advocacy experience also draws into question the ability of non-articled members to provide internal representation.


\textsuperscript{161} M20, M22, M37, M43, M68, M73, M88, M93, M97, M99 & M107. Reiner, \textit{supra}, note 145 at 200 also reported that in Britain, Police Federation representatives were known to have ruined their career chances if they were successful at defending officers.

\textsuperscript{162} Ibid.

\textsuperscript{163} M37, M75, M99 & M107.
\end{footnotesize}
Member Representative Unit because of the adverse consequences for members in the Unit and the lack of support provided by the Force. 164 It appears that anyone who serves in the Member Representative Unit usually ends up "demoralized, burned out and bitter" because of lack of support and the incomprehensibly "abusive treatment" that subject members can receive at the hands of management. 165

Members involved in the discipline process also indicated that the R.C.M.P. dislikes the legal approach because too many members are protected instead of being dealt with summarily as the commissioned officers would like. 166 These members, some of whom had experience on both sides of internal investigations/representation, reached the same conclusions with respect to the formal discipline process and the use of commissioned officers as adjudicators. It was indicated that, with a few exceptions, commissioned officers are generally biased, unqualified, incompetent, only interested in the facts and not law, and totally inappropriate as adjudicators. 167 These members were also convinced that the personal biases, status consciousness of officers, and personal views about Member Representatives who developed reputations for "getting members off," were injected into

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164 DSRRs' National Newsletter, "Civilianization of Member Representatives" (1997) 1:2 Division Clips 3-4. The author of the article notes that under the current framework "Regular Member Representatives ["M.R.s"] have a career in the Force to consider and they can often find themselves in difficult and adversarial situations. This fact has been supported recently by conducting face-to-face meeting [sic] with numerous documented examples. The playing field in this game is often for your career and it favours the A.O.R. [Appropriate Officers Representative]. M.R.'s spend about 70% of their time investigating their own cases; A.O.R.'s have internal investigators, unit or detachment assistance, larger numbers and many other advantages" (emphasis added).

165 M107, also M22, M37, M40, M43, M88, M93 & M99.

166 Ibid.

167 Ibid.
proceedings improperly. As one member stated, "the presumption of guilt" is the legal tenet, and the member "has to prove innocence" (emphasis added).

On a more practical level, members interviewed by the author felt that, in comparison to the Appropriate Officer's Representative Unit (i.e. internal prosecution), the Force displayed a less than balanced commitment to the Member Representative Unit. It was expressed that the Member Representative Unit was overworked, understaffed, and inadequately resourced. Some support is found for these views in that the Member Representative Unit is only comprised of four members to assist approximately 23,000 members, and for periods between 1993 to 1995, the Unit operated with only two or three members. On the other hand, the Appropriate Officer's Unit reported that its four positions were "always filled." In August, 1997, the author learned that the R.C.M.P. now supports 15 Appropriate Officer's Representatives (comprised of full-time civilian lawyers and members as well as ad hoc regular members). In comparison to the Member Representative Unit, the number of Appropriate Officer's Representative is disconcerting when you consider that there are only approximately 14 Commanding Officers (i.e. Appropriate Officers for discipline matters) who form the client base for these Representatives.

Currently, in "E" Division, the two full-time civilian Appropriate Officer's

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168 Ibid.
169 M43.
170 Supra, notes 164 and 165.
171 Supra, note 154.
172 Phone interview with Appropriate Officer's Representative Unit (96-03-08).
Representatives have a legal assistant and a secretary to assist with cases, an entire internal affairs investigational staff at the divisional level, as well as support at the detachment or unit level when the Representative attends to conduct hearings. There is also support and advice provided from R.C.M.P. Internal Affairs in H.Q. Ottawa as well as Department of Justice Counsel in Vancouver and Ottawa. The second Appropriate Officer's Representative was placed in "E" Division in June, 1997, to assist the Commanding Officer. On the other hand, the sole Member Representative recently appointed to "E" Division (who must assist approximately 8,000 members in British Columbia, Alberta, Yukon Territory and Saskatchewan), has no legal assistant, no secretary, had to "beg" for a car, and has limited support from the Member Representative Unit in Ottawa because positions are vacant or the members are not taking cases. The office space provided is insufficient and the furniture is comprised of cast-off material from other units that the member managed to collect by going around to various units. The budgetary allotment is also completely unrealistic and designed to pauperize the services of the Member Representative. This member was also not given any training or understudy time with an experienced Member Representative. When acting for a member, Member Representatives are not only required to prepare their own cases, with little or no support, they also have to do their own investigating and evidentiary follow-up. Member Representatives do not have the luxury of specialized units or detachment personnel to conduct their investigations. The added investigational duties, along with the fact that the Force asserts that it is only obliged to disclose the evidence it will rely upon at the hearing, makes the role of the Member Representative much more difficult. There certainly seems to be a greater commitment to ensuring that Force and commissioned officer
interests are well represented.\textsuperscript{173} There also seems to be little appreciation for the fact that members must have equitable access to legal services at the investigative stage and that it is not somehow improper for members to get proper advice and representation. The disparity between the lot of Appropriate Officer's Representatives and Member Representatives highlights starkly the fundamental values that continue to operate in this area of R.C.M.P. management and culture.

Recently, as noted, the Force has undertaken to hire civilians for the Appropriate Officer and Member Representative Units. This civilianization process was first undertaken with Appropriate Officer's Representatives, and has just been initiated with respect to Member Representative positions. The author does not see how the apparent lack of support for members internally, and the Member Representative Unit in particular, will be mitigated by this step. First, comments from members involved in the discipline process indicate that civilian Appropriate Officer's Representatives have shown that these lawyers are unfamiliar with the culture, process, training and practices of the R.C.M.P. which reduces their effectiveness. For example, it was reported by members involved in the discipline process that civilian lawyers in the Appropriate Officer's Representative Unit were overwhelmed with the technical language and processes that are second nature to members.\textsuperscript{174} Second, despite the adverse consequences for regular members who act as Member Representatives, it was felt that they still possessed a better ability to know how to approach members and detachment commanders to obtain information, and are less subject to pressure from

\textsuperscript{173} For example, during one recent adjudication proceeding, the Appropriate Officer's Representative was represented by three representatives and the subject member had one Member Representative.

\textsuperscript{174} M18, M20, M35, M36, M40, M43, M88, M90 & M107.
management because in the end, they still have a job if management became unhappy with their actions. Civilian lawyers, on the other hand, may be subject to dismissal, and the Force will certainly have, depending on the form of employment, the choice of whether or not to renew their employment contract. It is also anticipated that the civilian Member Representative positions will have a salary considerably below that required to attract and retain experienced and qualified legal counsel. Some of these civilian lawyers also take the curious position that they do not have to be a member of the law society in the province they are practising. With respect to civilian Appropriate Officer's Representatives, it was noted that the individuals would have to have considerable fortitude to withstand the managerial ethos of punishment. The experience of those involved in the discipline process with civilian Appropriate Officer's Representatives indicated that a greater orientation towards punishment, increased penalties, and more adversarial practices were being encountered; perhaps to be seen as "effective by management," to justify the continuation of one’s position, the limited experience of the civilian counsel, or a complete lack of understanding of matters that an operational police officer would know intuitively. For example, based on police experience and training, an allegation that a member struck a civilian in the face while holding a baton in his closed fist is on its face questionable when the individual sustained no facial injuries. Last, hiring civilian counsel without fundamentally changing the delivery or availability of legal advice to members during an investigation does nothing to close the current gap that exists internally. Unless the Force

175 A salary range of $42,400.00 to $60,200.00 (as recently set out in a public advertisement) for experienced counsel (with at least three years call) will not attract the level of counsel that should be provided in the Lower Mainland of British Columbia where the cost of living is notoriously high.

176 M40, M43 & M88.
expands the mandate and numbers of these civilian lawyers, and provides the necessary technical and support resources to fulfil the function properly, members will still be without legal counsel during investigations. The lack of support for members suspected of internal misconduct will not be changed by hiring civilian lawyers. In fact, it was suggested by several members that the low salaries will not attract the competent and qualified counsel required, and therefore, hiring civilian lawyers was seen as a further erosion in representation of members. A basic point to be addressed is the number of Member Representatives must be increased.

The fundamental precept is that police officers should have the right to representation regardless of the penalty at a disciplinary hearing. However, it took judicial direction in Re Husted and Ridley v. The Queen by the Federal Court to convince the R.C.M.P. that a regulation stating that a member charged with a major service offence (for which incarceration was still an available internal sanction) is not "entitled to have professional counsel appear on his behalf" was ultra vires. Even in 1987, in Cramm v. RCMP Commissioner, it was necessary for the Federal Court of Appeal to inform the Force that it was improper to deny a member the right to be represented by counsel during a Board of Inquiry, noting that fairness required the right to counsel when it affects career, reputation,

177 M43, M97, & M107. The salary range for civilian counsel is $40,000.00 to $60,000.00. This salary may be attractive in other parts of Canada, because of the high cost of living in the Lower Mainland of British Columbia it is not attractive. The regular members that filled these positions were paid approximately $62,000.00 to $65,000.00 without including overtime.

178 Samuels, supra, note 82 at 209.

179 (1981), 58 C.C.C. (2d) 156 (F.C.T.D.); in Joplin v. Vancouver (City) Commissioners of Police (1982), 2 C.C.C. (3d) 396 (B.C.S.C.) the Court noted that legal counsel is a right when employment impliedly promises officer justice, and nothing else will suffice; see also, Paul Ceyssens, Legal Aspects of Policing (Scarborough: Thomson Canada Ltd., 1994) at 5-45.
and livelihood.  

Yet, at the time of writing, even if a member did privately arrange for a representative or legal counsel to assist with an internal investigation, the R.C.M.P. considers itself to have the authority to exclude counsel from an interview. R.C.M.P. policy states that "During a Code of Conduct 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). There seems to be some doubt about the commitment of the Force to provide internal representation. The restrictions on providing internal "legal" representation during internal investigations reveals much, in the author's view, about the underlying values of the Force in this area.

**d. Other Proceedings**

As noted in Chapter 4, civil cases, Coroner's inquests, public inquiries, and other review mechanisms can compel the attendance of members as witnesses or as subjects of the proceeding. It is apparent that there are also some differing views on the adequacy of representation for R.C.M.P. members in civil proceedings. For example, the P.C.C. seems

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180 [1988] 2 F.C. 20 (F.C.A.) at 36-37; also Ceyssens, *ibid.* at 5-50. The Force repeatedly denied the member’s request to allow counsel to represent him. This case also provides an example of the high handed fashion in which internal matters can be dealt with in the R.C.M.P.

181 R.C.M.P. H.Q. A.M., "Code of Conduct (Part IV) Investigations" at XII.4.E.3. (95-09-05). John Baldwin, "Police Interrogation: What Are the Rules of the Game?" in David Morgan and Geoffrey M. Stephenson, eds., *Suspicion and Silence: The Right to Silence in Criminal Investigations* (London: Blackstone Press Ltd., 1994) at 74 noted that in Britain a solicitor can be removed from the interview room if the solicitor is interfering. The policy of the Force on exclusion is not restricted. The *Charter* jurisprudence on the right to counsel would probably not countenance the denial to counsel, as set out in the above policy, which will be explored in more detail in Chapter 8.
to assume that members get individual separate legal counsel at hearings in all cases.\(^\text{182}\) In
the author's experience though, the Force generally prefers that members utilize the
Department of Justice (usually the same lawyer) to represent them at hearings or inquests.
The problem, which many fail to perceive, is that, for Department of Justice lawyers, the
"client" is the Government of Canada (i.e. Minister of Justice), and not the individual
member, or even the Force.\(^\text{183}\) Many R.C.M.P. managers, and members, do not understand that the Department of Justice lawyer is not necessarily there to represent the interests of the member. The difficulty this could pose for a member is readily apparent.
During a recent Coroner's Inquest the Department of Justice lawyer acknowledged to the
author that he was representing the Solicitor General, the Force, and four R.C.M.P.
members, and if something came to his attention during preparatory interviews or during the
inquest his ultimate obligation was to the Minister of Justice.\(^\text{184}\) It would be interesting to see how the members would have reacted to this information. The author knows from personal and professional experience that Department of Justice lawyers frequently do not identify the limits to their "representation" of the member. This also raises serious doubts about the existence of any solicitor-client privilege between the member and the Department

\(^{182}\) Supra, note 19 at 76-77.

\(^{183}\) MacMillan and Thatcher, supra, note 158; see also, ss. 4-5 of the Department of Justice

\(^{184}\) Personal communications with several Department of Justice counsel have confirmed that this is the generally held view. The author was also advised of circumstances in which Department of Justice counsel had contacted and interviewed members in relation to a civil or administrative proceeding and the member thought the lawyer was acting for him or her. However, when the member arrived at the hearing the member found out the Department of Justice lawyer was not representing the him or her.
of Justice lawyer.\textsuperscript{185}

In other proceedings, such as public inquiries, the author has found that members are never informed about the potential points of adverse interest that may exist between the Force and the member. Most of the members interviewed were completely unaware of the implications of relying on Department of Justice counsel, or the potential conflict between interests. Members also believed generally that they had to take whatever counsel was provided by the R.C.M.P., primarily because that was what they were told by supervisors or management.\textsuperscript{186}

One has the sense that the Force prefers to leave members to their own devices and has certainly not made access to qualified legal advice during an investigation an administrative principle.\textsuperscript{187} Given the implications of either a criminal or internal investigation, real legal advice should be available as a matter of course. It is not acceptable in any accountability regime to leave members waiting for weeks to find out whether they will be provided counsel, based on the discretion of a commissioned officer. Moreover, to continue to rely on lay DSRRs and legally trained (non-lawyer) representatives in a disciplinary system that can result in dismissal is as unacceptable now as it was to the McDonald Commission in the 1980s. There should be a duty to advise members of their

\begin{itemize}
\item \textsuperscript{185} MacMillan and Thatcher, \textit{supra}, note 158; more generally see, Ronald Manes and Michael P. Silver, \textit{Solicitor-Client Privilege in Canadian Law} (Vancouver, B.C.: Butterworths, 1993).
\item \textsuperscript{186} M7, M25, & M46.
\item \textsuperscript{187} This is reminiscent of Levy’s view, \textit{supra}, note 34 at 322 that in 1649 there was no right to counsel in England and in practice a defendant was left to make his or her own defence regardless of their ignorance.
\end{itemize}
options or possibilities, otherwise it is nothing short of uninformed coercion.\textsuperscript{188} If society and the R.C.M.P. want high levels of accountability from members they also have a concurrent obligation to ensure members have immediate (and reasonable) access to qualified legal advice during criminal and internal investigations. More than one member commented on the fact that criminals can generally get free access to legal advice when first arrested and yet members are not provided or do not qualify for such services from the R.C.M.P. or society when they are alleged to have committed a criminal act.

5. Police Interviews

a. Methods

The general literature on police interviews and interrogations has application to the interviews of police by police. The author asserts that the police should not be permitted to interview police officers unconditionally for many of the same reasons that have been identified for limiting police interviews of citizens. As Skolnick notes, there are a number of investigatory and interrogatory deceptions that the police can engage in during the conduct of an investigation.\textsuperscript{189} The police will utilize various interviewing styles depending on the

\textsuperscript{188} Jones III, \textit{supra}, note 39 at 9-10.

\textsuperscript{189} \textit{Supra}, note 91 at 174 and 177. Gisli Gudjonsson, \textit{The Psychology of Interrogations, Confessions and Testimony} (West Sussex, England: John Wiley and Sons, 1992) at 16 states that "ethical interviewing" requires the police to communicate respect for the interviewee and treat or talk to the interviewee as an equal. Otherwise the interviewer is acting unethically by interfering with the interviewee's ability to make sound judgements and free choices. Similarly, Tom Williamson, "Reflection on Current Police Practice" in David Morgan and Geoffrey M. Stephenson, eds., \textit{Suspicion and Silence: The Right to Silence in Criminal Investigations} (London: Blackstone Press Ltd., 1994) at 111-12 notes that the British police are trying to instill the ethos of "search for the truth" based on a "fairness" approach in investigations and interviews. The principles of this approach are: 1) search for truth; 2) open mind; and 3) be fair.
circumstances.\textsuperscript{190} The main feature of any interview though, is that the investigator wants to know as much as possible about the incident.\textsuperscript{191} Conversely, the investigator wants to withhold as much information as possible from a suspect prior to an interview, and if necessary, gradually release any information over the course of the interview to de-stabilize the suspect and provide an advantage.\textsuperscript{192}

There are any number of reasons for an investigator to want to obtain a statement; however, the primary one is to obtain information or intelligence in relation to the complaint.\textsuperscript{193} Obtaining a statement provides the investigator with a considerable advantage


\textsuperscript{191} RCCP, \textit{ibid.} at 124-5. It is a common perception that the police believe that the ability to use interview techniques that enable them to obtain information/admissions from suspects is fundamental to their ability to do their job and that legal rules and decisions substantially impair police effectiveness in this regard. It may be that the police need to have access to more effective techniques to gather evidence based on such restrictions.

\textsuperscript{192} McConville and Hodgson, \textit{supra}, note 29 at 46.

\textsuperscript{193} Ouimet Committee, \textit{supra}, note 7 at 49 concurred that interrogations to obtain information can be of considerably more importance in an investigation than questioning for the purpose of obtaining a confession. RCCP Research Study No. 2, note 104 at 114-16 outlined the following purposes or objectives motivating a police officer to conduct an interview during a criminal investigation: 1) to obtain an admission; 2) to confirm in the officer's mind that the suspect is (a) guilty of the offence, or (b) had guilty knowledge; 3) needs admissible evidence because other evidence is unavailable or inadmissible for some reason; 4) even if have good evidence, an admission usually leads to more guilty pleas; and 5) clear up other offences. In the
by providing control over information and its management, which can have an impact on an accused's ability to account for what happened.\textsuperscript{194} It should not, according to commentators, be assumed that police questioning will always be legitimate, relevant, properly handled, unrelated to other matters, and based on proper legal grounds.\textsuperscript{195} As Chevigny found, it is very difficult to identify improper police interviewing practices because of the secretive conditions under which interviews are conducted.\textsuperscript{196}

It is also important to recognize the power relations being exercised during interviews. The great advantage of an interview for many investigators is that it can frequently occur before legal advice is obtained.\textsuperscript{197} The bottom line is that the police sometimes exploit ignorance or naivety when dealing with suspects.\textsuperscript{198} Everything that happens to a suspect from the moment the suspect is taken into custody and enters the police arena (\textit{i.e.} arrest, warning, handcuffs, search, cells, remove personal belongings, restricted

\begin{footnotesize}
\textsuperscript{194} McConville and Hodgson, \textit{supra}, note 29 at 42. The police probably see obtaining a statement as a way to limit the accused from making up a story (assuming the statement is accurate), while defence counsel would be concerned over the fact that the statement may be inaccurate or fail to account for information that is vitally relevant to the case/defence.

\textsuperscript{195} \textit{Ibid.} at 185-188 identify these issues as assumptions regarding police questioning in general.


\textsuperscript{197} Ed Ratushny, "Self-Incrimination: Nailing the Coffin Shut" (1977-78) 20 \textit{Criminal Law Quarterly} 312 at 323.

\textsuperscript{198} Sklonick, \textit{supra}, note 91 at 182.
\end{footnotesize}
movements) is premised on amplifying and reinforcing the authority and control of the police.\textsuperscript{199} As noted by Thomas, police interrogations contain an implicit threat that the investigator will continue the interrogation if the suspect does not answer questions.\textsuperscript{200} In such circumstances, as pointed out by a study for the Royal Commission on Criminal Procedure:

To remain silent in a police interview room in the face of determined questioning by an officer with legitimate authority to carry on their activity requires an abnormal exercise of will.\textsuperscript{201}

Zuckerman feels that questioning of a suspect by an officer should be considered "unfair" if the police have taken advantage of the suspect's ignorance by keeping the suspect in the dark about the allegation and evidence the police have in their possession.\textsuperscript{202} In fact, the interview process of suspects can become so successful, and the exercise of silence by suspects so uncommon, that some police officers come to rely on silence as a fallacious basis to assume guilt. One of the problems with interviews and statements is that the police can come to rely on confessions too much, and fail to implement thorough investigative practices.\textsuperscript{203} In response to recent initiatives in Britain to require responses from criminal suspects (\textit{i.e.} remove the right to silence), Zuckerman argues that it is unfair to expect accused criminals to defend themselves at the trial or investigation stage without knowing the

\textsuperscript{199} RCCP Research Study No. 2, \textit{supra}, note 104 at 134.

\textsuperscript{200} George C. Thomas, "A Philosophical Account of Coerced Self-Incrimination" (1993) 5 \textit{Yale Journal of Law & The Humanities} 79 at 93.

\textsuperscript{201} Research Study No. 2, \textit{supra}, note 104 at 153.


\textsuperscript{203} Gudjonsson, \textit{supra}, note 189 at 251 and Chp. 11.
case to be met or being given an account of the case to be met.\textsuperscript{204} Frequently it is assumed that investigations present "true facts," but as Zuckerman comments:

The police construct and present an entire picture of reality which is interlaced with evaluations and conclusions (such as the description of the conduct to fit a particular legal definition), with evidence created by the police in its interaction with the suspect (the confession), and is shaped by numerous decisions, mostly unrecorded and sometimes even unconscious, to pursue certain leads or hypotheses and drop others, to ask certain questions rather than others, and to look in some places but not others.\textsuperscript{205}

Police officers investigated for misconduct should also know the specifics of the allegation against them. In some cases, unless the subject officer has disclosure of the department's case, or at least the key allegations, before providing a compelled answer, the officer will be unable to determine if the question is: first, relevant; and more importantly, whether the answer is incriminatory. Merely providing a form with a brief recitation of an allegation, or verbally referring to improper conduct, does not provide sufficient information to determine if questions are criminatory or not, especially if an obscure answer is required.

\textbf{b. Psychological Considerations}

There are a number of behavioral or psychological approaches to considering the effects of interviews and interrogations.\textsuperscript{206} The effect of interrogations under conditions of

\textsuperscript{204} Zuckerman, \textit{supra}, note 202 at 137.

\textsuperscript{205} \textit{Ibid.} at 119; at 121-2 Zuckerman discusses the problems with police investigations as they relate to: 1) bias (\textit{i.e.} interpreter effect, observer effect and interaction effect; and 2) artifact and/or suggestibility (\textit{i.e.} communicate expectations unconsciously).

\textsuperscript{206} RCCP Research Study No. 1, \textit{supra}, note 104 at 8 state the following approach to considering interrogations: 1) psycho-analytic (\textit{e.g.} Reik, \textit{supra}, note 190); 2) social-psychological (\textit{e.g.} Driver, \textit{supra}, note 93); 3) sociological; and 4) experimental; Gudjonsson, note 189 at 61-72 outlines several theoretical models regarding confessions, in particular: 1) cognitive-behavioral; and 2) interactive process model.
strain are not completely known, and police, lawyers, and judges tend to apply tests that do not necessarily take account of modern knowledge. Psychological considerations are another feature that has not been examined in relation to compelled statements from police officers.

As a starting point, ordered statements are taken by an investigator superior in rank to the suspect officer, and as already identified, hierarchical power relations, obedience to authority, vulnerability, and discipline is central to policing and getting people to do things based on this power. An extreme example of this power dynamic was provided by Gudjonsson in a case in which a military serviceman interviewed by internal investigators falsely confessed to a crime. Even if an investigator is not improperly motivated, as noted by Chevigny, it is rather alarming how easily psychological persuasion, even in good faith, can result in a false or inaccurate statement. Police officers are recognized as having substantial factual power to exert great psychological pressure to obtain answers from suspects, and the case is no different with suspect police officers, especially given the cultural, organizational and power relations that exist in policing.

Another facet to consider with investigations into misconduct, either internally or by a

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207 Jackson, supra, note 33 at 70.

208 Gudjonsson, supra, note 189 at 112; Driver, note 93 at 56 provides a chart that sets out some of the variables which induce confessions or lead to resistance.

209 Ibid. at 313-15; the investigators testified they deliberately placed the serviceman under stress after building up trust and sympathy with the subject; see also, Gisli Gudjonsson, Isabel Clare, Susan Rutter and John Pearse, Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities (The Royal Commission on Criminal Justice Research Study No. 12) (London: H.M.S.O., 1993).

210 Supra, note 196 at 152.

211 Ouimet Committee, supra, note 7 at 49.
civilian process, is that officers may be in considerable distress during the "Impact Phase" when approached during the initial stages of an investigation. For example, it is reported that after a shooting, and for at least the next three days (in some cases years), officers suffer from such psychological factors as disorientation, flashbacks and sleep problems. Bonifacio also noted that police-involved shootings can lead to post-traumatic stress disorder symptoms, which can result in inaccurate information being obtained from an officer. Extremely dangerous incidents in and of themselves can result in psychological responses that impact on the "accuracy" of information (e.g. tunnel vision or auditory exclusion). In one incident, it is reported that an officer refused to seek counselling.

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212 Charles B. Wells, Ronald Getman and T.H. Blau, "Critical Incident Procedures: Crisis Management of Traumatic Incidents" (October, 1988) The Police Chief at 70; Roger M. Solomon, "Post-Shooting Trauma" (October, 1988) The Police Chief at 40; Richard B. Parent, "Aspects of Police Use of Deadly Force in British Columbia: The Phenomenon of Victim-Precipitated Homicide: (M.A. thesis, School of Criminology, Simon Fraser University, 1996) at Chp. 2 and 101-11 reports considerable perceptual alterations that occur during critical incidents. Further, the police officers interviewed reported suffering numerous physical, psychological and physiological reactions after the incident including perception distortions (e.g. tunnel vision, heightened visual acuity, sounds muffled, limited awareness of events around them), loss of fine motor coordination (e.g. shaking hands or uncontrollable legs spasms), sphincter control problems, uncontrollable fear, loss of appetite, sleep pattern changes, marked decrease in sex drive, depression, nightmares, flashbacks, anxiety, uncontrollable and overwhelming emotional states.


215 Massad Ayoob, "Lethal Force: Investigating the Officer-Involved Shooting" (August, 1986) 10 Police Product News 36; Parent, supra, note 212 at 101-11. These authors note that officers can experience memory, recall, time, visual and auditory distortions.
because he felt that what he might say could be used by the suspect’s lawyer at trial, and the result was a breakdown by the officer.\footnote{Bonifacio, supra, note 214 at 182.} Although post-incident debriefings and peer counselling are recommended, officers are reluctant to use them because, as noted by this thesis, admissions could lead to discipline, and confidentiality is suspect.\footnote{See generally, Perez, supra, note 44; Brown and Campbell, note 213 at 48 and 110-11 also note that peer counselling is not feasible because counsellors may directly supervise or subsequently supervise the officer. Access to psychologists notes and records are also sought, and they may be called as a witness. M8, M26 & M93 all confirm incidents where the R.C.M.P. used debriefings as a vehicle to gather evidence against them.} Further, an officer who may be in a state of bereavement or shock could, like anyone else, be vulnerable to giving misleading self-incriminatory statements because of normal feelings of guilt and distress.\footnote{Gisli H. Gudjonsson, "Psychological Vulnerability: Suspects at Risk" in David Morgan and Geoffrey M. Stephenson, eds., \textit{Suspicion and Silence: The Right to Silence in Criminal Investigations} (London: Blackstone Press Ltd., 1994) at 95. Bouza, supra, note 30 at 76 acknowledges that cops exploit a persons "instinct to unburden himself or herself at the emotional moment of arrest..."} However, it is immediately after a serious incident that statements from those officers involved are in the greatest demand, and concurrently, officers are looking for a release by discussing the incident. Despite the inherent weaknesses of statements taken under such psychological conditions, once a "statement" is rendered, any inconsistencies or disparities are seen as adverse indicators. For example, when a police officer says immediately after an incident that the suspect was five feet away when she shot him, but in fact the measured distance is fifteen feet, the entire process can become fixated on the distance disparity when there are sound psychological and perceptual distortion explanations for the officer’s estimate. In such a situation the distance component is relevant, but the first real issue is the perceived danger by the officer. By not answering questions during the
immediate psychological aftermath of such an incident a police officer avoids providing distorted responses.

Gudjonsson has concluded that it is clear from the evidence that both suggestibility and compliance can be markedly influenced by situational determinants, such as state anxiety and mood.219 Police officers know this and use emotional tactics when interviewing suspects. More importantly, at least in the police ordered statement and investigation context, is the finding of Gudjonsson that the fear of negative evaluations strongly correlates with suggestibility220 (i.e. from peers, supervisors, or management). The author concurs with the view, and this is particularly so with suspect police officers, that some suspects decide to give a statement precisely because they feel that "it will look bad if I don’t."221 This, as previously asserted, is even more the situation for police officers who are hierarchically motivated to cooperate and psychologically desirous of providing an explanation.222 While representing members in the accountability process the author has encountered quips from investigators when the member seeks legal advice about "what has he

219 Supra, note 189 at 327.

220 Ibid. at 148-9; RCCP Research Study No. 2, supra, note 104 at 133 suggests that people confess to resolve uncertainty rather than unburdening guilt which produces the anxiety. RCCP Research Study No. 1 at 16 also suggests that persuasion from social pressure can change responses during interviews.

221 McConville and Hodgson, supra, note 29 at 86; Levy, note 34 at 174 observes that refusing to cooperate was a concern for those appearing before the Star Chamber or High Commission because it was felt that it would cast suspicion on them.

222 As counsel to police officers just involved in a serious incident, one of the most difficult concepts to convey sometimes, and this is particularly true of R.C.M.P. members, is that what they say to co-workers, investigators and supervisors, can and will be used against them, formally or informally.
At this stage, aside from the common sense of getting legal advice in any serious incident, the conflicting interests operating in the accountability process, the quality of investigators, inter-organizational and interpersonal considerations, and for a host of other reasons, the what-have-they-got-to-hide mentality is no longer professional or acceptable; yet it is the norm.

There are any number of factors that could inhibit an individual, including a police officer, from making a statement or that affect the accuracy of responses, including: 1) fear of legal sanctions; 2) concern about reputation; 3) not wanting to admit to oneself what one has done; 4) not wanting family and friends to know about conduct; and 5) fear of retaliation. The author has found that members, especially those not previously involved in a serious incident, and despite knowing that the Force will not necessarily protect them, are preoccupied with the belief that getting legal advice or not providing a statement immediately will mean they did something wrong. There are also straightforward and sound reasons for police officers not to be rushed into providing statements after a serious incident.

Further, Gudjonsson notes that isolation, fatigue, hunger, lack of sleep, physical and emotional pain, and threats are all factors that can powerfully influence decision-making and reliability of statements. Isolation is a common interrogative tactic in policing since it

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223 M44.

224 Gudjonsson, supra, note 189 at 72-3.

225 See, supra, notes 212-214.

226 Supra, note 189 at 31; RCCP Research Study No. 1 at 28 found there are three general classes of stress relevant to an interrogation: 1) the stress arising from the physical characters of the suspect’s environment in the police station; 2) stress arising from confinement and the isolation from peers; and 3) stress arising from submission to authority.
makes persuasion more likely.\textsuperscript{227} It should not be assumed that police officers are less susceptible to such tactics, since it is equally plausible that they are more susceptible given the psychological, organizational and cultural milieu. The author has observed that the R.C.M.P uses the exact same psychological and tactical techniques on civilian suspects and police suspects. For example, waiting until 6:00 a.m. (and preferably it is a weekend so legal or other advice is exceedingly difficult to obtain), when the member is just finishing her or his last 12 hour night shift (in a marathon block of four twelve hour shifts), and is exhausted, hungry, and thinking only about getting to bed, to effect an arrest or conduct an interview of the member. Because of the employment context and culture of the R.C.M.P., members are vulnerable to such tactics and this must be taken into account when evaluating ordered statements.

The fact is that suggestibility and inaccurate admissions can happen to anyone of even average abilities.\textsuperscript{228} McConville and Hodgson note:

\begin{quote}
As psychologists have for long pointed out, the subtle social, cultural and psychological processes which are a feature of any human interaction make the maintenance of silence extremely difficult, even without the employment of specific undercutting interrogative tactics.\textsuperscript{229}
\end{quote}

Gudjonsson’s own research has found that when suspects feel that they have been induced to confess by unfair means they retain strong feelings of resentment towards the police, even many years afterwards.\textsuperscript{230} Logically, interrogated police officers feel the same, either about the ordered statement authority in general or the experience of providing an ordered

\textsuperscript{227} McConville and Hodgson, \textit{supra}, note 209 at 155.

\textsuperscript{228} \textit{Ibid.} at 137.

\textsuperscript{229} \textit{Ibid.} at 176.

\textsuperscript{230} \textit{Supra}, note 189 at 48.
statement, which negates a remedial or corrective approach.

c.  **Recording**

One of the difficulties with ordered statements is that there is no effective independent or external mechanism to review the process. In other words, it happens within the cloistered world of the police, in secret, without external supervision.\(^{231}\) Aside from the propriety of conducting such interviews, there is the related aspect of how accurate the ordered statement will be when it is obtained. As previously noted by Maloney, he found statements taken by internal investigators attributed to suspect officers were not necessarily in the words of that officer.\(^ {232}\) It may be that the investigating officer is trying to be helpful or the investigating officer may inappropriately be trying to assist the case against the suspect officer. In either case, the statement is not an accurate reproduction of what the suspect officer indicated.\(^ {233}\) Cato indicates that there are three reasons for monitoring police interrogations: first, there are no independent witnesses of the interview; second, written statements or notes are not necessarily reliable; and third, the accuracy of the descriptions

\(^{231}\) It is the conduct of these interviews, because of past abuses, that has lead to police bills of rights in several American jurisdictions; see, Warnken, *supra*, note 14 and Perez, note 44 at 60 and 110.


\(^{233}\) In at least one case, it was found that a police officer lied at the trial of another officer in order to try and secure a conviction; see, Ratushny, *supra*, note 32 at 237 referring to a *Globe and Mail* (10 August 1978) article where the judge found that a York Regional police officer had lied at the trial of a fellow officer, yet he was still acquitted of perjury.
provided of the interview process may be suspect. In order to avoid arguments over improper police questioning, Cato endorsed tape-recording for authenticating interviews instead of eliminating interviews.

There is little doubt that video and/or audio recording of interviews is easily accomplished. However, even audio or video tapes are open to criticism such as dry-runs (i.e. rehearsals) before taping or so-called informal discussions before the tape is activated. On the other hand, and this is equally applicable to statements taken during internals, recording goes some way towards protecting investigator against unwarranted allegations of misconduct or improper questioning. More importantly, taping introduces an element of publicity and accountability into interrogations by lifting the veil of mystery. This is particularly important with ordered statements, because unlike criminal

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236 Cato, *ibid.* at 44-45 reviews the results of studies in Canada, Britain, and Australia on the feasibility of recording police interviews; see also, Miller, *supra*, note 234.

237 Miller, *ibid.* at 14.


239 Miller, *ibid.* at 15-17.
interviews, there is no potential for public or judicial review during the normal course of events. The bottom line is tape recording can reduce arguments over the accuracy and propriety of the statement.240

Subject officers, however, may not be enthused about being taped, but if they decline there is no reason that the investigator would object since the investigator can still write down the answers.241 It is also possible that investigators may feel that taped statements will limit their ability to "go after" a member during an interview. Subject officers and investigators may also be concerned that there will be no freedom to conduct frank discussions if everything is being recorded. Tape recordings also have the potential to embarrass investigators or departments.242 On a more practical note, Baldwin, in a study of the recording of criminal interviews, found that even "summaries" of taped statements were very poor and unless completely transcribed tended to be very biased reports.243 Concerns have also been raised that recordings of interviews could end up being widely dispersed in public.244 Setting aside unauthorized release of information (e.g. to the media), there are other legitimate agencies or individuals that may gain/acquire possession of the recordings, such as a Coroner's hearing or criminal disclosure.

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240 L.R.C.C., supra, note 190 at 17-19; Baldwin, note 234 at 3?.

241 Cato, supra, note 234 at 39 reports a Scottish study that found 12% of criminal suspects only admitted crimes off tape.

242 MacMillan, supra, note 238. For example, "Don't embarrass the force - Trooper sacked for role in beating aftermath" in Law Enforcement News (30 September 1996) discusses a case where a police officer was criticized for a tape recording that embarrassed the department and disclosed wrongdoing by other officers.

243 Supra, note 234 at 6-15. At 21 Baldwin reports that 50% of summaries of transcripts were biased by being faulty or misleading.

244 Baldwin, supra, note 109 at 46.
Although ordered statements cannot be "used" in proceedings, a tape recording could provide a mechanism that will ensure the interview is conducted properly, as well as providing evidence for the member to pursue allegations of impropriety against the Force/investigator, if necessary. Taped statements will also protect the officer/suspect from oppressive actions by the investigator.\textsuperscript{245} The result would be better confidence in compelled statement scenarios. It was found that most R.C.M.P. investigators utilized tape recordings during interviews, but this did not necessarily negate improper practices during internal investigations. For instance, cases were identified during interviews in which it was alleged that an investigator erased a tape recording of a witness interview, attributed words to a transcript that did not appear on the tape, or did not disclose the existence of a tape or potential exculpatory evidence.\textsuperscript{246} It cannot be assumed that tape recordings will necessarily eliminate actual or potential abuses during suspect member interviews, particularly when the likelihood of external review by the E.R.C. or courts is fairly remote. What is clear is that suspect police officers are susceptible to the same interviewing methods, practices, and psychological pressures as anyone else subjected to the interview process. These are important considerations in light of the perceptual alterations that can affect police officers who are involved in incidents and who are placed in positions of danger by the nature of their work.

\textsuperscript{245} Baldwin, \textit{supra}, note 234 at 3.

\textsuperscript{246} M40, M43, M88, & M107.
6. A Look Inside

a. Investigations

Both the P.C.C. and E.R.C., as noted in Chapter 6, have expressed concerns over the nature and timing of the investigational process in the R.C.M.P. Even prior to the new regime, the McDonald Commission clearly concluded that there should be two separate investigations into misconduct by two different teams/investigators (one criminal and the other internal) to avoid conflict issues. The McDonald Commission felt that unless there are exceptional circumstances the criminal investigation should take precedence and be completed before the internal investigation. The problem is that the R.C.M.P. in "E" Division does not conduct separate investigations, either in fact or theory.

In conducting research, and as counsel to numerous R.C.M.P. members alleged to have engaged in misconduct, the author can state that the R.C.M.P. does not even try to separate investigations in many instances. In fact, as noted in Chapter 6, R.C.M.P. "E" Division policy has recently been amended to allow the use of one investigator for all investigations. Even though policy indicates that investigations are to be done separately, it became clear during interviews and discussions with members and while representing members that most investigators are highly motivated to obtain one statement to cover the public, criminal, and internal complaint. Policy is also contradictory because it tells investigators to keep investigations separate, yet it also directs investigators that witness statements and evidence gathered in one type of investigation can be used in another

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247 Supra, note 158 at 980.

248 Ibid.

Moreover, despite policy directions, the majority of members interviewed who had acted as investigators in an internal case were, except in the case of the criminal sub-regime, seldom able to articulate the various types of statements, the purposes of statements in each sub-regime, and had little appreciation of the actual rights and obligations of members. In fact, none of the investigators saw any problem in using an internally compelled statement in a criminal investigation. Investigators simply did not seem interested in the complicated and mundane matters of distinguishing between investigations. Investigators were often more concerned about just trying to meet a file diary date.

The artificiality of policy on the separateness of investigations was readily apparent to the author during a recent investigation in which the investigator, having objected to being assigned all three investigations, was assigned to conduct only the criminal and public complaint investigations. While he was conducting the "criminal" witness and subject member interviews, however, a member of the internal investigation section who was doing the internal, was present and questioned members. Further, the public complaint investigation was to be entirely based on the findings of the criminal investigation. It had not occurred to either the criminal/public complaint investigator or the internal investigator that this fundamentally violated the notion of separate investigations. It was clear that all three investigations were being done concurrently, and they were not separate as required by policy. This is even more evident where there is only one investigator. The

251 M5, M9, M21, M29, M69, M71, M80, & M92.
252 Ibid.
253 M9 & M29.
McDonald Commission did endorse the use of criminal reports for internal investigations after the criminal process was determined because the criminal investigation/process may have exculpatory evidence that the internal missed.\textsuperscript{254} The problem, of course, is that in the example provided, the internal investigator was not awaiting the results of the criminal matter, since the internal investigator actively participated in the criminal investigation. In addition, as the McDonald Commission found, internal investigations tended to rely heavily on criminal investigations material to determine appropriate disciplinary action, which is improper.\textsuperscript{255} One of the dangers in having one investigator is aptly contained in the comments of Levy:

\begin{quote}
The official who is completely convinced that he has in custody a dangerous criminal whose guilt must be exposed can be irresistibly tempted to ignore what Lilburne once called "formalities, niceties, and punctilios."\textsuperscript{256}
\end{quote}

Aside from the concurrent and same investigator problems, as noted in Chapter 6, the E.R.C. has also identified the problem of using a member's supervisor to conduct investigations. In addition to the public concern over objectivity, and conflict, Redeker makes an important point regarding the employee's perspective:

\begin{quote}
Managers [or supervisors] no matter how benevolent, may overlook the truly threatening atmosphere of a meeting between employer and employee. The employee, often alone, is faced with a judge and jury, all in one.\textsuperscript{257}
\end{quote}

It is evident that subject members under investigation by an immediate supervisor are under

\begin{footnotes}
\footnotetext{254}{\textit{Supra}, note 158 at 981.}
\footnotetext{255}{\textit{Ibid.} at 969.}
\footnotetext{256}{\textit{Supra}, note 34 at 351. At 26 he also comments that "Legal niceties, procedural regularities, and forms of law counted for little when the objective was to obtain a conviction at any cost in order to fulfil a sacred mission."}
\footnotetext{257}{\textit{Supra}, note 48 at 12-13.}
\end{footnotes}
some pressure to appear "friendly" to the investigator.\textsuperscript{258} Many of the members interviewed referred to the fact that a failure to cooperate or perceived attempts to make the investigator-supervisor's function more difficult could result in any number of formal or informal implications for them.\textsuperscript{259} Typically, the members stated that they did not want to "piss off the Corporal."

On the other hand, the author was informed of several situations in which members being investigated for a public complaint or internal complaint had been "threatened" with consequences by a supervisor-investigator, directly or indirectly, in order to elicit a statement from the member.\textsuperscript{260} Generally, if the member is showing reluctance or uncertainty over whether to provide a statement, some investigator-supervisors will tell the member that he or she can be forced to answer questions.\textsuperscript{261} What becomes evident from these situations is that the investigating and subject members either did not know the limits of the authority to compel answers or that in the particular circumstance there was no authority to compel an answer. In other instances it appears that the investigator can knowingly and deliberately mislead the member about the authority to take a statement. For example, the author interviewed a member who was told by an immediate supervisor during the course of a pure public complaint investigation (\textit{i.e.} no \textit{Code of Conduct} alleged), that the supervisor could


\textsuperscript{259} M2, M3, M7, M8, M10, M13, M14, M17, M25, M26, M27, M28, M34, M46, M54, M58, M66, M72, M74, & M91.

\textsuperscript{260} M6, M8, M65, M83, M87, & M101.

\textsuperscript{261} \textit{Ibid.}
order the member to answer, yet there was no legal authority in the situation to obtain an answer because it was not an internal investigation. Based on experience and interviews, the author formed the impression that in some instances supervisors are merely trying to coerce the member into providing a statement, particularly in the case of an inexperienced member. This raises doubt about the assertion that the ordered statement authority is seldom used. Unofficial threats of ordering a member to answer do occur.

Interestingly, Reiner provides the following quote from a British police officer regarding interviews by senior officers:

Superintendents are like crafty lawyers. They ask you for a statement, and then say "Oh, that's fair enough. Now what really happened, off the record?" And then they serve papers on you! The author also encountered the "off-the-record" approach in the R.C.M.P. as a means used by superiors or investigators to ensnare members. For example, based on interviews, one detachment internal investigator was particularly well known for using the off-the-record approach to solicit statements from members. In another case referred to earlier, a member was summoned by a commissioned officer to a "debriefing" with other members who were involved in a very serious incident. They were all told by the officer that any statements made during the debriefing were "confidential" and would "not go outside the

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262 M101.

263 Supra, note 145 at 89; Maloney, note 232 at 51-2 also found that, particularly in less serious cases, investigators would get a statement or version of events from the named officer without using a caution (i.e. off the record and/or inadmissible).

264 Internal investigators at the detachment and headquarters level have used this approach with a number of members the author interviewed or assisted. Of course, nothing is truly off-the-record.

265 M28, M41 & M48.
room. However, investigators were waiting outside the room and intercepted the members as they left the debriefing, at which point detailed statements were taken from them about what the suspect member had said during the confidential debriefing. These statements then formed part of the case to support criminal charges against the member. A variation of this approach is that a member becomes involved in a serious incident, it is clear there will be questions asked, and the supervisor either deliberately or uninformedly dismisses the situation as a non-event and merely tells the member to write up a statement.

b. Tactics

The general theme that developed during research was that the statement and interview process can be abused in any number of ways. Based on earlier discussions about the importance of the R.C.M.P. image, it is not hard to imagine that internal investigators may be particularly motivated to be deceptive in the obtaining and taking of statements from members because of the need to protect and purge the agency. An extreme example was found in the comments of one member, who did not form part of the interview group, that he was directed to conduct an internal investigation and interview of a member even though there was "no evidence at all" to support the allegation. The commissioned officer issuing the direction was not interested in the complete lack of evidence gathered during the criminal investigation to support the allegation. He wanted the member interviewed because of the potential implications with headquarters, the public and other agencies. It appears that

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266 M26; also confirmed as a tactic by M8, M93 & M107.

267 M57, M65, M66, & M8.

268 Personal Communication.
ensuring the right to counsel, right to silence and non-incrimination at the investigative stage may be the only effective way to prevent questionable tactics, intimidation, threats, punishment and coercion of those members under investigation.269

The extent to which a police department may be prepared to pursue statements and punish its members is revealed by the *Rumbolt* case in which the Royal Newfoundland Constabulary charged a member with two counts of "obstruction" under the *Criminal Code* for refusing to answer questions during a criminal investigation about the conduct of another member.270 The member declined to provide a statement based on the advice of his association and because he wanted to consult a lawyer. In acquitting the officer, the Court noted that if a lawyer had been present and advised silence there probably never would have been charges laid.271 The author has also found the criminal obstruction threat is a blunt tactic used by some R.C.M.P. investigators to get statements or information from a member.272

The E.R.C. documented a case in which a R.C.M.P. member gave two "contradictory" statements and the member was subsequently charged internally for giving a misleading statement. The statements were used against the member, but the Force could not

269 Erwin N. Griswold, "The Right to be Let Alone" (1960-61) 55 Northwestern University Law Review 216 at 222 feels protection against self-incrimination will stop such tactics in general police investigations, although in the police context the author is not convinced this will be the case.


272 M93 & M99.
prove with independent evidence that the second statement was in fact true. In another case that came to the attention of the author, a member was involved in a serious on-duty motor vehicle accident while travelling "Code 3" (i.e. emergency lights and siren activated) through an intersection. In this instance the police and civilian vehicles were severely damaged and the member's car actually started on fire while the member was stuck inside. The member was taken to the hospital and after treatment, was released. The investigator approached the member just after release in the hospital parking area and elicited responses (without administering the Charter/warning) from the member which were subsequently placed in a Report to Crown Counsel in support of charges. At trial, during the voir dire, when the Crown attempted to use the member's comments, the investigator acknowledged that at the time of questioning (as the member was being physically assisted out of the hospital) the member was being "investigated" and that the member was still visibly shaken and in shock. The investigator accounted for the failure to provide the police and Charter warnings on the basis that the member was a police officer and knew her rights! Another member reported being placed in a locked interview room by a supervisor for several hours after a serious on-duty incident without any explanation or right to counsel being administered.

The E.R.C. provides a further example of the strict attitude the Force can take

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273 Royal Canadian Mounted Police External Review Committee, Annual Report 1990-1991 (Minister of Supply and Services, 1991) at 19. However, the E.R.C. found that notebooks are not protected because they are like verbal statements.

274 R. v. Woo (2 June 1994), Surrey #AC48212568 (B.C. Prov. Ct.); see the Transcript at 27. The court excluded the statement.

275 M51.
towards compelled statements. In this case, a member was ordered to provide a statement, purportedly pursuant to the old R.C.M.P. Act (which did not contain express statutory authority to compel), however, on instructions from counsel the member declined to answer questions because the status of any possible criminal action was not known. The member wanted to determine whether the intended questions were relevant and lawful and asked for a list of the questions, but the Force asserted that there was no right to counsel under policy, therefore it would not provide the member with a list of the questions to be asked. The E.R.C. found: first, that there was no authority under the old R.C.M.P. Act to order a statement; second, it is a fundamental breach of natural justice to order a member to provide a statement and deny counsel; and third, s. 7 of the Charter was breached because it was unknown at the time what the results would be in the criminal matter. In the R.C.M.P., the author has observed that there is an infatuation with policy, and most commissioned officers equate policy with law. In the Armstrong case, for example, the Federal Court had to remind the Force that R.C.M.P. policy manuals do not confer the force of law and do not give rise to rights. During interviews and discussions with members, and interactions with senior managers, the author found that for many there has been no abatement in the "policy is law" view in the R.C.M.P.

During one interview, it was reported that a senior member, while interviewing a suspect member, denied that the statement was being required under s. 40 because he felt members "should have no protection" for statements, and they should not have the same


277 Armstrong v. RCMP Commissioner, [1994] 2 F.C. 356 (T.D.) at 362-65; see also, Ceyssens, supra, note 179 at 5-38.
rights as citizens. Another member, who conducted only internal investigations, told the author that he tells members that all statements, including ordered statements, are "without prejudice." The author was not successful in getting this member to explain how statements from witness or suspect members are necessarily made without prejudice.

One tactic reported to the author that can be utilized by investigators to get members to cooperate is to advise the member that he or she is under investigation for a much more serious matter than is the case, even if the evidence does not support the serious allegation. For example, improper conduct on the part of a member may be reported or suspected (e.g. improper contact with a civilian on- or off-duty). The investigator may indicate to the suspect member that he or she is under investigation for sexual assault criminally, when in fact there may be no grounds to support (or actual complaint of) a sexual assault, but the seriousness of the allegation practically demands that a member make a statement, which will then be used to sustain an internal offence (e.g. member denies assault, but admits having a consent relationship with the person). The author has also found that certain investigators, whenever there is a criminal aspect to an allegation against a member, will rely on a judicially authorized one-party consent to intercept communications in the first instance before conducting interviews of witness and suspect members.

278 M88.

279 M29.

280 M40 & M88.

281 M6, M40, M43, M57, & M88. The investigator receives the complaint and in order to avoid tipping-off the suspect member instead of conducting interviews will immediately get a one-party consent from the complainant and judicial authorization to intercept communications. The investigator then has the complainant call the suspect member to try and get incriminating statements. Unlike a full-blown wire, a one-party consent does not require all avenues of investigation be exhausted or unsuitable before judicial authorization is obtained.
interesting about these cases is that, based on usual police practices, the nature of the criminal allegations involved would not have justified the time or expense of doing a "wire" if the suspect had been a civilian.

One member reported that he was providing a witness statement in relation to the alleged misconduct of another member, but part way through the interview it became apparent that the investigator was also investigating the member as a suspect.\textsuperscript{282} When the member raised this contradiction with the investigator, the investigator said not to worry about it, the statement was only as a witness, and that a "warned" statement would be obtained from the member later. The member reported that the purported "witness" statement then became part of the investigative package with respect to the investigation into alleged misconduct involving himself. It was not unusual for members who had been the subject of a complaint to indicate that they were assured that everything would be okay by the investigator, and that they were led to believe they did not need counsel, only to "learn a lesson" about such representations.\textsuperscript{283} One member involved in the discipline process indicated that although there may be a statutory protection for statements made during the informal resolution of a public complaint, the Force still asks supervisors to report what was said during these meetings.\textsuperscript{284} In some cases, tactics of misrepresentation, deception and lack of clarity are present.

In Willette v. Royal Canadian Mounted Police Commissioner, the member unsuccessfully argued that the Bill of Rights prevented the admissibility of a statement that

\textsuperscript{282} M89.

\textsuperscript{283} M8, M26, M58, & M98.

\textsuperscript{284} M107.
was extracted pursuant to a direct order and threat of internal charges. Furthermore, testimony before the McDonald Commission makes it clear that the Force is not shy about interrogating members. For example, one member advised the Commission that he was the subject of a four hour interrogation during an internal investigation, that he felt "quite demoralized," and ultimately was depressed and unable to read the extracted statement for accuracy because of his troubled state of mind. Another member was interrogated for three hours, without a break, refused a lawyer, and he testified that he was made to feel really small and events happened so fast he could not think. Thus, as Ratushny found, "Even highly trained R.C.M.P. officers admit to having suffered severe emotional pressures from the effects of relatively short periods of interrogation." Yet, the Force has been statutorily empowered to extract statements from members.

c. Two Cases

The author was surprised to learn that "E" Division could provide very little data on ordered statements. For example, Complaints and Internal Investigation Section (now Internal Affairs Unit) when asked about "The total number of ordered statements taken in "E" Division," responded that the number was "Unknown" and it was estimated that

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285 (1986), 70 N.R. 225 (F.C.A.) at 232; see also, Laroche v. Beirsdorfer (1981), 131 D.L.R. (3d) 152 (F.C.A.) where the Court found that the member had not in fact been compelled, because he obeyed the order to provide a statement. The issue of natural justice or a breach of the Canadian Bill of Rights did not arise.

286 Ratushny, supra, note 32 at 224-5, citing the Toronto Globe and Mail (11 and 12 May, 1978).

287 Ibid.

288 Ibid. at 246.
"Roughly 2-3 investigations per year result in ordered statements being taken." This estimate of formally ordered statements was independently confirmed to be accurate through interviews and discussions. It is not believed that this figure accurately represents the unofficial or informal application of the ordered statement authority to get members to answer questions (i.e. threats to use the authority are not reported or recorded). This figure also does not reflect instances in which members falsely believed they had to provide a statement. Given the invasive nature of the ordered statement authority, and the proclivity of the Force to maintain records/data for almost everything else related to internal matters (e.g. number of high speed chases, injuries from chases, property damage, public complaints, etc.) it is unusual that data was not maintained on ordered statements. The bottom line is no one in "E" Division knows how frequently ordered statements are threatened or obtained.

However, if only 2-3 ordered statements are formally taken a year in "E" Division, it raises questions about the necessity for such an authority for management or to prove allegations. On the other hand, though, little is known about the circumstances surrounding the actual taking of an ordered statement. It is clear, however, as reported by the DSRRs, there is considerable "confusion amongst members" regarding the statement process.

The author did manage to identify and interview two members who had been ordered to provide statements during an internal investigation. R.C.M.P. policy states that:

An "ordered statement" should only be taken under rare circumstances:

1. When there is no other way for the Force to determine what has transpired and therefore cannot account for the conduct of the member, or

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289 CIIS correspondence, supra, note 120.

2. The matter is so urgent that the investigator cannot wait to conduct other avenues of investigation.

Obtain written authority to order a member to answer relevant questions from an Officer or Member in command of the detachment.291 (emphasis original)

The circumstances that led to the first member being ordered to provide a statement have been adjudicated before a criminal court, and the member was acquitted.292 Briefly, the member and his former spouse, who is also a member, had been separated for a period of time. The dissolution of the relationship had been somewhat acrimonious, and on the day in question, the member had attended his spouse's residence to pick up their daughter for a planned visit. While in the residence, an encounter occurred in which the member received a serious knife wound down the side of his face and throat that required numerous stitches and left a long permanent scare. The spouse also had some hand and arm wounds. The member, bleeding profusely, left the house to get help, and the spouse called the police. The ambulance and police arrived and both members were taken to the hospital. The member maintains that he was assaulted from behind by his former spouse while he was getting some items out of a closet, and that she slashed him with the knife. The spouse claimed that the member had attacked her with the knife. The member verbally advised the ambulance attendant of the circumstances of the assault. He also advised a civilian neighbour and the attending police officer. Further, upon hearing that his spouse reportedly had suffered knife wounds, the member specifically requested that the scene be protected and a blood analysis be conducted at the scene and of his clothes because he was certain that it would establish


292 R. v. Reilly (July 1996) Langley #24685 (B.C. Prov. Ct.). Other information for this section was obtained from an affidavit from counsel filed in the internal adjudication hearing in support of staying the internal process.
that he was the victim and/or her injuries were self-inflicted. A criminal investigator and an internal investigator were assigned to the case.

The member was suspended from duty, ordered to physically report and sign-in at his detachment five days a week, and charged with assault with a weapon and assault causing bodily harm. The ex-spouse was not charged, and in fact, the Force declined to investigate several other criminal allegations put forward by the member about his ex-spouse (e.g. fraudulent cashing of a cheque). The criminal investigator also did not interview several witnesses that the member and his counsel put forward as being able to provide relevant evidence. Up to this point the member had verbally told the ambulance attendant, a civilian, and the attending police officers his version of events. The spouse had also provided her version of events to the investigators. The member was off-duty at the time of the incident, as was the spouse. He therefore did not qualify for Force funded counsel or assistance from a Member Representative during the investigations.

Approximately 31 days after the alleged assault, an internal investigator ordered the member to answer questions about the incident. The member attended the detachment and at no time was given any notice of the right to counsel by the investigator. No explicit reason was given for demanding the statement. After obtaining the ordered statement, and even though the criminal charges were outstanding, an investigator allegedly used the member’s ordered statement to specifically question the spouse (e.g. X says…). In particular, it is alleged that the investigator went through the member’s ordered statement point by point with the spouse. The member was particularly troubled by this action because it specifically disclosed the points of discrepancy upon which he and his counsel intended to attack the spouse’s version of events. Further, the nature of the questioning potentially allowed the former spouse to tailor her evidence or know his case well in advance of being confronted in
court. This statement also formed the basis of other matrimonial actions and claims by the spouse. What is even more disturbing, is that it is alleged that one hour and twenty minutes of an interview between the investigator and spouse were not recorded by the investigator.

After seven months, this case went to a preliminary inquiry which lasted for two days. Despite repeated requests by the accused member and his counsel, the Force had still not done a forensic examination of the member's clothes to determine if they had any of the spouse's blood on them, followed-up with the witnesses identified by the member, or pursued the other criminal allegations filed by the member against the spouse. The Force also served notice that it was instituting formal disciplinary proceedings and seeking the member's dismissal. The member maintained that any wounds suffered by the spouse had to be self-inflicted. Twenty one months after the incident, and approximately twelve months after the preliminary inquiry, on the first day of the trial, just "moments" before commencement, the investigator verbally disclosed to defence counsel the results of a forensic report that was dated some three months earlier. It was confirmed that none of the spouse's blood was on the member's clothing. A copy of the forensic report was not produced until the second day of the trial almost two weeks later. At the conclusion of the trial, after four days of testimony, the judge made several findings, including:

...certain aspects of the testimony cause me to conclude that the evidentiary narrative provided by the accused is the more reasonable on the whole than provided by the complainant.

His evidence provides a more logical explanation of the events and possesses a degree of candour which is often lacking in the evidence of the complainant.

I find it difficult to wholly accept her evidence in certain areas. For example, one, if the attack took place as she described, why is there none of her blood upon the accused's clothing since she would have been cut and bleeding before he was cut?

Second, I question to some degree her description of how the attacked occurred within the confines of the small storage closet and the adjacent area. Her injuries,
relatively symmetrical slashes, do not appear to be in keeping with that description.

Third, the nature and severity of his wounds are difficult to relate to her description of how they were inflicted...

Fourth, it is strange that he, right-hand dominant, was able to inflict her wounds with his left hand, while his right hand was partially immobilized in a soft cast from a previous injury and, further, why, when he was in that condition, would he use that injured hand to push her away, as she indicates...

Five, her version of the attack does not account logically for his landing upon her back to front, thus permitting her to slash out at him in the manner described...

Six, she says she does not know if she cut him, but tells the 911 operator that he is "going to be covered in blood. I got him,"

Seventh, her emphatic denial of [JB's] (phonetic) statement regarding the potential slashing of his face is troubling since Ms. [B] presents herself as a credible and, indeed, detached witness...

Eight, similarly, there are the conflicting statements with respect to the pay cheque incident, threatening him with a knife or carrot peeler, and the blackened eye that he received, the last two elements corroborated by [KR's] evidence, who also presents as a credible witness...

Nine, as well as the misleading comments with regard to his financial contributions to her, from the period of...where it is clear from the evidence that he provided for the maintenance of her and the family...

Those observations are not necessarily exhaustive. There are other area of contradiction within her evidence and statements she made to other persons. For example, those made to the ambulance driver regarding a restraining order and the knife location...

At times during her cross examination, I found her evasive... [and the defence] properly points out her significant number of negative responses involving her recollective ability...293

Even more troubling are the comments of the court regarding the investigation by the R.C.M.P.:

...I am amazed, frankly, that more attention was not given to certain areas of the investigation, particularly blood analysis, where D.N.A. or at least blood typing could

293 Ibid., Collingwood J., Reasons for Judgement at 5-6.
have contributed significantly to the fact finding process... Because the parties are both police officers, I would have thought more attention and care would have been accorded the investigation, not only to assist the parties, but the R.C.M.P. itself. 294

The Force, however, was not finished, and despite the foregoing statements and findings by the Court, proceeded with internal disciplinary charges against the member. The Member Representative could not dissuade the Force from proceeding. In fact, the Member Representative spent a half day presenting evidence in support of an abuse of process and estoppel application to have the internal matter stayed. Finally, after the evidence about the investigation and other actions of the Force were formally presented to the Adjudication Board, the Appropriate Officer's Representative stayed the case internally. The lawyer who acted for the member in the criminal trial, who has over 20 years experience, and has assisted hundreds of police officers, found the conduct of the Force to be disturbing in this case. After being suspended for almost two and half years, reporting physically to the detachment five days a week, spending tens of thousands of dollars of his own money, and enduring the untold stress of this incident and the conduct of the Force, the member was finally cleared of all allegations. It is not possible to put into words this member's feelings about the way this investigation was handled, how he was treated, and how his personal, financial and career situations have been irreparably damaged.

Turning to the ordered statement in this case, several curious aspects arise. First, none of the strict circumstances existed under policy to order the member to provide a statement: a) it cannot be asserted the Force had no other way to determine what transpired because it already had the member's version of events through the ambulance driver, civilian neighbour and attending police officers, there was the spouse's version, not to mention that

294 Ibid. at 6.
an investigation at the scene would have identified how matters unfolded (i.e. blood spatter analysis); and b) this matter was not urgent, since the order to answer questions was not issued until 31 days after the incident. Second, since the conduct in question occurred off-duty, one also has to question whether it was necessary to pursue an ordered statement, particularly since the statement did not deal with his specific duties as a member. Third, under the circumstances, why was a statement required at all? One compelling answer that arises from the member is that the Force wanted to have the statement so it could be used to help prove the criminal and internal allegations.

The problematic nature of ordered statement highlighted by this case are twofold. First, possessing an ordered statement that can be discussed with a witness can affect the ability of an accused member to conduct an effective defence to a criminal charge, even if the statement itself is not tendered into evidence. Second, there seems to be a correlation between ordering a statement and conducting an investigation that the trial judged considered inadequate. By design, default, or neglect, an ordered statement can assist in ensuring any "loopholes" in a case are eliminated. It is entirely possible that the disclosure of the ordered statement by an investigator could tip the scales against an accused member at trial. An ordered statement can certainly enable the Force to tailor its inquiries. The conduct of the Force in proceeding internally, in light of the strong comments and factual findings of the court, also raises questions.

295 One must also be concerned about the delay in making a request for a forensic examination and the apparent delay in its actual disclosure at trial. Such incidents are consistent with other information that came to the attention of the author about failures to disclose or record evidence. It is reported that one investigator did not disclose the existence of a tape which contained the denial of an alleged criminal act by a member until after the member was convicted. In another case, the internal/criminal investigator reportedly told a subject member that his lawyers would never get to see the internal investigation report despite repeated requests.
The second case to be discussed also presents an unsettling picture in relation to internal investigations, ordered statements and employee relations in the R.C.M.P. This particular case dates back almost ten years, and has yet to be completely settled. The member involved, who was very junior in service at the time (two years), was out on patrol when he was called back to the office. At the office he was taken to an interview room by the internal investigator, where it is alleged that the investigator "pulled rank," unceremoniously directed the member to start answering questions and stated "if you refuse, you will be charged." The member was under investigation for unlawful confinement arising from an on-duty action wherein the accused in an assault had been driven home several months earlier. The member asserts that the investigator did not administer the Charter, any warnings, internal or otherwise, nor said anything about getting a lawyer. The member was essentially "read the riot act." The member refused to provide a statement. The member states that no complaint was ever filed by the alleged victim, and the member believes the entire matter was generated by certain members of the Force. The member was eventually charged criminally and internally. The member was denied funded counsel in the criminal matter.

In the interim, a second internal investigation was initiated on an unrelated matter in which it was alleged the member, while off-duty, used his position to pressure a citizen into paying some outstanding rent. The member was required to provide a statement, by the same internal investigator, but this time the member wanted the interview tape recorded. The interview was tape recorded, and a second internal charge was laid against the member.

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296 The material in this case primarily arises from pleadings, transcripts and supporting documentation filed in Moore v. Attorney General of Canada, Halifax Reg. No. 116525 (N.S.S.C.). Interviews were also conducted.
The member maintains that all the allegations were trumped-up and motivated by the improper actions of senior members. Between the time of the investigations and the ultimate hearing of these allegations, the member states the Force engaged in a campaign of intimidation and harassment. The member reports that he was suspended and the commanding officer imposed extreme and unusual conditions, including an attempt to have the member request permission to go past the end of his street. The member was only allowed to go to the front counter at the office, was not allowed to use the office phone, manuals or resources to prepare grievances. During interviews of members who had experience at the hands of the internal process, and from personal observation, it is not unusual for the R.C.M.P. to engage zealously in campaigns where inconsequential, trivial, dated or previously known actions of a member are suddenly dredged up to form the basis of further allegations and investigations.297

The internal matters preceded the criminal case, and the internal prosecution was unsuccessful. Although there were many problems with the internal case, one of the primary reasons that allegedly led to an early conclusion was that it became apparent that the transcript of the member’s statement prepared by the internal investigator had not been reproduced verbatim. In fact, the statement attributed to the member was significantly modified, including the deletion, movement or addition of words to questions and answers. During cross-examination the investigator asserted that the statement was simply edited to leave only the "relevant" material.298 It was also alleged that the member had been

297 M6, M26, M40, M57 & M93.

298 Throughout the cross-examination the investigator asserts that he simply took the taped statement and extracted what he thought was relevant to the allegations. Second, he asserted that since he presented the statement to the member the member was responsible for ensuring the statement was accurate (internal proceedings transcript at 183-205). At 204 the following
charged criminally without there first having been a complete criminal. In the interim, the criminal matter went to a preliminary inquiry at which evidence was found to support committing the matter to trial; however, the member appealed all the way to the Supreme Court of Canada on a specific point, and although unsuccessful in his application, the criminal charges were subsequently stayed without explanation by the Crown. It is alleged that at one point the member's counsel was told that if the member quit the Force the criminal charges would go away.

The member filed a grievance regarding the denial of payment for his legal fees, which went all the way to the E.R.C. around 1992; the E.R.C. found that the member's exchange occurs during cross-examination:

A. Its changed slightly but I don't think the meaning is changed.
Q. But, again, you're selectively editing the response of the Member because you thought it was redundant.
A. I thought it was more appropriate to the answer that he wanted to give or, in my opinion, that he wanted to give, yes.
Q. Okay. So, you have taken what you thought the answer the Member wanted to give to the question and included that in the statement. (emphasis added)
A. That's correct.

Further at 211-212:

Q. ...Would you agree that there are a couple of sentences of explanatory nature provided by the Member as what went on that were not included in the statement?
A. There are omissions there, but I don't think they are relevant to the content.
Q. Again, you didn't think the Member's explanation was relevant.

At 218-220:

Q. Okay. For the record, I'd like to read what was considered to be garbage [investigator's term] by the investigator and not worthy of inclusion in the Member's own statement, commencing [reads in 48 lines or two transcript pages of text excluded from statement]: ....
To you, the Member's explanation of why he got involved in that particular situation and what his motives were garbage.
A. It was irrelevant to the allegation in my opinion.
Q. In your opinion.
legal fees should have been authorized. The Commissioner at the time reluctantly stated that the fees would be paid, but the matter still has not been settled. In fact, the member has now had to file a civil suit to recover his legal fees, which, with interest, he claims are now far in excess of one hundred thousand dollars. The only reason that this member has been able to withstand these circumstances, is that he had the financial ability to pursue this matter, which, he reports, the Force had not counted on, nor expected. This matter has been ongoing for almost 10 years, and in the member's mind the Force's conduct is nothing short of unconscionable. As one DSRR expressed to the Commissioner in a memo in 1994, "In my twenty-nine years of service, I have never seen a more classic example of malicious prosecution, abuse of process, and such a loosely concocted scheme as this one, which was conducted by upper managers of the R.C.M.P…" It is alleged that a number of "dirty tricks," threats and abusive actions were taken against the member along the way. One of the major problems recounted by the member was that the same senior members who were making decisions in his case, were also the ones who were responsible for handling any grievances, and they routinely denied the member's request for relevant documents.

As this member stated, he was new in the Force and "could not believe an organization that was to uphold the law would use it as a battering ram to destroy one of its members." One point the member did raise, is that when this incident arose, the notion of suspending members without pay had not gone beyond the "embryonic stage", but he is convinced that if this matter occurred today the Force would suspend him without pay because "the judicial process takes too long, and they know that [SWOP] is an effective weapon, because it takes away the income."

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299 Memorandum dated May 10, 1994 at 4. It was clear to this DSRR that the actions were "a conspiracy to get rid of" the member.
Again, based on the facts of this second case, there were no compelling reasons for the Force to obtain a statement from this member. The matters were certainly not urgent and involved other parties who could provide versions of events. Unfortunately, this case bespeaks an attitude, frequently encountered during research, that some senior officers and investigators still consider themselves impervious to being held to account. It is also consistent with other dubious tactics and actions recounted to the author in relation to other cases in which evidence was allegedly not provided, erased, or not disclosed.

The foregoing two cases certainly confirm the observations of a member involved in the discipline process:

Section 40 is about derivative evidence. The entire purpose is to interview these guys and to get statements from them to use against them or others.\(^{300}\) The two foregoing cases provide compelling evidence that the R.C.M.P. cannot, unfortunately, be trusted with the authority to compel statements from members. The apparently inconsistent manner in which ordered statements can be applied and the impunity with which policy restrictions on ordered statements can be ignored is also of concern. Further, simply removing the ordered statement authority would not fully address more prevalent concerns regarding the apparent inconsistent support for members under investigation and the punishment orientation found in Chapter 6 that appear, to some degree, to be driving the internal accountability regime in the R.C.M.P. Some may charge that these are isolated or aberrant examples of the system gone wrong. Even if these findings do not represent typical management behaviour, they clearly speak to a need to provide better protection for members. Further, the negative effect that such cases can have on member moral and organizational effectiveness cannot be ignored. The professional, personal and

\(^{300}\) M88.
social costs for the member (and his or her family) who becomes entangled in discipline-
system-gone-wrong case should not be acceptable regardless of the frequency of such cases.
Instances of harsh conduct and punishment by the Force travel rapidly through the formal
and informal lines of communication in the R.C.M.P. Of course, a Foucaultian would
merely say that is the point.

7. Validity

Traditional wisdom in criminal investigations is that interrogations and statements of
the suspect are required to prove a case successfully, but studies have had mixed results.\textsuperscript{301} Baldwin and Maloney found in their study that most crimes can only be solved if members of
the public are able to supply information about the identity of the perpetrator.\textsuperscript{302} In fact, it
was found that most offences cleared by charge will be solved no matter what the
investigator does.\textsuperscript{303} Leng asserts that in the absence of good independent evidence prior to
the interrogation, it makes little difference whether the suspect denies the offence or says
nothing.\textsuperscript{304}

On the issue of the purported low visibility of police action, Barton's review of
studies and figures on the "place" where complaints of police misconduct arose concluded

\textsuperscript{301} Cato, \textit{supra}, note 234 at 30-33 reviews studies on this point.

\textsuperscript{302} John Baldwin and Timothy Moloney, "Supervision of Police Investigation in Serious
Criminal Cases" in \textit{The Conduct of Police Investigations: Records of Interview, The Defence
Lawyer's Role and Standards of Supervision} (The Royal Commission on Criminal Justice
Research Studies No. 2, 3 and 4) (London: H.M.S.O., 1992), Study No. 4 at 55.

\textsuperscript{303} \textit{Ibid.} at 55-6.

\textsuperscript{304} Roger Leng, \textit{The Right to Silence in Police Interrogation - A Study of Some of the Issues
Underlying the Debate} (The Royal Commission on Criminal Justice Research Study No. 10)
that investigations by any agency would not be greatly hampered by an absence of witnesses. Since identity is usually not at issue in police misconduct cases, at least on an individual or collective basis (i.e. known police officer, unknown police officer working for a specific department, or unknown officer working in a specific area, time, car, location), it seems that ordered statements would do little to advance an investigation beyond the identification of the subject officer stage. On the other hand, during a recent lecture on the use of force, the instructor advised the candidates to use loud clear commands, in part, "to create witnesses through verbalization." The concern has now become that members must be cognizant of creating independent witnesses, since there is a perception that some low visibility complaints are based on the word of a police officer against the collusion of individuals who are more interested in protecting each other than setting out the truth. As noted in Chapter 5, civilian review has also not had any significant impact on substantiation rates for allegations of misconduct in several jurisdictions.

With respect to the internal relational paradigm, it appears there is little question that

305 Peter G. Barton, "Civilian Review Boards And The Handling Of Complaints Against The Police" (1970) 20 University of Toronto Law Journal 448 at 452.

306 This occurred on the Small Arms Replacement Program for conversion from .38 revolvers to .9 mm pistols for the R.C.M.P.

ordered statements exist, and are utilized, for the reinforcement of the power that management, in particular commissioned officers, can exert over members. The indoctrination process experienced by members during recruiting, training, and service exerts a powerful influence over members which may make it unrealistic to expect that members will defy the process without outside intervention. As Dolinko argues, compelling individuals to confess assists in stripping them of their self-esteem and erodes their sense of identity. In other words, members are being compelled to provide statements in order symbolically to ensure conformity, re-moulding, dependence, and submission.

In the end, there is no convincing evidence that ordered statements are necessary to deal with internal investigations or allegations. First, other police departments have successfully operated without using such mechanisms. Second, there are generally witnesses to police conduct, but even if there are not, and an allegation is registered, if the member does not respond the Force can properly rely on the allegation as a basis to take the necessary administrative (e.g. suspension) or investigative action. If an allegation is registered and the suspect member refuses to respond, the Force, in good faith, can act on the best, albeit unanswered, information it has at the time. If the member refuses to respond to an allegation he or she will have to face the natural consequences of that decision. Third, if the R.C.M.P., purported to be one of the most sophisticated and best technologically equipped police forces in the world, is unable to reconstruct what happened or successfully

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308 Ratushny, *supra*, note 32 at 245.


310 For example, municipal police departments in British Columbia and Nova Scotia do not have statutory authority to order statements from their police officers.
investigate an allegation without a response from the member there is a real problem. In the case of serious incidents, such as shootings, pursuits, and assaults, forensic analysis can easily determine the course of events. Further, the Force has a distinct advantage in the internal and public accountability scheme in that a case only needs to be established on a balance of probabilities, which is well below the criminal beyond a reasonable doubt standard. Fourth, in general, investigations by the R.C.M.P. tend to gather evidence against a suspect prior to interrogating, rather than interrogating first as part of a fishing expedition. If criminal investigations can succeed by interviewing the suspects last, or not at all, there is little reason to believe internal investigations would be stymied without an account from the member. Fifth, the Marin Commission conducted a thorough inquiry of the use of ordered statements and concluded that:

...the abandonment of the ordered statement will not alter, to any significant degree, management’s ability to administer the Force with efficiency. (emphasis added)

The Marin Commission received substantial input from members of the R.C.M.P. who asserted that ordered statements had little credibility and were not necessary to conduct an investigation successfully. Last, the conduct of the R.C.M.P. and its treatment of members in some cases does not instill confidence that the Force can be counted upon to administer this invasive authority with fairness and consistency. The findings with respect to the lack of notice, training, and qualified and accessible legal representation by the R.C.M.P.

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311 For example, the R.C.M.P. have world renowned crime labs and expert personnel in the area of firearms (e.g. use, types, ballistics, angles, distance), D.N.A., statement analysis, computer analysis, blood spatter analysis, psychology, computer reconstruction, to name a few.

312 Ratushny, supra, note 32 at 240.

313 Supra, note 2 at 153.

314 Ibid.
for members provides another perspective on the Force's underlying values. Consideration
must also be given to the fact that members do not have organized financial support from an
employee organization to protect them from more questionable actions. As emphasized in
preceding chapters, the very nature of police work and the complexity of the accountability
regime places members in a much different and more vulnerable situation than other public
or private sector employees.

The evidence seems overwhelming, either from the mouth of the former
Commissioner, or the actions of the Force documented here, that it can use ordered
statements to obtain evidence which it can use against members in any way it sees fit. The
potential for misuse of the ordered statement authority or the statements themselves, as
evidenced in this Chapter, is just too great to permit the R.C.M.P. to have this authority as it
is currently constituted, regardless of the number of times it is exercised. It must not be
overlooked that it is police officers, agents of the state responsible for criminal
investigations, who are responsible for the internal process. What is clear is that internal,
employment, public accountability, civil liability and criminal responsibility are not
watertight compartments and that in theory and practice ordered statements are surfacing
inappropriately despite any purported protection. In the final analysis, as one member put it,
"you only have to look at the way we treat our members internally to understand why we
need a Charter!"315

315 M43.
Chapter 8

LEGAL ANALYSIS

"When society employs young men and women to maintain law and order in a sometimes unreasonable and irreverent society, it impliedly promises them justice and nothing else will suffice."¹


1. Introduction²

The material and findings discussed in Chapter 7 not only challenge some of the basic premises that inform the employment context of Royal Canadian Mounted Police ("R.C.M.P.") members, it seriously questions the function of and need for ordered statements. The purpose of this Chapter is to move beyond the functional evaluation and context to conduct a legal analysis of ordered statements.

While compelled statements from police officers have received considerable academic and judicial attention in the United States, the validity of such a mechanism has not been the subject of academic or Charter scrutiny in Canada for several reasons.³ First, changes in the R.C.M.P. Act which made the authority to compel a statement statutorily explicit were


² Portions of this Chapter are informed by an analysis the author began developing in an independent research paper and later article while attending Dalhousie Law School in 1992-93.

not instituted until 1986 to 1988. Second, in 1987 the Supreme Court of Canada in *R. v. Wigglesworth* raised the threshold, to a significant degree, 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." The protections contained in s. 11 of the *Charter* ("Proceedings in Criminal and Penal Matters") are unavailable in a disciplinary matter unless it is a true "criminal proceeding" or a conviction would lead to a "true penal consequence." This severely curtailed the basis upon which anyone subject to internal disciplinary proceedings could invoke certain constitutional protections. For instance, in the case of ordered statements, members cannot refuse to answer based on any of the procedural protections outlined in s. 11 of the *Charter* (leaving it to other constitutional rights, such as the right to counsel, to perhaps fill the void). Third, as identified earlier, members do not generally have the financial ability or organized employee support to challenge R.C.M.P. internal disciplinary matters in court. Fourth, it is only recently that certain *Charter* developments may have opened the door to potential legal challenges.

This Chapter will examine some of the legal and constitutional issues that now

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4 Canada, *Commission of Inquiry Relating to Public Complaints, Internal Discipline, and Grievance Procedures within the Royal Canadian Mounted Police* (Ottawa: Information Canada, 1976) (Chair: Rene Marin) ("Marin Commission") at 32 notes that in 1962 the Commissioner's *Standing Orders* were changed and a member who chose to remain silent during an internal investigation could be ordered to answer. The response could not be used in Service Court proceedings, but could be used for "other purposes." It should also be noted that a statutory ordered statement authority does not exist in many other jurisdictions. This has limited the possibility of judicial review of such authority.


6 Wilson J., *ibid.* at 560.

surround ordered statements. Section 40 of the *R.C.M.P. Act* states:

1. Where it appears to an officer or to a member in command of a detachment that a member under the command of the officer or member has contravened the Code of Conduct, the officer or member shall make or cause to be made such investigation as the officer or member considers necessary to enable the officer or member to determine whether that member has contravened or is contravening the Code of Conduct.

2. In any investigation under subsection (1), no member shall be excused from answering any questions 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.

3. No answer or statement made in response to a question described in subsection (2) shall be used or receivable in any criminal, civil or administrative proceedings, other than a hearing... into an allegation that with intend to mislead the member gave the answer or statement knowing it to be false.

The central issue regarding ordered statements is that R.C.M.P. members are forced to incriminate themselves by answering questions and providing evidence that can be used against them. As this thesis has demonstrated, complaints about police misconduct are not straightforward matters and the line between criminal and internal investigations is generally nonexistent. A former Commissioner of the R.C.M.P. highlighted this issue in his testimony before the Legislative Committee by confirming that ordered statements are used to acquire derivative evidence that can be used against a member. Critics argue that compelled statements violate a member’s right to be free from self-incrimination and/or the right to

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8 Canada, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65, *An Act to Amend The Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof*, Issue no. 7 (27 November 1985) at 7:16; see also, Issue no. 11 (10 December 1985) at 11:114. The senior executive of the R.C.M.P. was certainly unconcerned about the problems that s. 40 posed. At 11:112, Commissioner Simmonds states that, "[i]f, as a result of having to account for the activity, it leads to further investigation which shows the man committed an offence...and he ends up charged with it, too bad" (emphasis added).
remain silent.\textsuperscript{9} Although s. 40(3) of the \textit{R.C.M.P. Act} purports to protect compelled responses by providing that no answer or statement shall be "used or receivable in any criminal, civil or administrative proceeding" there is no statutory derivative-use immunity. In other words, while a compelled statement under s. 40 cannot be used in a proceeding (\textit{i.e.} use-immunity), any evidence derived from the statement is not protected and can be used in an investigation or subsequent proceeding (\textit{i.e.} no derivative-use immunity).

Unfortunately, judicial and administrative interpretation of the protection provided by s. 40(3) has been somewhat conflicting and contradictory. To complicate matters even further, \textit{Charter} decisions regarding disclosure and "use" may also have applications that erode the statutory protection for ordered statements. For example, \textit{R. v. Kuldip}\textsuperscript{10} (use of testimony from previous judicial proceedings) and \textit{R. v. Stinchcombe}\textsuperscript{11} (disclosure), raise interesting questions regarding the veil created by s. 40(3) of the \textit{R.C.M.P. Act} and the use of ordered statements. Aside from some of the practical use issues discussed in previous chapters, as a legal matter, subject members may be ill-advised to rely on s. 40 as a basis to prevent the "use" of their statements.

In 1990, the Supreme Court of Canada in \textit{Thomson Newspapers Ltd. v. Canada (Dir. of Investigations and Research)}\textsuperscript{12} failed to clarify the application of s. 7 of the \textit{Charter} as it

\textsuperscript{9} Svend Robinson, Member of Parliament, House of Commons Debates, 1st Session 33rd Parliament, Vol. VII, 1985 at 10511; see also his comments to the House of Commons Legislative Committee on Bill C-65, \textit{An Act to Amend the Royal Canadian Mounted Police Act and Other Act in Consequence Thereof}, Minutes of Proceedings and Evidence, 11:113-15; Lewis \textit{et al.}, supra, note 3 discuss the concerns of police officers in this regard.

\textsuperscript{10} [1990] 3 S.C.R. 618.


\textsuperscript{12} (1990), 76 C.R. (3d) 129; \textit{Stelco Inc. v. Canada (A.G.)}, [1990] 1 S.C.R. 617 also dealt with the use of administrative agencies as an investigative mechanism in the regulatory context
pertains to self-incrimination and silence in regulatory/administrative or quasi-criminal contexts. The members of the Court fundamentally disagreed, and left unresolved, whether s. 7 was violated by a Combines Investigation Act provision which required a person/corporation to attend before the Restrictive Trade Practices Commission ("RTPC") to answer questions. In Thomson Newspapers the Court could not reach a consensus on whether compulsory testimony or questioning by the state in the regulatory context requires use, derivative-use, or discretionary-use immunity under s. 7 of the Charter. It was not until a series of decisions in 1995, in particular British Columbia (Securities Commission) v. Branch, that the Supreme Court of Canada determined that both use- and limited derivative-use immunity is the standard under s. 7 of the Charter when an individual is compelled to testify or investigatively conscripted to produce evidence in proceedings that have legal consequences. In addition, there is also an immunity from testimonial compulsion in certain limited circumstances.

The Thomson Newspapers and Branch cases offer important theoretical analyses of the extent to which self-incrimination, the right to silence, and the use of derivative evidence to compel individuals to answer potentially incriminating questions. Section 8 of the Charter was also in issue, but will not form part of this analysis.

13 R.S.C. 1970, c. C-23, s. 17 (now s. 19) continued under the Competition Act, R.S.C. 1985, c. C-34.


16 Ibid.
are inter-dependent and protected under s. 7 of the Charter. These cases form the foundation upon which to evaluate the constitutional validity of s. 40(2) of the R.C.M.P. Act. This Chapter will include a review of the current distinction between domestic/internal and criminal matters as they influence the application of the Charter. This will be supplemented by an analysis of the cases and statutes that relate to self-incrimination and the right to silence in general. For the most part, any challenge to the use of ordered statements is premised on the assertion that members are being forced to incriminate themselves. Of course, a related issue is the use of derivative evidence that may be obtained as a direct or indirect result of ordered statements. Section 7 of the Charter forms the constitutional focal point of this review of compelled statements based on an examination of the judicial positions taken in Thomson Newspapers, Branch and other cases. Based on this analysis the author will extrapolate and apply the principles under s. 7 to the ordered statement context. It is the author's view that the use in criminal proceedings of derivative evidence from ordered statements will be impermissible pursuant to s. 7. The more difficult question is what protection members will have against the use of derivative evidence from ordered statements in non-criminal proceedings such as internal adjudication hearings. In certain limited circumstances, it may also be argued that a member is exempt from the statutory compulsion to provide an ordered statement.

On the premise that an argument can be made that its provisions violate s. 7 of the Charter, the requirements of s. 40 of the R.C.M.P. Act will also be considered under ss. 1 and 24 of the Charter. These analyses will rely heavily on the contextual features identified and discussed in Chapters 6 and 7 in relation to compelled statements, as well as the broader discussion of police management, culture, organization and accountability in Chapters 1-5.
The integral relationship that has been identified and established between criminal, public complaint, and internal investigations will be critical in determining if there is a basis upon which to question the constitutional validity of ordered statements. The actual or potential criminal implications that are attached to a compelled statement will continue to be a theme throughout this Chapter. The more difficult issue will be determining whether the application of s. 7 is contingent on whether the ordered statement is occurring in a purely employment/internal, criminal or interwoven criminal-internal scenario. In the end, based on the legal analysis, the question is whether the Charter will permit a member to refuse to answer any questions, or in the alternative, whether there is any greater constitutional restriction on the use of evidence derived from compelled statements than currently exists statutorily.

2. **Scope of the Statutory Protection**
   
a. **Interpretations**

   Although s. 40(3) of the *R.C.M.P. Act* plainly states that compelled answers are not to be "used or receivable in any criminal, civil or administrative proceedings," judicial and administrative interpretations of this clause have not been so simple. Moreover, as a practical matter, a rule prohibiting the "use" of an ordered statement is, as recently pointed out by the municipal police chiefs in British Columbia, really a legal fiction for three reasons: first, disciplinary and criminal investigations are undertaken at the same time; second, in most instances the investigations are conducted by the same investigator or unit; and third, the information garnered from the statement is relied upon (formally or informally)
to further the investigation or prosecution, either internally or externally.\textsuperscript{17}

The first judicial pronouncement on the protection set out for compelled statements under s. 40(3) was provided in a civil case by the New Brunswick Court of Queen’s Bench (Trial Division) in \textit{Murphy v. Keating}.\textsuperscript{18} This case involved a civil action initiated by the plaintiff as a result of a confrontation between himself and members of the R.C.M.P. and Moncton Police Force. The plaintiff was arrested by the defendant R.C.M.P. member and three Moncton police officers during a visit by then Prime Minister Mulroney and Mrs. Mulroney. The plaintiff sued for assault, battery, and unlawful imprisonment. In preparing for trial, the plaintiff sought an order from the Court to have the contents of the internal investigation by the R.C.M.P. disclosed. The defendant member, who had provided an internal statement, objected on the basis of the protection contained in s. 40(3) of the \textit{R.C.M.P. Act}. In other words, the member was asserting that the ordered statement could not be used or receivable in a civil proceeding as stated in subsection (3).

The Court found that the member’s statement was protected pursuant to s. 40(3). However, the report of the internal investigator was subject to disclosure in its entirety.\textsuperscript{19} It is not stated in the case whether the report gave a precise, summary, or direct quotes of the member’s statement, which would have made the statutory protection virtually meaningless. As a matter of practice, internal police reports outline the evidence, statements, sources and


\textsuperscript{18} (1989), 96 N.B.R. (2d) 412.

\textsuperscript{19} \textit{Ibid.} at 422.
refer to verbatim comments.\textsuperscript{20} The Court clearly applied a very narrow interpretation to "answer and statement." In addition, any derivative material collected or interviews conducted on the basis of the member's statement were also subject to disclosure. Interestingly, in the \textit{Keating} case the internal investigator did not "order" the member to provide answers \textit{per se}, and in the affidavits before the Court, both Keating and the investigator stated it was their belief that the statement was "required" and therefore the protection was operating.\textsuperscript{21} Consistent with the findings from interviews conducted of members for this thesis, it appears that neither the investigator or member understood the s. 40 procedure \textit{(i.e.} ask question, member declines (because may subject member to "any proceeding"), then order/require statement). Although the member's compelled statement \textit{per se} could not be used or receivable, excerpts or portions reproduced in another form were not protected, nor was any of the derivative evidence discovered from the statement protected. This raises two points. First, contrary to initial impressions, there is no blanket protection against relying on ordered statements in the preparation of a civil action and/or indirectly in civil proceedings. This may not be as serious a concern where the case is a civil action, but the actual protection is not as broad as the language of the section may indicate. Second, following this analysis in a criminal context, there does not appear to be any prohibition against using the statement to assist in a criminal investigation or preparing

\textsuperscript{20} This observation is based on the author's experience in preparing and reviewing investigation reports, internal or otherwise. Arthur Maloney, \textit{The Metropolitan Toronto Review Of Citizen-Police Complaint Procedures} (Report To The Metropolitan Toronto Board Of Commissioners Of Police, 1975) at 53 provides an example of this practice.

\textsuperscript{21} \textit{Supra}, note 19. The Court also rejected the application of the "public interest privilege" in the confidentiality of police investigations, in that statements provided by individuals to the police do not fall within the privilege to prevent disclosure in civil proceedings. However, if the officer was interviewed under s. 40(2) was the internal investigator not acting \textit{qua} discipline and not \textit{ qua} police?
for a criminal prosecution. While *Keating* is not about incrimination in the criminal sense, it
does raise the issue of how s. 40(3) will be applied.

The Chair of the R.C.M.P. External Review Committee ("E.R.C.") has 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.*, the Force conducted an internal investigation and
obtained statements from the subject member and several civilian witnesses. The R.C.M.P.
sought to submit the member's second statement as proof that the first statement was false (a
permissible statutory use under s. 40(3)). The Adjudication Board found the statements were
inadmissible and that it was never proved that the second statement was in fact true. Judge Marin (as the Chair of the E.R.C.) made several subsequent findings on review.

First, Judge Marin noted generally that:

...an employer's right to manage his business and an *employer/employee relationship has never been enough to overrule an employee's right to remain silent*. It is true that
such silence can lead an employer to take administrative action against him; however,
this is not equivalent to the compulsion to answer [as found in s. 40].

Second, it was found that the requirement to answer under s. 40(2), with the attending
protection of subsection (3), arises whenever an investigation and/or question under s. 40(1)
is necessary to determine whether or not the member contravened the *Code of Conduct*. Judge Marin was of the view that s. 40 is more closely equated to s. 13 of the *Charter (i.e.

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22 R.C.M.P. External Review Committee File #2200-90-005 (cites to this reference); also reported at (1990), 3 Adjudicative Decisions 168 (R.C.M.P. Trib.).


where self-incrimination is automatic) than s. 5 of the Canada Evidence Act ("C.E.A.") (i.e. where self-incrimination protection must be claimed), and therefore, did not require an objection before the protection accrued.\textsuperscript{26} In other words, the protection under s. 40(3) is automatic. If the member refuses to answer, the authority to order a response still operates. The questions directed to the member must be to determine if there has been a contravention, otherwise it appears that the member can refuse to answer questions not directed to this inquiry. However, how does the member necessarily know whether the questions are "relevant" or "incriminating"?

Third, Judge Marin identified two of the fundamental problems with the authority to compel a statement:

The investigators in this case forgot a fundamental rule, i.e. that it is very dangerous to limit an investigation to the obtention of a statement. When a statement is inadmissible, the evidence crumbles, as shown in this case. The investigators must not take for granted that a statement obtained from a member pursuant to section 40 of the Act will be enough to establish a violation. The violation will have to be established by separate evidence, because the statement will be inadmissible. This case shows a certain lack of professionalism in the preparation of evidence against the

\textsuperscript{26} Ibid. at 22. After this thesis was filed it was learned that the Acting Chair of the E.R.C., Jennifer Lynch, Q.C., in Cpl. "A" v. Appropriate Officer "B", File No.: 2400-95-006 (11 April 1997) at 31 upheld Special Cst. "A" by finding that "judicial pronouncements thus far made on section 40 of the RCMP Act are all based upon an approach by which a member answering questions in a section 40 investigation is viewed as being inherently compelled to answer." The E.R.C. in lengthy reasons firmly rejected at 32 the "objection based" (i.e. member must object to each question) and "requirement-based" (i.e. member must be ordered/required to answer) approaches advanced by the Force for internal statements. The E.R.C. also found the s. 40 "warning" given to Cpl. "A" to be "inaccurate" and "deficient and misleading." The Acting Chair also seemed troubled by the conduct of the Adjudication Board when it granted a motion of non-suit and dismissed the case against Cpl. "A", but then the Board Chair proceeded to verbally chastise and lecture Cpl. "A" about the alleged conduct that it held there was no evidence to support. The R.C.M.P. Commissioner (as the final level of appeal) released his Decision in October, 1997, and in an eight line paragraph rejected not only the findings of the current E.R.C. decision, but also reversed the findings of the E.R.C. in Special Cst. "A" (which the Force previously accepted), the N.B.Q.B. in Keating, the B.C.C.A. in Gustar, infra, and the Ont. Prov. Ct. in Radeschi, infra on s. 40.
respondent.27

In other words, the investigator simply relied on the authority to obtain a statement from a member to do the inquiries instead of conducting a thorough investigation. Second, but not developed by Judge Marin, is the fact that the compelled statement can become the tool to obtain the "separate evidence." This case is a further example of the policy concerns underlying the authority to order statements highlighted in Chapter 7. In the end, both statements were inadmissible because it was not proven that either was false, and the mere existence of two apparently contradictory statements (especially when the apparent contradiction was explained in testimony by the subject member), is insufficient to prove falseness. The problem, even though Judge Marin found the s. 40 protection attaches when the member is compelled to answer (to determine if there has been a contravention), is there is no derivative-use immunity, and arguably, because of this case, there is even more incentive to use statements to acquire derivative evidence. The developing issue is whether s. 7 of the Charter will provide derivative-use protection in a criminal and/or internal investigation or hearing.

There is another factor that needs to be considered here. If s. 40(3) prevents the "use" of statements in proceedings, how did the Appropriate Officer's Representative (i.e. internal prosecutor) obtain copies of these statements? The author was advised by the Appropriate Officer's Representative Unit that ordered statements form part of the internal file that is forwarded to the Unit28 (even when the charge does not relate to providing a false statement). As a matter of routine, the internal "prosecutor" is given a copy of the

27 Ibid. at 26.

28 Phone interview (96-03-08). This process was confirmed by M43 and M107.
ordered statement and this can be used to prepare the case, obtain further evidence, develop other inquiries, prepare witnesses and questions for witnesses and/or the subject member. Not only the investigator, but also the internal prosecutor is given full advantage of the ordered statement.

Judge Marin also refers to the harsh and inflexible attitude that the R.C.M.P. can take in discipline matters. In this case the R.C.M.P. had suspended the member, but knew for over a year that it could not prove many of the allegations, prompting Judge Marin to state:

It is deplorable that the Force waited one year to conclude this case and it waited for the hearing before admitting that several allegations could not be proven after serving as grounds for the decision to suspend the respondent of his duties. What Judge Marin did not consider is that this type of tactic may be used by the R.C.M.P. to force members to resign. As already identified, there is evidence that suspensions without pay are reportedly becoming more frequent as the R.C.M.P. views this as a tool to pressure members out of the organization without having to follow lengthy procedures.

One final note about Special Cst. "A". Judge Marin did refer to the Thomson

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29 Supra, note 23 at 28. Based on the author’s experience and the comments of M40, M44, M79, M83 and M85, the Force continues to pursue internal proceedings as a strategy even when it is clear allegations cannot be proven; see also the two ordered statement cases discussed in Chapter 7.

30 Ibid. This was a consistent theme identified by those interviewed who are involved with the discipline process or have been the subject of formal discipline.

31 M40, M43, M88, M93 & M107; see the suspension without pay case of S/Sgt. Delisle discussed in Chapter 6; "C" Division Bulletin on Staff Relations within the RCMP, "Suspension Without Pay" (September 1996) Contrepoids at 1-3 where the findings of the Arbitration Board of Human Resources Development Canada that he "did not act unreasonably when he refused to follow the order received, especially considering the fact that the election process had began and that he had previously received permission to run for office....the real motive for the suspension is more that fact that Mr. Delisle wanted to establish an RCMP police officers association than the fact that he was running for mayor" (unofficial translation) (emphasis added); Canadian Press, "Mountie-made-mayor disputes reason behind suspension from force" in The Vancouver Sun (10 November 1995).
Newspapers case, but limited his analysis to the comments of Justice La Forest, concluding that members are not placed in any more of an "exceptional situation" than a citizen appearing before the RTPC. With the greatest of respect, Judge Marin chose to agree with only one opinion of the divided panel that sat in the Thomson Newspapers case. Further, there is some question that the two situations are sufficiently similar to make such a broad generalization. At most, the witness appearing before the RTPC may ultimately face a "criminal charge," whereas a member faces a panoply of possible internal, criminal, and inquiry consequences. The RTPC is also not the employer of the person being examined. The protections available can also be disparate. For example, the Force states in policy that legal counsel can be excluded during interviews. Further, R.C.M.P. interviews are conducted in private behind closed doors by partisan state agents. At least the person appearing before the RTPC has the security of qualified legal representation, public scrutiny and judicial review to regulate the activities of the inquirer. These issues will be developed in greater detail below.

The British Columbia Court of Appeal was next to deal with s. 40(3) in Gustar v. Wadden. Unfortunately, the Court of Appeal interpreted s. 40(3) in a fashion that did not seem to accord with how it was believed to apply by those who worked with this provision. In Gustar, the plaintiff was a former R.C.M.P. member claiming damages in

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32 Supra, note 23 at 25.


34 (1992), 74 B.C.L.R. (2d) 184.

torts of assault, defamation, conspiracy and negligence from incidents allegedly perpetrated by the (nine) defendants (also members) against the plaintiff. Two of the subject members were ordered to answer questions and the others voluntarily provided statements during the internal investigation. None of the defendants refused to answer questions on the grounds of incrimination. To start with, the lower court found that whether or not the statements fell within the purview of s. 40 must be determined at the time the statement is sought to be used.\textsuperscript{36} The Court also found that s. 40 does not prohibit production of the compelled statement for inspection by the interested parties, since the protection is not against disclosure, as with solicitor/client privilege, but against the use of the statement to incriminate the member.\textsuperscript{37} The Supreme Court judge ordered that all the statements given during the investigation be produced for inspection and copying by the plaintiff.

Although the Court of Appeal agreed there is a prohibition against use and receipt of answers under s. 40(3), it only applied to answers or statement "made in response to a question described in subsection (2)."\textsuperscript{38} In other words, not all responses incriminate a member or subject him or her to any proceeding or penalty. Lambert J.A. concluded:

Consequently, in my opinion, answers or statements to questions where the answer may tend to criminate the member or subject the member to a proceeding or a penalty cannot be used in any way in any criminal, civil or administrative proceeding. But all other answers or statements may be used and accordingly must be disclosed in this case to the opposing parties.\textsuperscript{39}

The Court went even further, and expressed the view that the phrase "subject the

\textsuperscript{37} Ibid. at 8.
\textsuperscript{38} Supra, note 34 at 187.
\textsuperscript{39} Ibid.
member to any proceeding or penalty" relates "only to answers or statements which in themselves provide the basis for the initiation of proceedings or in themselves provide the basis of the imposition of a penalty."\textsuperscript{40} This clarification raises an interesting point in that it now appears to be improper for the R.C.M.P. to even rely upon ("use") a compelled statement when imposing "informal discipline" or deciding upon administrative action (\textit{i.e.} any proceeding or penalty). In other words, a decision to suspend and/or proceed by way of informal or formal discipline cannot be based, in any way, upon the compelled statement because it relates to initiating proceedings or provides the basis for the imposition of a penalty. Alternatively, by statute, reliance upon ordered statements to make such decisions should be an impermissible use in an administrative proceeding. The use of "any proceeding" in s. 40 is clearly much broader in scope than terms such as "legal proceeding" or judicial proceedings. Interviews with members have confirmed, however that, despite the prohibition that appears to arise from \textit{Gustar}, the R.C.M.P. still relies on ordered statements to make decisions.

In the end, the Court ordered: first, that each member be given a copy of his statement and within 30 days identify the answers that tend to incriminate that member or subject that member to proceedings or a penalty; second, the statements, after being marked appropriately, were to be returned to the Force for editing; and third, the edited statements were to be provided by the Force to the parties and any editing disputes are to be settled by a court.\textsuperscript{41} Thus, all other compelled non-incriminating statements or answers contained in the

\textsuperscript{40} \textit{Ibid.}

\textsuperscript{41} \textit{Ibid.} at 190.
ordered response can be used in any proceeding.\textsuperscript{42}

Again, the Court did not deal with the issue of derivative evidence that can arise from the ordered statement and its use in criminal, civil or administrative proceedings. However, it appears that a member does not have to specifically object to answering questions (in fact counsel for the R.C.M.P. specifically argued that members are inherently required to answer questions) in order to invoke the provisions of s. 40 because the Court did not raise any concern over the fact that only two of the subject members were specifically ordered to provide responses, and none of the other members objected to responding. This is contrary to the information given to a member by the R.C.M.P. after \textit{Gustar} which stated that members must claim s. 40 protection by specifically claiming the grounds indicated in subsection (3) at the time of questioning.\textsuperscript{43} The Court appears to endorse a flexible process by permitting the member to determine what is incriminating, but this occurs much later, when attempts are being made to obtain disclosure of the statement. This decision does not address the numerous investigational or evidentiary uses to which compelled statements can be put by the Force. The Court also failed to appreciate the harm of derivative-use from such statements. Further, how does a member know if the answer or statement is incriminating at the time the question is answered?

Even more interesting is the fact that the Court of Appeal, in interpreting s. 40, found

\textsuperscript{42} Scorer, \textit{supra}, note 35 at 60. The obvious concern is that personal, family or other unrelated matters will be disclosed.

\textsuperscript{43} \textit{Ibid.} at 61 referring to "E" Division DSRR Bulletin, \textit{The Informer} (May 13, 1993) at 6. However, the new statement format set out in the R.C.M.P. "E" Div. A.M., "Internal Investigations" at App. XII-4-2 (96-02-06) states that no objection is required. The members interviewed who are involved in the discipline process all believed that \textit{Gustar} requires a member to object to each question to provide the protection of s. 40.
that:

The policy underlying that section must include a balancing of the interests of the need for full disclosure in the internal proceedings of the police against the interests of the need for full disclosure in civil proceedings in the furtherance of the administration of justice generally.\textsuperscript{44}

The position can be taken then that the underlying interests in disclosure in other contexts may result in total unedited disclosure. Moreover, the issues remains, but will not be dealt with by this thesis, whether in fact the \textit{R.C.M.P. Act} as a federal enactment can validly limit the civil process which is subject to provincial constitutional jurisdiction. Rather than trying to re-interpret and limit the scope of s. 40(3), the courts could have taken guidance from the comments of Lamer C.J.C. in \textit{Kuldip}:

\begin{quote}
It is possible that, in certain circumstances, the \textit{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 chooses to grant protection over and above that which is enshrined in our Charter, it is always at liberty to do so.\textsuperscript{45} (emphasis added)
\end{quote}

The results of these cases have left matters in a confused state. Although it appears that members do not have to object specifically to providing an answer on one of the grounds statutorily enumerated before the s. 40(3) protection attaches, there is some contradiction on what must be disclosed, civilly, at least. \textit{Keating} found the entire statement exempt, while \textit{Gustar}, despite the wording of the s. 40(3), found only incriminatory or proceeding-penalty initiation answers exempt. The R.C.M.P., on the other hand, issued direction after \textit{Gustar} which plainly indicated that a member had to object to every question. The only member interviewed who, although not involved in the discipline process, was aware of the s. 40(3)

\textsuperscript{44} \textit{Supra}, note 34 at 188.

\textsuperscript{45} \textit{Supra}, note 10 at 638.
protection still thought a member had to object to every question. None of the cases adequately dealt with the disclosure of internal reports that may contain excerpts from ordered statements that could end up in other civil, criminal or administrative investigations or proceedings.

b. Criminal Disclosure

Over the last few years, the Supreme Court of Canada, building on the foundation of *Boucher v. The Queen*, has imposed a substantial burden on the prosecution and police to disclose material to the defence. In particular, in *R. v. Stinchcombe*, the Supreme Court of Canada found that the Crown has a legal duty to disclose all relevant information to the defence in a criminal trial. Mr. 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). 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, and such a privilege is reviewable on the ground that it is not a "reasonable limit" under the *Charter*. The next question, of course, is whether, on the basis of full answer and defence, counsel can now request the disclosure of ordered/internal statements taken from members that relate to a situation involving a criminal charge against a client (be it a civilian or

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46 M85.


48 *Supra*, note 11.

member).

Section 40(3) of the *R.C.M.P. Act* states that answers are not to be "used or receivable" in "any criminal" proceeding. Nevertheless, if defence counsel can convince a court that the ordered statement is relevant to making full answer and defence of the (civilian or police) client, the result would most likely be an order for disclosure, regardless of s. 40(3) or the fact that the "statement" was provided during an internal investigation.

Following the logic of the Court of Appeal in *Gustar*, full (*Charter*) disclosure in a criminal trial will supersede the policy underlying s. 40 and require disclosure of the entire unedited statement. Alternatively, it may be asserted that the statement is not being used to incriminate the member, and is, therefore, disclosable.

There is little distinction to be made between Crown-Police and the internal-criminal process when it comes to full answer and defence. It certainly would not be credible for the Crown to argue it is not in possession of an ordered statement when it is held by the R.C.M.P. The Crown and police would be indistinguishable on this possession point. In fact, the *Crown Counsel Policy Manual* in British Columbia expressly directs prosecutors to obtain all the information relative to internal police investigation files and disclose the relevant information to defence as soon possible.\(^5\)\(^0\) Although Crown Counsel policy does recognize that it may object to disclosure on the basis of a legal privilege (in particular s. 40) it is doubtful that defence would be refused an request/order for disclosure of a compelled statement, based on the principles enunciated in *Stinchcombe*, if it was found to be relevant.

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\(^5\)\(^0\) British Columbia, Minister of Attorney General, Criminal Justice Branch, "Police - Allegations Against Peace Officers" (1-1-91) *Crown Counsel Policy Manual* at 2.
to full answer and defence.\textsuperscript{51}

A number of courts have ruled on the issue of disclosing internal police reports and statements from subject officers in the criminal context. In these cases, however, the police departments were not relying on a statutory protection, but a common law privilege against disclosure. For example, in \textit{R. v. Delong},\textsuperscript{52} which preceded \textit{Stinchcombe}, the accused requested a copy of the police internal report and statements for the purposes of his criminal trial. The police department argued that the internal investigation and statements should not be disclosed because of a "public interest privilege." The Court examined the four fundamental conditions necessary to sustain a privilege finding ("Wigmore Test") and found that there was no assurance of confidentiality, even though it was implied during labour negotiations that the reports would not be used.\textsuperscript{53} Further, the Court adopted the findings of \textit{Campbell v. Paton}\textsuperscript{54} that the lack of confidentiality of internal reports would not inhibit

\textsuperscript{51} \textit{Ibid.}, "Disclosure to Defence" (01-08-93) at 4; see also, Gil McKinnon, "Crown Disclosure" in \textit{Criminal Law Update '96 - Charter & Evidence} (Vancouver, B.C.: Continuing Legal Education Society of B.C., April 20, 1996); Elizabeth Bennett, "Disclosure of Complainant's Medical and Therapeutic Records" in \textit{Criminal Law Update '96 - Charter & Evidence} (Vancouver, B.C.: Continuing Legal Education Society of B.C., April 20, 1996); Lee Stuesser, "General Principles Concerning Disclosure" (1996) 1 \textit{Canadian Criminal Law Review} 1. There is no reason the disclosure principles would not also apply to internal adjudication hearings. Presumably, the member, as an accused before an internal or criminal court, can now also demand disclosure of all statements taken during the course of the internal investigation. This is important because the statutory disclosure provisions in the \textit{R.C.M.P. Act} are much more limited. The Forces position has been that it must disclose only what it will rely upon during a hearing.

\textsuperscript{52} (1989), 69 C.R. (3d) 147 (O.C.A.).

\textsuperscript{53} \textit{Ibid.} at 164. The elements of the Wigmore Test are: 1) communication made in confidence; 2) confidentiality is essential to maintain relations; 3) relationship is one to be fostered; and 4) injury to relationship greater than benefit of disclosure. Ronald Manes and Michael P. Silver, \textit{Solicitor-Client Privilege in Canadian Law} (Vancouver, B.C.: Butterworths, 1993) at 168 also discuss the difficulty with establishing the first, in confidence, threshold.

\textsuperscript{54} (1979), 26 O.R. (2d) 14, leave to appeal refused 26 O.R. (2d) 16 (H.C.).
relations between the internal investigators and police officers, nor is confidence in internal reports one that should be fostered.\textsuperscript{55} Post-\textit{Stinchcombe} decisions have also rejected the public interest privilege and have held that internal police reports and statements in criminal cases must be disclosed to defence to ensure full answer and defence.\textsuperscript{56}

The author is not aware of any criminal case that has definitively dealt with the disclosure issue in relation to s. 40(3). The author can state, based on experience, that in practice most R.C.M.P. internal investigation units and senior managers hold the view that internal investigations and statements are still \textit{exempt} from disclosure in criminal matters. Based on \textit{Gustar}, it may be possible for the Force to assert that compelled statements can only be released on an edited basis to the defence. However, such an argument is not persuasive when contrasted with the orientation towards full disclosure in the criminal arena. It was suggested by one member that complaints against members, whether legitimate or vexatious, could be used as a mechanism to access files of the R.C.M.P. pertaining to the


\textsuperscript{56} See, \textit{R. v. Mai} (1994), 31 C.R. (4th) 327 (Alta. Prov. Ct.) (order to disclose internal report and statements); \textit{R. v. McRae (J.S.) et al.} (1993), 143 A.R. 285 (Prov. Ct.) (failure to disclose internal statement lead to judicial stay of charges); also \textit{R. v. Spurgeon (D.)} (1994), 148 A.R. 73 (Q.B.) (military police investigation). It should also be noted that in \textit{R. v. O'Connor}, [1995] 4 S.C.R. 411 at 429, Lamer C.J.C. and Sopinka J. (in dissent) argued the concerns over "privacy" or "privilege" disappear where the document has fallen into the possession of the Crown. \textit{Nason v. Hamilton-Wentworth (Region) Commissioners of Police}, (31 August 1984) Hamilton-Wentworth Judicial District (Ont. Co. Ct.) (unreported) found no reason that fact reports made at the request of a senior officer were inadmissible and that "Without Prejudice" preambles in statements by police officers have no effect. This thesis will not examine the issue of without prejudice statements by police officers.
conduct of the member, but the author found no evidence to substantiate such a trend. On the other hand, the author has seen first hand how some commissioned officers and investigators adamantly oppose the disclosure of internal investigation reports to defence counsel representing members.

In contrast, in relation to the use of a suspect member’s statement by the R.C.M.P., an Ontario judge sitting in a preliminary inquiry at Cornwall, in *R. v. Radeschi* (unreported, September 1, 1994) refused to accept into evidence statements made by a suspect member on the ground that the statements were protected under s. 40(3). The Court held that the member’s response to another member when asked about missing money occurred during an internal investigation and the answer could not be used in the criminal proceeding. The Court found that the protection of subsection (3) is automatic whenever a supervisor or investigator asks questions of a subject member knowing that there has been or could have been a breach of the *Code of Conduct*. Even so, what is evident here is that the R.C.M.P. and Crown counsel had the benefit of the member’s statements during the investigation and preparation of the case. It also substantiates concerns that such statements can be directly and/or derivatively used in a criminal context although they are purportedly obtained in the internal/employment realm.

c. **Impeaching Credibility**

The other possible breach of the s. 40(3) protection is the ability to use an ordered statement to test the credibility of a member, either criminally as outlined above, or administratively. Section 5(1) of the *C.E.A.* states that no witness shall be excused from

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57 M93.
answering on the basis of incrimination, however, subsection (2) provides that incriminatory
testimony shall "not be used or admissible in evidence against" the witness if the witness
objects to the question. There is also statutory authority under ss. 10 and 11 of the C.E.A.
that permits the use of previous written and oral statements of witnesses at trial for the
purpose of cross-examination. However, s. 30(10)(a)(i) of the C.E.A. denies admissibility in
evidence of any "record" in a legal proceeding made in the course of an "investigation or
inquiry." As noted by Samuels, it remains unclear whether internal police complaints
investigations fall under this exception.\footnote{Sharon Samuels, Complaints About Municipal Police In British Columbia, Volume I (Report Prepared for The Commission Of Inquiry Into Policing in British Columbia, 1994) at 157.} Although the Court found in \textit{R. v. McLarty (No. 3)} that an investigation and inquiry includes matters under the \textit{Inquiries Act} (R.S.C.) or \textit{Coroners Act} (provincial), but \textit{not} normal police investigations, there is contrary authority
suggesting criminal police investigations are not exempt.\footnote{(1978), 45 C.C.C. (2d) 184 (Ont. Co. Ct.) at 186-7. Although Paris J. initially suggested in \textit{R. v. Biasi} (1981), 62 C.C.C. (2d) 304 (B.C.S.C.) that police logs were admissible under s. 30, he subsequently denied admissibility of the logs (1981), 66 C.C.C. (2d) 563 as records because they were made pursuant to an investigation. In \textit{Baker v. R.} (1977), 2 B.C.L.R. 284 (C.A.) it was held that a judicial authorization to intercept communications was not admissible as a record because it was made in contemplation of a legal proceeding albeit that it was not, arguably, part of an investigation \textit{per se}. In \textit{R. v. Sunila and Solayman} (1986), 26 C.C.C. (3d) 331 (N.S.S.C. T.D.) it was found that plotting the position of vessels by military surveillance aircraft constituted an investigation within the meaning of s. 30(10)(a)(i) and the evidence was inadmissible as a record.} This could leave open the
potential for using ordered statements to challenge credibility. An unanswered question is
how frequently a member can be required to succumb to the authority to provide an ordered
statement during a single investigation?

In addition, in \textit{R. v. Kuldip},\footnote{\textit{Supra}, note 10.} the Supreme Court of Canada found that s. 13 of the
Charter (and s. 5(2) of the C.E.A.) did not prevent the Crown from using the accused's previous trial testimony in a second trial to undermine or impeach his credibility. Leading a four to three majority, Lamer C.J.C. found the Crown is only prevented from using previous testimony of the accused if the purpose is to incriminate the individual. 61 Recognizing that the accused has the right to remain silent, it was reasoned that when the accused took the stand he was placing his credibility at issue, and the Crown was permitted to rely on the prior inconsistent statement/testimony in this regard, as it was not being used to "incriminate" the accused. 62 This analysis does not appear to contradict s. 13 of the Charter, since the protection extends to not having any previous testimony "used to incriminate" the witness at a subsequent proceeding. However, it is not clear how such evidence is not being used to incriminate a person when Crown relies on it to prepare for trial or question the witness. The question has now arisen whether s. 40(3) prevents the use of an ordered statement to attack credibility at a criminal or administrative proceeding by the phrase "used or receivable"? 63

The Supreme Court placed emphasis on the fact that the accused in Kuldip chose to enter the witness box to make the statement/testify. An accused charged with a criminal offence cannot be compelled to enter the witness box. 64 The subject member, however, may have no such "choice" administratively (or criminally). First, because the member may

61 Ibid. at 641.

62 Ibid. at 634-5.

63 The Evidence Act, R.S.N.S. 1989, c. 154 at s. 59(2) also states that incriminatory answers "shall not be used or receivable in evidence," which indicates this is not a unique legislative phrase.

be summoned to testify in certain accountability proceedings. Second, an ordered statement can, in effect, force a member to take the stand at an adjudication or criminal hearing to enter an explanation regarding the derivative evidence that the member was required to disclose. For example, in *Special Cst. "A"* the member faced several problems: first, he was forced to take the stand to testify regarding the apparent inconsistencies in the statements he was compelled to provide; second, arguably the statements were derivatively used to interview the other witnesses; third, the R.C.M.P. improperly tried to use the statements at the hearing; and fourth, he was probably subject to examination on the statement regarding credibility. Further, based on the distinction in *Kuldip*, the testimony before the disciplinary hearing, albeit extracted, could now be used at a subsequent criminal proceeding, as the member "chose" to take the stand at the disciplinary hearing. This is not a remote possibility, since the R.C.M.P. can, and in practice does, proceed with internal hearings before the criminal matter is determined.

A further issue may also arise from *Kuldip*, as the Supreme Court re-affirmed its position that the incriminatory protection in 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). On this basis, any protection that s. 40(3) offers regarding use or derivative evidence would not arise until the member is before the tribunal, be it disciplinary

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65 *Supra*, note 23.

66 *In camera* protection does not necessarily prevent use; see, *Royal Comm. Into Metro Toronto Police Practices v. Ashton* (1975), 10 O.R. (2d) 113 (Div. Ct.) which ruled that a police officer whose credibility was raised as an issue at an inquiry could be questioned as to his convictions under the internal discipline process.

or criminal. This accords with the argument that there is an unchecked freedom to interview the member, thereby obtaining incriminatory evidence, as the protection of s. 40(3) only accrues when the statement is to be utilized in the criminal or administrative proceeding. On the other hand, if the ordered statement was obtained in a manner that violates the Charter, it is quite possible in the criminal context that the statement will not be admissible even to test credibility.68

d. Limits

One thing, however, remains clear. Despite s. 40(3), the individual member can never be certain who will have the ability to access internal reports and statements. Based on the review of the cases to date, an ordered statement, depending on the forum, can be subject to full or partial disclosure. Aside from criminal, internal and civil disclosure, internal investigations and reviews regarding R.C.M.P. high speed pursuits and shootings where death occurs are turned over to Coroner’s counsel, complete with reports, statements, diagrams, and notebook entries.69

68 In R. v. Calder (1996), 46 C.R. (4th) 133 (S.C.C.) it was found that the Crown could not rely on a statement from a police officer that was obtained in violation of the Charter to challenge credibility; see also, David Rose, "Calder Success Will Be Rare and the Procedure Uncertain" (1996), 46 C.R. (4th) 151; Ian D. Scott, "Calder - The Charter Trumps the Truth-Seeking Tool of Impeaching the Accused with A Prior Inconsistent Statement" (1996), 46 C.R. (4th) 161; and R.J. Delisle "Annotation" (1996), 46 C.R. (4th) 135.

69 For example, Duncan Chappell and Linda P. Graham, Police Use of Deadly Force: Canadian Perspectives (Univ. of Toronto: Centre of Criminology, 1985) and Richard B. Parent, "Aspects of Police Use of Deadly Force in British Columbia: The Phenomenon of Victim-Precipitated Homicide: (M.A. thesis, School of Criminology, Simon Fraser University, 1996) (unpublished) accessed this material in Coroner files during their research.
of, compelled statements could have consequences that many fail to consider.\textsuperscript{70}

Based on the foregoing analysis, there is cause for concern regarding the limits and effectiveness of the protection under s. 40(3), particularly in the criminal context. As shown in Chapter 7 ordered statements can be, and are in fact, used to further criminal and other investigations. They are fully available to investigators and representatives preparing internal prosecutions. They are partially available to plaintiffs to prepare civil cases, and fully available to investigators, Crown counsel, defence counsel and civilian counsel to prepare criminal and public complaint cases. They may be used to question credibility at a hearing. It is even more problematic when the member will not necessarily know at the time of questioning if the ordered response is valid to determine if there has been a Code of Conduct contravention. It may also not be clear at the time what questions are actually incriminating or form the potential for any penalty or proceeding. It is impossible to assert that ordered statements are not, or would not be, used to further investigations and gather evidence against members. Even if the compelled statement is not forwarded to other individuals or agencies, it is inextricably linked to and outlined in the investigative report. Furthermore, how does one account for the inherent impact that ordered statements can have on an investigator? Once information gleaned from an ordered statement is known by the internal

\textsuperscript{70} For example, adverse inferences could be drawn about inconsistencies that arise from a statement that is obtained immediately after a shooting when there are explanations; see Massad Ayoob, "Lethal Force: Investigating the Officer-Involved Shooting" (August, 1986) 10 Police Product News 36. However, the natural reaction is to consider any subsequent statements from a member to explain inconsistencies with great suspicion. This scenario is similar to the findings of Valerie P. Hans and Anthony N. Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1975-76) 18 The Criminal Law Quarterly 235 at 251 that the likelihood of a jury convicting an accused is significantly higher if the accused’s criminal record is made known to the jury. Similarly, is there not a danger that distortions and biases will be introduced into proceedings if exhorted statements from members are permitted to be part of the investigation, used to prepare a case, used to test credibility, or are the subject of admissibility arguments before an adjudicator.
(criminal, public complaint) investigator, other decision-makers in the R.C.M.P. or other agencies, that knowledge necessarily affects the future actions of the investigator or other individuals. Once information is cognitively or institutionally acquired, it determines future actions and events. The difficult question to be faced then is how to deal with and regulate criminal and/or internal prosecutions by the state that are based on evidence conscripted from members. Before considering the Canadian context, the United States provides some instructive guidance on this issue.

3. The American Approach

The American constitutional analysis of compelled statements from police officers is based on the Fifth Amendment to the U.S. Constitution. Although the language of the Fifth Amendment appears to be limited to testimonial compulsion in criminal cases, it has "traversed many areas of legal jurisprudence" and has been extended to many situations (which are not purely criminal trials) in which compelled self-incriminatory evidence may be revealed that could be used in future criminal proceedings. Conducting an analysis of the

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71 The applicable Fifth Amendment excerpt reads: "No person...shall be compelled in any criminal case to be a witness against himself..."; see also, 18 U.S.C. s. 6002 (1988) which outlines a statutory based immunity for compelled testimony.

constitutional development of self-incrimination in the United States could easily constitute a thesis by itself, therefore, the author will only deal directly with the situation of police officers vis-a-vis compelled statements.

a. Garrity Interviews

In the United States the constitutional and legal position of a police officer regarding internally compelled statements has been the subject of several articles. Traditionally, it was believed that providing police officers with no, or very limited, rights was a valid way to treat them as public employees. However, the question of ordered statements has now been mostly resolved pursuant to what are termed "Garrity Interviews."

Two United States Supreme Court decisions in the 1960s outlined the theoretical and

Lushing, "Testimonial Immunity And The Privilege Against Self-Incrimination: A Study In Isomorphism" (1982) 73 The Journal of Criminal Law & Criminology 1690 provide an excellent overview of compulsion, immunity and self-incrimination under the Fifth Amendment.


constitutional position of ordered statements from police officers. In *Garrity v. New Jersey* the Attorney General of New Jersey initiated an investigation into ticket fixing by several municipal police officers. Prior to questioning, the investigators advised suspect officers that anything they said might be used against them criminally, they had a right to refuse to answer questions which may incriminate them, but if they refused to answer they would be subject to discharge. The officers answered questions, even though no immunity was granted and no statute prohibited the use of the statements in subsequent proceedings. Some of the answers were used in subsequent prosecutions which led to convictions against the officers.

On appeal, the officers argued that the evidence obtained in the interrogations was clearly coerced (*i.e.* answer or be fired). One of the issues for the Court was whether compelled statements on pain of discharge for failing to answer were coerced. The Court found (which will have a ringing Canadian familiarity, *infra*) that the statements were inadmissible because coercion can include both mental and physical forms of influence. The Court focused on the lack of *choice* faced by the subject officers, in that "the option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." The officers were clearly coerced which

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75 385 U.S. 493 (1967).

76 *Ibid.* at 496.

77 *Ibid.* at 497, *per* Justice Douglas writing for a 6-3 majority. In the U.S. due process protections encompass the protection of both liberty and property interests, with property including beneficial relationships with government such as employment as long as the relationship can be characterized as one of entitlement rather than a discretionary benefit. Canadian "due process" law under s. 7 is not as broadly construed and is more closely linked to liberty; see, Philip L. Bryden, "Developments in Administrative Law: The 1994-95 Term" (1996) 7 *Supreme Court Law Review* 27 at 34-48.
made the statement involuntary and unavailable in a criminal prosecution. In an effort to alleviate occupational disparities with respect to constitutional protection, the Court emphasized that "policemen, like teachers and lawyers" will not be given "a watered-down version of constitutional rights."\textsuperscript{78}

A year later, in \textit{Gardner v. Broderick},\textsuperscript{79} the United States Supreme Court was provided an opportunity to build on the foundation established in \textit{Garrity}. In \textit{Gardner}, a New York City police officer was subpoenaed before a grand jury to testify regarding his involvement (and the Department's) in alleged bribery and corruption involving illegal gambling operations. The Assistant District Attorney advised Gardner of his protection against self-incrimination, but required that he sign a waiver of immunity. The officer was advised that failure to do so would result in termination from employment.\textsuperscript{80} Gardner refused to sign the waiver, and after an administrative hearing, was dismissed. The issue in \textit{Gardner} was whether a police officer could be disciplined or discharged for refusing to waive a constitutionally guaranteed right against self-incrimination.

The City argued that a police officer is directly and immediately responsible, accountable, and has a duty of loyalty to the city employer, as well as being a "trustee of the public interest."\textsuperscript{81} The Court responded to these assertions by management and found that

\begin{itemize}
\item \textsuperscript{78} Ibid. at 500.
\item \textsuperscript{79} 392 U.S. 273 (1968).
\item \textsuperscript{80} Ibid. at 274. Under the New York City Charter, s. 1123, if any city employee or political representative refused, \textit{inter alia}, to waive immunity from prosecution when lawfully compelled to testify, employment was terminable.
\item \textsuperscript{81} Ibid. at 513-15. The City was trying to distinguish itself from the situation in \textit{Spevack v. Klein}, 385 U.S. 511 (1967) were the U.S.S.C. ruled that a lawyer could not be disciplined solely because he refused to testify at a disciplinary proceeding.
\end{itemize}
if a police officer:

...refused to answer *questions specifically, directly, and narrowly relating to the performance of his official duties*, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself...the privilege against self-incrimination would not have been a bar to dismissal.82 (emphasis added)

Thus, in this case, dismissing Gardner because he refused to waive his constitutional protection was invalid.83 As Jones points out:

These cases show that a public employee can be disciplined or discharged for refusing to provide information after asserting the fifth amendment privilege against self-incrimination provided the discipline or discharge is *not* for the assertion of the privilege or for the refusal to waive immunity.84 (emphasis added)

Hill and Wright also provide a helpful summary:

Under current law it is improper to compel a [public] employee to waive his constitutional rights in a criminal proceeding by threat of dismissal. It is, however, proper for an agency to demand an accounting of the public employee’s performance of his duties even though criminal activities may be involved. A refusal to give such an accounting may then be deemed to be insubordination. Thus, even though the municipality may not force the employee to waive his constitutional right against self-incrimination, it may grant the employee immunity and then dismiss for insubordination if no accounting is forthcoming.85

This process ensures that the police officer is provided constitutional use and derivative-use immunity with respect to the responses provided. The United States Supreme Court has tried to balance the competing right of the public employer to information from employees and the

82 *Ibid.* at 278.

83 In a companion case released the same day, the U.S.S.C. affirmed in *Uniformed Sanitation Men Association v. Commission of Sanitation*, 392 U.S. 280 (1968) at 282 that public sector employees are subject to dismissal if they refuse to account for employment performance "after proper proceedings [*i.e.* grant of criminal immunity], which do not involve an attempt to coerce them to relinquish their constitutional rights."

84 *Supra*, note 73 at 14.

85 *Supra*, note 72 at 878.
right of public employees to be protected against self-incrimination.\footnote{Jones III, \textit{supra}, note 73 at 10.}

The \textit{Garrity} analysis is founded on the principle that coercion exists when demanding a compelled statement from a police officer because the formula is give a statement or be fired (even though the evidence can be used criminally).\footnote{Hill and Wright, \textit{supra}, note 72 at 873-4.} Herzig states that two things are now clear regarding compelled responses from police officers: first, the Fifth Amendment will not tolerate the use of coerced statements or derivative evidence (\textit{i.e.} "fruits") in a criminal proceeding; and second, it is not permissible to demand a waiver of constitutional protection against incrimination from the employee.\footnote{\textit{Supra}, note 73; more generally see, Yale Kamisar, "On The Fruits Of Miranda Violations, Coerced Confessions, And Compelled Testimony" (1995) 93 \textit{Michigan Law Review} 929; Akhil Reed Amar and Rennee B. Lettow, "Fifth Amendment First Principles: The Self-Incrimination Clause" (1995) 93 \textit{Michigan Law Review} 857; Henry J. Friendly, "The Fifth Amendment Tomorrow: The Case For Constitutional Change" (1968) 37 \textit{University of Cincinnati Law Review} 671; Eden Moglen, "Taking The Fifth: Reconsidering The Origins of the Constitutional Privilege Against Self-Incrimination" (1994) 92 \textit{Michigan Law Review} 1086.}

The next issue to be addressed by the American courts after \textit{Garrity} and \textit{Gardner} was under what circumstances public employee testimony is immunized from use in later proceedings. In other words, must an explicit affirmative immunity be given before an employee is required to cooperate.\footnote{Hill and Wright, \textit{supra}, note 72 at 880.} In \textit{Kastigar v. United States} the Supreme Court re-affirmed that the state can compel testimony as long as (statutory or granted) immunity is provided.\footnote{406 U.S. 441 (1972) at 445-6.} Although it has been asserted that the immunity applies as a matter of right, regardless of whether it is affirmatively granted, the language of the Supreme Court seems to
indicate that an affirmative immunity is necessary. 91 The weight of lower court authority also suggests that an affirmative grant is required. 92 If immunity is not affirmatively granted, the courts have tended to exclude the evidence. 93 As pointed out by Hill and Wright, police officers under interrogation cannot be expected to know the technical details of the Fifth Amendment and should not have to guess whether they have criminal immunity. 94 This observation certainly has application to the ordered statement and investigational processes under the R.C.M.P. regime.

Carter describes a typical Garrity Interview as follows: first, any sworn statement or deposition of an accused officer will be taken by a police investigator that is of higher rank than the officer under investigation; second, the suspect officer is "ordered" (on the record) to answer all questions truthfully during the interview; and third, the suspect officer is also told (on the record) that her or his statement will be used during the internal discipline

91 In Lefkowitz v. Cunningham, 431 U.S. 801 (1977) at 809 the Court states "Once proper use immunity is granted..."; while in Lefkowitz v. Turley, 414 U.S. 70 (1973) at 78 the Court found an employee "may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers [and]...states must offer to the witness whatever immunity is required..."

92 See, for example, United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert denied, 421 U.S. 975 (1975) (no disciplinary action for refusing to testify unless advised evidence obtained will not be used criminally); Confederation of Police v. Conlisk, 489 F.2d. 891 (7th Cir. 1974) (public employer must restrict to specific questions to duties and advise of consequences of choice and use/derivative protection); D'Acquisto v. Washington, 640 F. Supp. (N.D. Ill. 1986) (immunity must be affirmatively granted).

93 Hill and Wright, supra, note 72 at 880-91.

94 Ibid. at 881-2. The easier approach may be that the threat of dismissal is equivalent to compulsion, therefore a compelled statement is not useable in a criminal trial as a matter of law, which means the statement cannot be used regardless of a immunity grant (i.e. express vs. implied).
process, but it cannot be used in a criminal proceeding. Ordering responses for administrative purposes is accepted practice, subject of course to contractual, arbitral, legislative and due process provisions in the respective jurisdiction (e.g. Law Enforcement Officers' Bill of Rights). In other words, in the United States, the department can fire or discipline a police officer for refusing to provide information after self-incrimination is claimed (provided immunity is granted), but not for claiming the self-incrimination protection.

In practice then, if a U.S. police officer is being asked for a statement there are several possible scenarios that can arise. First, the employee "voluntarily" talks and the protection against self-incrimination is not at issue (i.e. not coerced). Second, if the employee refuses to talk and does not assert protection against self-incrimination or a fear of criminal prosecution, the employee can be disciplined/discharged for not answering. However, the question/answer must be specifically, directly and narrowly related to performance of official duties. Third, if the employee refuses to respond to direct and narrow duty related questions and asserts self-incrimination protection there are two things that can happen: a) if the employee is compelled to answer without immunity it is unconstitutional; or b) if the employee asserts self-incrimination the employee can be discharged for refusal to provide information when immunity is provided (i.e. not for claiming, but for refusing to provide information). Fourth, if the employee is compelled to answer direct and narrow duty questions, the information provided can be used to discipline and discharge the employee, but it cannot be used directly or derivatively in subsequent

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criminal proceedings. The important feature is that protection against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory."  

The courts have utilized a balancing approach to self-incrimination wherein the government, in order to defeat self-incrimination protection needs to demonstrate that it has a sufficiently strong legitimate, valid, and specific interest which overrides any competing interests that an individual may have (i.e. functional policy basis). Hill and Wright note that the current immunity provisions provide a "rational accommodation between individual rights and the demand of government to compel testimony." As pointed out by Herzig though:

The glaring fact remains that police departments do not prosecute, so they are unable to ensure that the statements they coerce under authority of Garrity will not be used against an officer in a later proceeding.

Two additional issues arise. First, based on the Garrity procedure, is it appropriate that the police department be responsible for bestowing/granting immunity on a subject officer instead

96 Jones III, supra, note 73 at 10-15.

97 Kastigar, supra, note 90 at 444.

98 Tarallo, supra, note 72 at 184-5. Although Tarallo rejects balancing in the criminal context, the use of material outside that regime is endorsed. David Dolinko, "Is There A Rationale For The Privilege Against Self-Incrimination?" (1986) 33 University of California Los Angeles Law Review 1063 at 1141-2 discusses whether there should be no other source for the information; Amar and Lettow, supra, note 88 at 878 note that some believe the Kastigar case provides a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel a citizen to testify.

99 Supra, note 72 at 880, referring to Kastigar at 445-46.

100 Supra, note 73 at 408-9. While the police in some jurisdictions do not necessarily have the legal authority to offer immunity, they can provide immunity by simply not sending charges forward. The police also have considerable influence over prosecutions in some jurisdictions.
of a separate branch of government (i.e. the prosecutor)? Giving this immunity discretion to the department/investigator could result in allegations of complicity, collusion, bad faith, or incompetence (e.g. where the investigator blunders and unintentionally provides immunity because suppression is ordered at trial). Second, the Fifth Amendment protection plunges ordered statements into the derivative-use whirlpool.  

b. Scope of Protection

The United States has retrenched from initial common law and constitutional law requirements of transactional immunity for compelled testimony (i.e. no criminal charges for any criminal conduct) by restricting the scope of immunity protection (statutorily or constitutionally) to prohibiting use and derivative-use of compelled testimony. Immunity has been removed as a complete defence to prosecution.

One of the recurring criticisms of American self-incrimination protection is that the entire exercise becomes consumed with ensuring against, or disproving, improper derivative-use attacks. Implicit in Flaum and Carr's analysis is that it may be easier for governmental employers, depending on the remedy desired, to adopt one of two options when confronted with a suspect employee. First, the employer can conduct a criminal prosecution without questioning the suspect employee (i.e. no use or derivative-use argument). Alternatively, the employer can administratively demand an accounting and take appropriate internal measures.

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101 See, Bloch, supra, note 73.

102 Herzig, supra, note 73 at 426.

103 Flaum and Carr, supra, note 72 at 328.
It has been settled in the United States that a prosecutor cannot use compelled testimony in a subsequent criminal case. As Herzig notes, this leads to difficulties because prosecutors cannot use "direct or indirect" evidence, and if the prosecutor learns discrete incriminatory facts from/about the accused from the immunized testimony it can lead to numerous constitutional challenges or suppression/exclusion orders. According to Turner, the American courts have identified three types of use that can be made of evidence: direct, indirect, and non-evidentiary use. Challenges because of improper use and derivative-use of compelled evidence have led prosecuting agencies to, inter alia, adopt the use of screens or walls to be able to show that evidence was independently found. The perceived problem with derivative-use immunity is that the state must disprove that it relied on compelled testimony, which can be both costly and time consuming. In fact, American courts have utilized several tests to determine whether there has been improper use of evidence, including: the "but for" test (i.e. evidence not found but for the statement);

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104 Supra, note 73 at 424-26.

105 Supra, note 72 at 113; Amar and Lettow, supra, note 88 at 858 identify the following types of immunities: 1) transactional immunity (Counselman v. Hitchcock, 142 U.S. 547 (1892)); 2) use-fruits immunity (Kastigar case); 3) use immunity, but reliable fruits remain admissible (Amar and Lettow proposal); see also, Jefferson Keenan, "Nonevidentiary Use Of Compelled Testimony And The Increased Likelihood of Conviction" (1990) 32 Arizona Law Review 173; Kamisar, supra, note 88 at 985.

106 Amar and Lettow, ibid. at 878-79; Turner at 111-112 states the U.S.C. immunity barred use of testimony as an investigatory lead or as a tool to focus the investigation. As a result of Kastigar, the state must show independent and legitimate source of disputed evidence (i.e. Kastigar Hearing).

107 Turner, ibid. at 114-15 notes the state must show that no impermissible use was made of the evidence (e.g. filing evidence or theories with court prior to compellation; no knowledge of immunized testimony; prove independent leads to evidence); see also, Shaun Ansell, "Self-Incrimination In Australia: The United States Influence" (1994) 24 Queensland Law Society Journal 545 at 550.
physical possession test (i.e. who had possession and at what point); or first referred to analysis (i.e. before or after compellation).108

In the United States there has been concern over the numerous non-evidentiary uses to which a compelled statement can be applied. For example, it can be used to establish and decide charges or plea-resolutions, as an aid in the preparation for a hearing, to develop questions and hearing strategies, to motivate research for independent sources of information not previously known, and it can represent a psychological threat if testimony differs.109 Non-evidentiary use of compelled testimonial evidence often becomes the focal point of many cases, which, if the evidence had not been compelled in the first place, would be an unnecessary exercise. On the other hand, the theory is that derivative-use immunity prevents the state, after hearing the compelled testimony protected by the use-immunity, from using that testimony or statement to seek out other information that will incriminate the accused.110 The theory in providing immunity is that the government has a choice. It can force testimony and risk immunity or use problems. Alternatively, it can conduct a thorough investigation without compelled evidence.111 The burden is on the government to prove evidence or information did not result from compellation and should not be suppressed.

One conclusion that arises from this analysis is that R.C.M.P. members appear to have, in theory at least, broader statutory protection with respect to the use of ordered statements than their American counterparts. The R.C.M.P. Act prohibits the use of an

108 Ansell, ibid.


110 Herzig, ibid. at 426.

111 Ibid. at 426-7, footnote 163.
ordered statement in any subsequent criminal, civil or administrative proceedings whereas an American police officer only appears to have (constitutional) protection against the use of the statement in the criminal arena. In some American jurisdictions, however, legislative measures have been proposed or undertaken to provide clearer direction on the obtaining and use of compelled statements. On the other hand, ordered statements from American police officers also enjoy derivative-use immunity in relation to criminal proceedings. Statutorily derivative-use protection is not available to R.C.M.P. members. The following section will address what constitutional protection R.C.M.P. members have with respect to compelled statements.

3. Section 11 of the Charter

a. The Wigglesworth Case

Wigglesworth was an R.C.M.P. member charged with common assault under the Criminal Code\textsuperscript{113} for slapping an "uncooperative" motorist during an investigation for impaired driving. Prior to being tried for the assault, Wigglesworth was charged, found guilty, and fined $300.00 dollars for a Major Service Offence by an internal R.C.M.P.

\textsuperscript{112} As previously discussed, several American jurisdictions have passed Police Bill of Rights that detail how and when officers will be interviewed; see generally, Warnken, \textit{supra}, note 73; Douglas W. Perez, \textit{Common Sense About Police Review} (Philadelphia: Temple University Press, 1994) at 59-61. In the Rodney King beating investigation defence counsel are arguing on appeal, which the government has conceded, that at least one prosecution witness was provided with a transcript of a suspect officer's compelled testimony by internal affairs before the witness testified. As a result, a Bill was introduced in the U.S. Congress (Bill H.R. 878) (Senate s. 334) to amend title 1 of the \textit{Omnibus Crime Control and Safe Streets Act of 1968 to encourage States to enact a Law Enforcement Officers' Bill of Rights, to provide standards and protection for the conduct of internal police investigations, and for other purposes} cited as the \textit{Law Enforcement Officers' Bill of Rights Act of 1995}.

\textsuperscript{113} R.S.C. 1970, c. C-34, s. 245(1).
Service Court. Prior to 1986, a member of the R.C.M.P. convicted of a Major Service Offence was subject to imprisonment up to one year, a fine not exceeding five hundred dollars, dismissal, loss of pay not exceeding thirty days, reduction in rank, loss of seniority, or reprimand. Punishment for a Minor Offence included confinement to barracks not exceeding thirty days, dismissal, a fine not exceeding three hundred dollars, loss of seniority or reprimand.\textsuperscript{114}

At the subsequent criminal trial the judge quashed the common assault information under s. 24(1) of the \textit{Charter}, reasoning that Wigglesworth was being tried twice for the same misconduct, contrary to s. 11(h) of the \textit{Charter}.\textsuperscript{115} The issue before the Supreme Court of Canada was whether the conviction of Wigglesworth for the internal Major Service Offence precluded a further criminal trial under the \textit{Criminal Code}, since the second proceeding would be a violation of the right not to be tried twice for the same offence \textit{(i.e. double jeopardy)} under s. 11(h) of the \textit{Charter}.

As noted by Eberts, Wilson J. adopted a clear "functional and philosophical distinction between disciplinary matters and those proceedings affecting society at large."\textsuperscript{116}

\textsuperscript{114} 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 offenses" and s. 26 "minor offenses." 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 \textit{arrest} under the \textit{Act}. In addition, s. 28 permitted the Force to hold the member in \textit{custody} until trial for an internal offence. These invasive provision were in place until amended in 1986-88 by c. 8 (see Chapter 6).

\textsuperscript{115} The Saskatchewan Court of Queen's Bench (1984), 38 CR. (3d) 388 disagreed and permitted an appeal, finding that the assault and service offence constituted separate offenses. A further appeal to the Court of Appeal was dismissed.

Writing for the majority, Wilson J. found that "[p]roceedings 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. The Court envisioned two circumstances in which someone can invoke s. 11: first, where the proceeding by "its very nature...is a criminal proceeding" (i.e. criminal charge); or second, in a situation where a finding of guilt "may lead to a true penal consequence." A true penal consequence, for the purposes of s. 11, is where 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 rather than to the maintenance of internal discipline" (emphasis added). In this regard, the fact that service offence fines were paid to the R.C.M.P., and not the Consolidated Revenue Fund of the government, would be a factor in evaluating the "true penal consequence." In any event, at the time, a member of the R.C.M.P. was subject to imprisonment, thereby meeting the penal consequences branch.

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

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117 Supra, note 5 at 560.

118 Ibid. at 559.

119 Ibid. at 561.

120 Scorer, supra, note 35 at 62; Paul Ceyssens, Legal Aspects of Policing (Scarborough: Thomson Canada Ltd., 1994) at 5-66. A simple amendment to the sanctions could, however, provide members with protection under s. 11. This is not unrealistic since there has been somewhat of a trend to return to fines as a potential sanction for police discipline; see, (unknown author) Police Discipline and Complaints in Saskatchewan (publisher unknown, 1991); also, the Railway Act, R.S.C. 1985, c. R-3 at s. 418 still provides for imprisonment and hard labour for two months for railway police officers convicted of misconduct.
Charter, as the majority, following the distinction in Kienapple v. The Queen,\textsuperscript{121} 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.\textsuperscript{122} In dissent, Estey J. postulated that the protection of s. 11 could arise if the conviction before the first court/tribunal was performed as part of a legislated task which permitted a penalty that recognized the "general public's interest in the administration of criminal law...over and above the limited interest of internal discipline."\textsuperscript{123} Ironically, this approach would recognize what many critics, and the R.C.M.P. itself, routinely assert, that internal discipline is for the purposes of maintaining public confidence and redressing a public wrong.\textsuperscript{124}

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 was inapplicable to "domestic, internal or disciplinary matters which are of a regulatory nature designed to maintain discipline and professional integrity."\textsuperscript{125} Wigglesworth severely

\textsuperscript{121} [1975] 1 S.C.R. 729.

\textsuperscript{122} Supra, note 5 at 562-3.

\textsuperscript{123} Ibid, at 570.

\textsuperscript{124} See, Royal Canadian Mounted Police External Review Committee, Sanctioning Police Misconduct-General Principles (Discussion Paper 8) (1991); Royal Canadian Mounted Police External Review Committee, Post-Complaint Management: The Impact of Complaint Procedures in Police Discipline (Discussion Paper 4) by Clifford D. Shearing (Minister of Supply and Services Canada, 1990); Royal Canadian Mounted Police External Review Committee, Suspensions-A Balanced View (Discussion Paper 1) (Minister of Supply and Services Canada, 1988). In fact, public confidence was one of the central arguments made by the Force in Special Constable "A", supra, note 23.

\textsuperscript{125} W.J. Atkinson, "The Independence and Impartiality of Administrative Tribunals After the Charter" in N. Finkelstein and B.M. Rogers, eds., Administrative Tribunals and The Charter (Toronto: Carswell, 1990) at 93. The Supreme Court of Canada found in Burnham v.
limited the application of the Charter to disciplinary proceedings.\textsuperscript{126} Because of the threshold for application, this decision also eliminated the possibility of arguing that ordered statements are a violation of s. 11(c) of the Charter by compelling a subject member to be a "witness in proceedings against that person in respect of the offence."

b. Legislative Developments

In the aftermath of Wigglesworth it was evident that the Supreme Court had promulgated a test which severely restricts 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 (because a member was subject to imprisonment), amendments to the R.C.M.P. Act between 1986 and 1988 removed the fine and imprisonment provisions. The former disciplinary sanctions were replaced by a two tier disciplinary system wherein a member can be dealt with either by "Informal Disciplinary Action" or "Formal Disciplinary Action" depending on the "gravity" and "surrounding

\textit{Metropolitan Toronto Police,} [1987] 2 S.C.R. 572 (sub nom. Burnham v. Ackroyd) that s. 11(d) of the Charter (\textit{i.e.} independent and impartial tribunal) did not apply to Police Act, R.S.O. 1980, c. 381 (as \textit{per} Reg. 791 R.R.O. 1980 creating the \textit{Code of Offenses}) disciplinary proceedings involving "discreditable conduct" because it was not "criminal in nature nor did they involve penal consequences" since the legislation 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 (\textit{i.e.} s. 11 did not apply to the forum of internal/domestic discipline).

\textsuperscript{126} See the discussion in E.R.C. Discussion Paper 8, \textit{supra}, note 124 and Scorer, note 35 at 62. Folk, \textit{supra}, note 74 at 7 provides an American analysis on whether civil or administrative proceedings are criminal and subject to self-incrimination (\textit{i.e.} Fifth Amendment) protection: 1) affirmative disability or restraint; 2) sanction historically regarded as punishment; 3) traditional aim of punishment promoted, retribution and deterrence; 4) behaviour already a crime; 5) alternative purpose rationally assignable; 6) appears excessive in relation to alternative purpose assigned; see also, \textit{U.S. v. Ward,} 448 U.S. 242 (1980).
circumstances" of the Code of Conduct contravention. These amendments have removed the "true penal consequences" (fine and imprisonment) 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.

A second factor to be contemplated in relation to the applicability of s. 11 of the Charter to ordered statements is the condition that the person be formally charged with an offence. Even if the internal disciplinary "offence" was one that met either of the criminal or true penal consequences branches, in many cases, a member will not be "charged" with an offence when the statement is taken because virtually all ordered statements are required at the pre-charge/investigative stage. Therefore, there would be no basis to assert under s. 11(c) of the Charter that a member "cannot be compelled to be a witness in proceedings against" the member. The significance of this distinction was understood even prior to the decision in Wigglesworth. Former R.C.M.P. Commissioner Simmonds observed before the Legislative Committee dealing with the proposed changes to the R.C.M.P. Act that s. 11 would not apply to ordered statements because the member would not be "charged" when the statement was compelled. In addition, the term "proceedings" has often been limited to "compelled testimony" in criminal or judicial proceeding and has not been extended to apply to the investigative stage of offences. Morgan, noting that it has been accepted by some that self-incrimination has no application to inquisitions by the police, believes this is unfortunate because:

The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse

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127 See, ss. 41-43.

128 Supra, note 6, Issue No. 11 at 11:115.
are fraught with much greater danger.\textsuperscript{129}

A police investigation (especially an internal police investigation) may not be a judicial inquisition, but it is as much an "official proceeding" as the early English process before a justice, yet it has none of the safeguards of a judicial proceeding.\textsuperscript{130} Developing protection for persons at the investigative stage has, in part, been a matter for the right to silence and self-incrimination protections under s. 7 of the \textit{Charter}.\textsuperscript{131}

The artificiality of the distinction identified for the application of s. 11 to not only internal police proceedings, but disciplinary proceedings in general, is apparent. Rogers concluded that:

\ldots simply 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.\textsuperscript{132}

As argued in this thesis, the rights of R.C.M.P. members are substantially affected by the accountability process, perhaps more than in any other public or private employment situation. As shown in Chapter 7, the \textit{R.C.M.P. Act}, and R.C.M.P. policy on ordered statements (which is apparently not complied with), do not impose any investigational conditions on the taking of ordered statements other than the requirement that it "appears"

\textsuperscript{129} Edmund M. Morgan, "The Privilege Against Self-Incrimination" (1949) 34 \textit{Minnesota Law Review} 1 at 27.

\textsuperscript{130} On this basis, Morgan, \textit{ibid.} at 28 argues for the expansion of self-incrimination protection.

\textsuperscript{131} For example, in \textit{R. v. Esposito} (1985), 53 O.R. (2d) 356 (C.A.) leave to appeal to the S.C.C. refused, the Court specifically found that s. 11(c) of the \textit{Charter} only applies to being compelled to testify and has no application to "questioning" by the police.

\textsuperscript{132} B.M. Rogers, "Charter Limits on Administrative Investigative Powers" in N. Finkelstein and B.M. Rogers, eds., \textit{Administrative Tribunals and The Charter} (Toronto: Carswell, 1990) at 130.
there has been misconduct. The mere fact that the authority to order a member to give a statement is limited to an "investigation" under s. 40(1) is little assurance the mechanism can not be used improperly. This was clearly shown in the two ordered statement cases discussed in Chapter 7. A member can be marched into an interview room in a police station and ordered by a superior officer (with several vested interests) to answer questions without any public scrutiny. Moreover, in the regulatory context the state agent that is demanding explanations is not also your employer. Not to mention the fact members are awash in an internal and external accountability regime that is extremely complicated and bound to many interests. The vulnerability of members to criminal sanctions for job-related activity and the absence of representation also distinguish the employment context of members.

Although the Supreme Court has said that internal discipline is neither criminal or penal, formal discipline procedures (i.e. notice, statement of particulars, arraignment), which are akin to criminal procedure, leave the impression that it is still quasi-criminal. Even if discipline is not "penal," it is still a very serious matter with very serious consequences. The Court has failed to value the different demands in employment, accountability, regulatory, and criminal proceedings in policing. As Brown points out, fines

133 Section 40(1).


135 Ferguson and Rusen, supra, note 17 at 61. A study for E.R.C. Discussion Paper 8, note 124, found 30% of R.C.M.P. adjudicators felt discipline for theft was for punishment. During a recent discipline seminar attended by the author, an informal poll indicated that at least 70-80% of commissioned officers were committed to "punishment" as an objective.

136 Ibid. at 62.
in disciplinary matters can be much higher than in criminal courts\textsuperscript{137} (and there is nothing preventing the government/Force from amending the \textit{R.C.M.P. Act}, \textit{Regulations} or \textit{Commissioner's Standing Orders} to re-implement fines). In addition, how is a court going to be able to deal with the alternate or extra-statutory discipline process in the R.C.M.P., discussed in Chapters 6 and 7, that is occurring outside the statutory regime? For example, during a recent negotiation, the Force suggested that the member pay a "fine" (in the hundreds of dollars) to a charity as part of a discipline process (despite the fact no such provision statutorily exists).\textsuperscript{138} Even more unsettling, a trend appears to be developing in the R.C.M.P. to suspend members without pay as a matter of course during internals. As previously highlighted, in cases where members lose certain "basic qualifications" they are now also subject to suspension without pay for extended periods. For example, if a member is convicted of an on-duty firearms incident (\textit{e.g.} careless use of firearm), which results in either a mandatory or discretionary period of prohibition from possessing a firearm, the member will be suspended without pay until the ability to carry a weapon is reinstated. This is so even though no disciplinary action is taken. Such a suspension can amount to a significant loss of pay (\textit{e.g.} for a constable $25,000.00 for a six month suspension to $50,000.00 for a one year suspension). The loss of employment or income can be far more devastating than a criminal conviction for the same matter (\textit{e.g.} absolute discharge).

Such scenarios highlights the complicated context in which ordered statements are operating and the observation of Eberts, regarding the operation of administrative procedures

\textsuperscript{137} \textit{Supra}, note 134 at 124.

\textsuperscript{138} M93.
in general, is particularly apt:

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 multiplicity of proceedings, or for safeguarding the rights of a respondent.\textsuperscript{139}

It is these types of issues that call out for a broader application of s. 11 (and s. 7) to employment issues instead of a predominate status being attached to criminal sanctions. The constitutional door was not closed in \textit{Wigglesworth}, however, as Wilson J. expressly declared that "constitutionally guaranteed procedural protections may be available in a particular case under s. 7 of the \textit{Charter} even although s. 11 is not available."\textsuperscript{140}

5. Testimonial Protection

a. Common Law

At common law, although it appears self-incrimination was initially confined to objections to the form of oath in a judicial proceeding, it gradually came to be recognized that a person should not be compelled to incriminate himself or herself in the face of extra-judicial interrogation.\textsuperscript{141} Wigmore asserted that initially it was not claimed that there was a

\textsuperscript{139} \textit{Supra}, note 117 at 105.

\textsuperscript{140} \textit{Supra}, note 5 at 562. Jack Watson, "Talking About the Right to Remain Silent" (1991-92) 34 \textit{Criminal Law Quarterly} 106 observes that recently the courts in Canada have implicitly absorbed the right to silence and non-incrimination in a number of decisions into the \textit{Charter}. Further, David M. Paciocco, "Self-Incrimination: Removing the Coffin Nails" (1989-90) 35 \textit{McGill Law Journal} 73 at 116 concludes that ss. 11(c), 13 and 10(b) of the \textit{Charter} have not responded to protect against investigative self-incrimination, and s. 7 will have to do the job with respect to pre-trial obligations.

\textsuperscript{141} See, C.B. Cato, \textit{The Privilege Against Self-Incrimination and Reform Of The Law and Practice Of Police Interrogation} (West Plaza Copy Centre, N.Z.: Legal Research Foundation Inc., 1985); John H. Wigmore, "The Privilege Against Self-Incrimination" (1901-2) 15 \textit{Harvard Law Review} 610; John H. Wigmore, \textit{"Nemo Tenetur Seipsum Prodere"} (1891-92) 5 \textit{Harvard Law Review} 71 at 74 refers to Statute 13 Ed. I, Circumspect Agatis (1285) to Prohibito Formata de statuto articulorum cleir (1307 @ 1326) Edward II as the statutory foundation for self-
right against incrimination, rather it was claimed that a proper proceeding entailed a presentment or accusation.\textsuperscript{142} As Wigmore noted, historically at least, self-incrimination protection extended to all manner of proceedings in which testimony was taken, litigious or not, and also applied in investigations by an administrative official.\textsuperscript{143} Levy confirmed that the protection against self-incrimination applied to compulsory responses, although he asserted that the accused had to claim protection at common law, except in rare occasions where the judge intervened or provided the protection.\textsuperscript{144}

Under the common law witnesses are not compellable to answer questions in a proceeding when the answers would have a tendency to expose the witness to any kind of criminal charge, a penalty, or forfeiture of any nature.\textsuperscript{145} According to Taylor, the self-

\begin{itemize}
  \item \textsuperscript{142} \textit{Ibid.} (1901-2) at 613 and 627 states no one objected to answering matters properly charged and relating to him or her (\textit{i.e.} method of questioning at issue, not the ability to question).
  \item \textsuperscript{143} \textit{Ibid.} (1905) at s. 2252; also, Morgan, supra, note 129 at 29.
  \item \textsuperscript{144} Leonard W. Levy, \textit{Origins of the Fifth Amendment - The Right Against Self-Incrimination} (New York: Oxford Univ. Press, 1968) at 375. At 321 Levy comments that "Like the right against self-incrimination itself, some procedures indispensable to fair trial or due process of law imperceptibly crept into common law practice as a result of judicial indulgence rather than statutory enactment." Wigmore (1905), supra, note 141 at 3105 says "The facts protected from disclosure are distinctly facts involving a criminal liability or its equivalent. Hence, facts involving civil liability are entirely without the scope of the privilege."
  \item \textsuperscript{145} Pitt Taylor, \textit{A Treatise On The Law of Evidence As Administered In England & Ireland}, 11th ed., Vol. II (London: Sweet & Maxwell, 1920) at 997; Wigmore (1901-2), supra, note 141 at 627 says by the end of the 1600's professional opinion settled against the exaction of an answer under any form of procedure in matters of criminality or forfeiture. The \textit{Morris} case, supra, note 55 indicates that under the common law you cannot compel answers if there is a penalty, and it applies to non-judicial proceedings.
\end{itemize}
incrimination protection ceases if the penalty or forfeiture is barred by lapse of time (i.e.,
limitation of action), the offence is pardoned, or the penalty or forfeiture is waived.\textsuperscript{146} In
1882, the Court of Queen’s Bench in \textit{Lamb v. Munster}\textsuperscript{147} found the common law
recognized that a person, during a civil discovery process for libel, was not required to
answer any questions if the person swore that the answer may tend to incriminate him or her
in a criminal prosecution. The New Brunswick Supreme Court affirmed in 1963 that at
common law no person can be compelled to incriminate herself or himself, and "[n]o
abrogation or curtailment of the common law privilege can be effected save through
legislation couched in clear and explicit terms."\textsuperscript{148} 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 is little doubt about the explicit nature of subsection (2).\textsuperscript{149} Section 40(3)
of the \textit{R.C.M.P. Act} attempts to provide some redress for the denial of the common law
protection against self-incrimination by stating that an internal statement will not be used or
receivable in a criminal, civil or administrative proceeding, except where the member
knowingly gives a false or misleading statement to the investigator.

It should be noted that s. 8(3) of the \textit{Criminal Code}\textsuperscript{150} recognizes that common law

\textsuperscript{146} \textit{Ibid.} at 1002-3.

\textsuperscript{147} (1882-3), 10 Q.B.D. 110; (1881-85), All E.R. 465.


\textsuperscript{149} See, \textit{Bachinsky v. Sawyer} (1973), 43 D.L.R. (3d) 96 (Alta. T.D.) at 106-7 for an analysis
of a police disciplinary regime and the removal of common law rights.

\textsuperscript{150} R.S.C. 1985, c. C-46.
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 R. v. Jobidon, 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 a defence or which deny certain features of an offence."\(^{151}\) It is 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.\(^{152}\) If, however, the statutory provision to answer were invalid or removed, a member would arguably have the common law right to not answer incriminating questions where there is the possibility of a sanction (which appear more broadly conceived in the common law context).

b. **Canada Evidence Act**

Although under the common law a witness was entitled to refuse to answer any questions on the ground it may tend to incriminate, in 1893, the common law protection was abolished in Canada by the *C.E.A.*\(^{153}\) Section 40(2) is similar to s. 5(1) of the *C.E.A.*\(^{154}\)

\(^{151}\) *Supra*, note 148 at 251.

\(^{152}\) *Ibid.*, at 253; Gonthier J., 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 new intent element into the assault provisions of the *Criminal Code*, which created a new offence; see, S.J. Usprich, "Annotation" (1991), 7 C.R. (4th) 235.

which states that:

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 any other person. (emphasis added)

Section 5(2) provides that a witness's testimony cannot be used against the witness if the witness objected to the question. Until recently, it was settled law in Canada that s. 5(1) abolished the common law privilege of a "witness" to refuse to answer questions in a "proceeding" that may tend to incriminate the person. 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." Thus, a "witness" is compellable before a tribunal and there is no common law privilege against self-incrimination in that capacity. However, as of 1982, 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 herself or himself in that proceeding. The "charged" exception to being compelled to testify was also recognized earlier under s. 4(1) (accused competent witness for defence) of the C.E.A. The result, as noted by Schiff, is that s. 4(1) "give[s] an accused [i.e. charged]

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155 For example, see Dubois, supra, note 67, per Lamer J. (as he then was) at 362; also Di Iorio & Fontaine v. Montreal Jail Warden, [1978] 1 S.C.R. 152 (sub nom. Di Iorio & Fontaine v. Warden of the Common Jail of Montreal and Brunett); Rogers, supra, note 132 at 135; M. McInnes, "The Right To Silence In the Presence of Anton Pillar: A Question of Self Incrimination" (1987-88), 26 Alta. L.R. 332.

person the power to *choose* whether to testify" (emphasis added).\(^{157}\) The *C.E.A.* requires
the person to claim protection against self-incrimination, and although it applies to an inquiry
or proceeding where a witness is subpoenaed or compelled to answer, it does not prevent
information derived from testimony from being "used."\(^{158}\)

Section 5 of the *C.E.A.* in relation to self-incrimination means that protection is given
to any witness while testifying.\(^{159}\) In addition, the protection is only limited to subsequent
use in a criminal (or provincial prosecution) proceeding, which enables parallel or collateral
proceedings to be utilized as a basis to provide a mechanism: 1) as a backdoor to assist the
criminal process *(e.g. inquest)*; 2) to assist in preparing a case; 3) to provide inappropriate or
certain publicity; 4) to pursue fishing expeditions; and 5) to complete investigations.\(^ {160}\)

According to Watson, although the American Fifth Amendment and the common law
protection against self-incrimination are analogous, Canada, in 1893, took another route *(i.e.
truth* was more important in the battle of norms).\(^ {161}\) Whitten asserts it was the "need for
information" which was the policy reason behind abrogating common law self-incrimination

at 946.

\(^{158}\) A.G. Henderson, "Statements Compelled By Statute" (1981-82) 24 *The Criminal Law
Quarterly* 176 at 178.

\(^{159}\) Ed. Ratushny, *Self-Incrimination In The Canadian Criminal Process* (Toronto: Carswell
Co., 1979) at 66. It could also be interpreted to provide protection against being compelled to
testify as an accused.

\(^{160}\) *Ibid.* at 349-50; see also, John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The
Law of Evidence in Canada* (Markham, Ont.: Butterworths, 1992) at 373.

\(^{161}\) *Supra*, note 140 at 116-17.
protection under the 1893 statutory C.E.A. initiative.\footnote{162} This is why, according to Watson, the C.E.A. is limited to providing "use immunity."\footnote{163}

Despite purportedly enjoying testimonial protection against self-incrimination, the exercise of this protection by the accused can have detrimental consequences.\footnote{164} It also appears that the courts, at least pre-Charter, have not committed to an overriding privilege against self-incrimination in their treatment of s. 4(6) of the C.E.A. on commenting about the failure of an accused to testify. First, despite apparently plain language against comment, it only applies to jury trials. Second, courts have permitted indirect references to the accused’s silence at trial (i.e. narrow meaning applied to "comment"). Third, even if a comment breach is found, appellate courts can ignore the reference by saying there was no miscarriage of justice.\footnote{165}

The present law under the C.E.A. is just over a 100 years old, and as can be seen,

\footnote{162} Alan Whitten, "The Privilege Against Self-Incrimination" (1986-87) 29 Criminal Law Quarterly 66 at 82.

\footnote{163} Supra, note 140.

\footnote{164} Ratushny, supra, note 159 at 71. For example, although s. 4(6) of the C.E.A. states that an accused’s failure to testify will not be the subject of comment, defence counsel can comment on the right of an accused not to testify (e.g. my client has the right not to testify). Counsel for a co-accused may also be able to comment on the failure of the accused to testify. Subsection (6) states that "The failure of the person charged,....to testify shall not be made the subject of comment by the judge or by counsel for the prosecution."

\footnote{165} Ibid. at 73. Section 12 of the C.E.A. (examination on previous convictions) is unsatisfactory because it purports to do what is not humanely possible according to reason, experience and empirical data. The "Cruel Dilemma" (or Hobson’s Choice) as noted by Ratushny at 338-340 is to take the stand and be convicted on a past criminal record. The assumptions in s. 12 are twofold regarding previous convictions: 1) a convicted person is more likely to lie than a previously unconvicted person; 2) a jury will only use previous conviction for credibility and not in assessing guilt; see also, Valerie P. Hans and Anthony N. Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1975-76) 18 The Criminal Law Quarterly 235.
does not necessarily sit well in some contexts. This led Mewett to conclude that one of the advantages to resurrecting the common law as a standard (constitutionally) is it is not necessary to strike down the different proceedings, nor is the protection status bound (i.e. accused, charged, suspect), in that full protection is available regardless.\textsuperscript{166} It remains to be seen if questioning a police officer \textit{qua} suspect/accused in an internal investigation (not accused in the formal sense—\textit{i.e.} charged) or the nature of the "proceeding" will be a determinative consideration under s. 7 of the \textit{Charter}.


The first quasi-constitutional measure that had potential to provide broader self-incrimination protection was the \textit{Canadian Bill of Rights}.\textsuperscript{167} However, it did not have the effect of creating a general right against self-incrimination in Canada.\textsuperscript{168} Section 2(d) of the \textit{Bill of Rights} states:

\begin{quote}
...no law of Canada shall be construed or applied so as to...authorize a court or tribunal, commission, board or \textit{other authority} to compel a person to give \textit{evidence} if he is denied...protection against \textit{self crimination}..." (emphasis added)
\end{quote}

In the \textit{Lavoie} case, s. 2(d) of the \textit{Bill of Rights} was considered and it was found that "other authority" did not equate to a police officer, moreover, "evidence" was equated with testimony in a proceeding, which did not include a statement to a police officer.\textsuperscript{169}

\textsuperscript{166} Alan W. Mewett, "The Right to Silence" (1989-90) 32 \textit{Criminal Law Quarterly} 273 at 274.

\textsuperscript{167} R.S.C. 1985, Appendix III, S.C. 1960, c. 44.

\textsuperscript{168} Ed. Ratushny, "Is There a Right Against Self-Incrimination in Canada?" (1973) 19 \textit{McGill Law Journal} 1 at 76.

\textsuperscript{169} \textit{R. v. Lavoie}, [1971] 1 W.W.R. 690 (B.C. Co. Ct.) afmd. [1971] 5 W.W.R. 472 (B.C.C.A.); see also, \textit{ibid.} at 68; Ratushny, \textit{supra}, note 159 at 88. This limited any potential
Further, in *Curr v. R.*, 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*.\(^{170}\) *Curr* is authority for the proposition that the testimonial right against self-incrimination operates before a criminal court, and that any statutory provision that compels a witness to testify must be accompanied by incriminatory protection.\(^{171}\)

With respect to internal disciplinary proceedings, in *Willette v. Royal Canadian Mounted Police Commissioner*,\(^{172}\) the member argued that the *Bill of Rights* prevented the admissibility of a statement that was extracted pursuant to a direct order and threat of internal charges. The Federal Court of Appeal rejected any such argument stating:

> There was no deprivation of the right of due process of law in respect of the personal security of the applicant [s. (1)(a)]. Nor was he deprived of the right to [a] fair hearing required by s. 2(e) [of the *Bill of Rights*]. As a member of a para-military force with which, upon appointment, he signed articles of engagement and upon entering upon his duties of office he took the oath of office by which he was required to obey the lawful command of a superior officer. In this case there was nothing unlawful about the order given...and it was, as it should have been, obeyed by the applicant. He was then, at his hearing, given the opportunity to confirm, vary or repudiate the alleged involuntary statement. He did none of these. The statement did not result in a criminal conviction.\(^{173}\)

The *Bill of Rights* has not figured prominently in the post-*Charter* era, and given the investigative application. A police officer is not the same as a board as set out in the preceding wording of s. 2.

\(^{170}\) [1972] S.C.R. 889 at 910. This case also held that "other authority" does not equal a peace officer.

\(^{171}\) Ibid. at 912.

\(^{172}\) (1986), 70 N.R. 225 (Fed. C.A.).

\(^{173}\) Ibid. at 232; see also, *Laroche v. Beirsdorfer* (1981), 131 D.L.R. (3d) 152 (Fed. C.A.) where the Court found that because the member had not in fact been compelled, because he obeyed the order to provide a statement, the issue of natural justice or a breach of the *Bill of Rights* did not arise.
restrictions of *Curr* and *Willette*, making it consistent with the *C.E.A.*, it is evident that members providing ordered statements would not be provided any meaningful protection by its provisions.\(^{174}\)

Pursuant to s. 11(c) of the *Charter*, individuals charged with an "offence" (i.e. criminal or true penal consequence) cannot be compelled to testify.\(^{175}\) Further, similar to the *C.E.A.* (*Bill of Rights* and *R.C.M.P. Act*) s. 13 of the *Charter* states that any incriminating testimony by a "witness" cannot be used in any subsequent proceedings.\(^{176}\) However, unlike s. 5(2) of the *C.E.A.*, s. 13 of the *Charter* provides protection for a witness' incriminatory testimony without an objection by the witness. The fundamental problem of course, is that none of these constitutional provisions extend beyond a "testimonial privilege." In other words, they provide no protection at the investigative stage (which is where members under investigation are the most vulnerable). More importantly, as Whitten points out, s. 13 of the *Charter* does not preclude the use of derivative evidence.\(^{177}\) Moreover, the courts have limited the protection provided in s. 13 by permitting the Crown

\(^{174}\) 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; see also, *Pangli v. Minister of Employment and Immigration* (1988), 4 Imm.L.R. (2d) 266 (F.C.A.); *Alvero-Rautert v. Minister of Employment and Immigration* (1988), 4 Imm.L.R. (2d) 139 (F.C.T.D.); *Rajpaul v. Minister of Employment and Immigration*, [1987] 3 F.C. 257 (T.D.) aff'd [1988] 3 F.C. 157 (C.A.); and Philip L. Bryden, "Fundamental Justice and Family Class Immigration: The Example of *Pangli v. Minister of Employment and Immigration*" (1991) 41 *University of Toronto Law Journal* 484 where s. 2(e) of the *Bill of Rights* was used to require procedural changes in immigration administration. There has been little judicial activity otherwise in this regard.

\(^{175}\) *Wigglesworth, supra.*

\(^{176}\) 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..."

\(^{177}\) *Supra*, note 162 at 83.
in *Kuldip* to use previous testimony in a subsequent proceeding to impeach credibility.¹⁷⁸

d. Distinctions

Based on the above, it is clear that a "witness" can be compelled to appear before an administrative board and provide testimony that is subject to a "use" exclusion in subsequent proceedings. Nonetheless, the testimony may derivatively disclose damaging evidence that could lead to serious consequences, including criminal charges. Although there can be similar consequences when disclosing derivative evidence, either before an administrative tribunal or in an ordered statement (*i.e.* a criminal charge), there are several important distinctions to be made between the two contexts. First, the ordered statement is not obtained in the context of a true "proceeding," such as before a court or quasi-judicial body, which substantially alters the forum under consideration. There is no "record" of the compelled statement procedure, perhaps other than the statement, nor is there a public or quasi-public nature to the procedure. In short, there is no assured/reliable monitoring mechanism or independent adjudicator of the internal or ordered statement process to ensure the member is receiving fair treatment. Second, under s. 40(1), the member is not being questioned as a "witness," but is under investigation as an "accused" on the basis that it "appears" there has been a contravention of the *Code of Conduct*.¹⁷⁹ This distinction is even more striking when it is recalled that there are frequently concurrent or parallel criminal and public complaint investigations being undertaken by the same investigator. Even if the

¹⁷⁸ *Supra*, note 10.

¹⁷⁹ Commissioner Simmonds, *supra*, note 6 advised the Legislative Committee on Bill C-65 that the legal advice regarding the self-incrimination provision of s. 13 of the *Charter* indicated that it did not apply to the member, as they were not a "witness."
investigator completed the criminal investigation and forwarded the reports prior to taking an ordered statement, the content of the ordered statement would be known to the investigator during any subsequent criminal or internal testimony. The statement will also be subsequently disclosed to the Crown.

Moreover, the institution of an internal investigation, with the attending ordered statement, is premised on a very low threshold (i.e. it "appears"), and enables the Force to obtain information without any credible authority checks (i.e. reasonable grounds). As previously indicated, at least one case was identified in which the R.C.M.P. directed an internal investigation despite the fact that a criminal investigation disclosed no evidence of impropriety by the member. What happens if the Force suspects internal misconduct, orders a statement, but then finds out there was criminal misconduct? A member of the R.C.M.P. can be subjected to questioning in a context which is not even remotely associated with the limited "trial" like investigation or incrimination safeguards that are present when a witness is called upon to testify in a criminal or regulatory-administrative "proceeding" and receives the protection of the Charter, C.E.A. or Bill of Rights. What procedural safeguards are given to the member, other than the limited protection of s. 40(3)? More importantly, how is the internal investigator to be held accountable given the apparent non-existence of any attainable or effective external judicial or civilian review of the process? Although R.C.M.P. members are granted significant powers in society, it must also be recognized, as pointed out in Chapters 6 and 7, that members are also vulnerable to an internal process that can easily become oppressive of the individual member. It is clear that protection beyond what has been found to exist thus far in this thesis is required at the investigative stage.
6. Investigative Protection

a. Considerations

There are two primary concerns regarding compelled statements that must be constitutionally addressed. First, whether compelling statements from a member is valid. Second, the validity of extracting statements for the very purpose of, or that enable, the discovery of evidence.\(^{180}\) It is clear under the R.C.M.P. accountability regime that the slightest suspicion can be used internally to investigate a member with no rigorous formal accusation process.\(^{181}\) Wigmore noted that any system which permits forced answers on mere suspicion, rumour, or betrayal leads to two abuses: first, petty judicial (investigative) officers become local tyrants; and second, blackmail by unscrupulous members of the community who use threats to intimidate the timid, vulnerable and weak.\(^{182}\) One of the policy considerations of self-incrimination protection is to exempt all persons from being compelled to disclose offenses before a formal process is validly implemented\(^ {183}\) (i.e. case-to-meet). The fundamental problem with the R.C.M.P. internal investigative process is that, like the Star Chamber, a witness/member can be required to answer all questions without any formal presentment of the accusation(s), merely by virtue of the judge's/investigator's

\(^{180}\) See generally, Kamisar, *supra*, note 88; Folk, note 74 at 3 examines the U.S. military and whether the applicable regulations or Constitution prevents use of statements in administrative proceedings.

\(^{181}\) Wigmore (1905), *supra*, note 141 at 3095-6 considers a system that operates with no accusation or mere suspicion is certain to be abused. Even if it is not, the potential for abuse damages its credibility with the stakeholders.

\(^{182}\) *Ibid.*

\(^{183}\) *Ibid.*
position and based solely upon suspicion.\(^{184}\) In fact, Commissioner Simmonds has conveniently stated that ordered statements enable the R.C.M.P. to do exactly what Lilburn objected to: ensnaring members by getting evidence out of the examination. As noted above, former Commissioner Simmond's response to the possibility that members could end up charged with statutory offences as a result of an ordered statement was "too bad."

As previously shown, internal interrogations are being conducted in the absence of counsel in the majority, if not all, cases, they are not public proceedings, and apparently there is no presumption of innocence. This form of interrogation has ominous parallels to the Star Chamber.\(^{185}\) A critical observation by Herzig is that when an internal investigator takes an ordered statement from a police officer a *government agent* is, in fact, compelling the *creation* of a previously non-existing communication or document.\(^{186}\) Unlike private employment investigators and most other public employment contexts, in the R.C.M.P. the employer is the state arm that conducts criminal investigations. This unique feature must not be overlooked when considering the issue of ordered statements.

Folk, in the context of military discharges, attempts to assert that the stigma from a misconduct discharge is less than the stigma from a criminal conviction because (in his example) legislation restricts disclosure of details through the use of discharge certificates and proceedings are not open to the public.\(^{187}\) The problem is that the discharge certificate

\(^{184}\) Keenan, *supra*, note 105 at 174-5.

\(^{185}\) Law Reform Commission of Canada, *Questioning Suspects* (Working Paper 32) (Minister of Supply and Services, 1984) at 44-5 identified the same concerns over police interrogations in general.

\(^{186}\) *Supra*, note 73 at 435.

\(^{187}\) *Supra*, note 74 at 9-10.
may say the reason for discharge (e.g. disciplinary dismissal). Even if the reason is not public, every prospective employer will know it was not by retirement or resignation.

Further, while a criminal record may be sealed, not subject to disclosure (e.g. youth records), or expunged with a pardon, R.C.M.P. records will always indicate the grounds for release and may permanently prevent employment possibilities. Some human rights regimes make it a discriminatory act to not employ someone in certain circumstances because of a criminal record, but no such protection exists for disciplinary dismissal. Although R.C.M.P. disciplinary proceedings may be in camera (a position that is presently under attack), the prompting circumstances, suspensions, and discharges are usually accompanied by considerable notoriety, media attention, and formal media releases. Further, if R.C.M.P. disciplinary proceedings become public there will be no privacy surrounding the reasons for a discharge. Moreover, when a member is suspended there is often a ritualistic spectacle and public degradation ceremony employed by the Force. The member to be suspended is marched (sometimes literally) into a superior’s office where the member is required to turn over identification, weapons, keys, passes, any locker/desk is cleaned out, and then the member is marched out of the building by one or more members for all to see. Other members are sometimes told not to associate with the suspended member. It was the opinion of several members involved in the discipline process that ordered statements are used in proceedings to suspend or informally discipline members, yet no one has challenged this

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188 The suspension of S/Sgt. Delisle, supra, note 68 certainly utilized these degradation tactics. Recall also the comments of the E.R.C. discussed in Chapter 6 about the memo issued at the Training Academy directing other members and recruits not to associate with a recruit suspected of having engaged in misconduct. Isolating and marginalizing members under suspicion or who are labelled as having "attitude problems" is common.
specific use. The stigma of being released from employment for misconduct can carry an even greater burden than a criminal conviction because the person has lost his or her income and the "record" is permanent. With the trend towards public and open police disciplinary hearings, the circumstances surrounding any discipline have an even greater likelihood of becoming a permanent blot on an officer's record.

As Wigmore noted, amnesty statutes in the past have been an expedient way to investigate offenses whose proof and punishment were otherwise practically impossible because of the criminal implications of the offence. Of course the use of amnesty or immunity still leaves the stigma or disgrace of the offence in place. The object of self-incrimination is to protect against the employment of the legal process to extract from a person an admission of guilt which will also be used to take the police to other evidence.

If the courts have decided that respect for individual rights is more important than efficient police operations in the criminal context, why should individual rights be sacrificed in the discipline context where the consequences are equal to, if not more severe, than the criminal context for both the accused and society? Unlike members of other professional

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189 M88, M93 & M107.

190 (1905), supra, note 141 at 3166 notes that amnesty statutes had been an investigative vehicle for two centuries to deal with incrimination issues.

191 Ibid. at 3176-77. Wigmore also points out that immunity or amnesty may not protect the person from being prosecuted in another jurisdiction.

192 Ibid. at 3123.

193 Rene J. Marin, Admissibility of Statements, 8th ed. (Aurora Ont.: Canada Law Book Inc., 1992) at 305 suggests society has placed a greater priority on individual rights than efficient police operations. As an example of disparate consequences, consider that because of mitigating medical circumstances a minor theft charge is diverted without charge or results in an absolute or conditional discharge, yet the member is suspended and dismissed, leaving the member unemployable and potentially his or her family financially destitute. The author has observed this
bodies (e.g. law societies), it is not the professional's employer and/or the state that is responsible for the investigation and imposing discipline.\textsuperscript{194} These self-regulating professional bodies do not have a concurrent criminal investigative responsibility and capacity. At least with a professional discipline body there is no intermingling of the employer-employee, internal, public, and criminal accountability roles. Based on the frequent assignment of one state investigator to conduct the criminal, internal and public complaint investigations in the R.C.M.P. there is virtually no distinction in roles or responsibilities as exist in other employment contexts.

Permitting compelled statements with use-immunity, but admitting derivative evidence does little to address constitutional equal protection arguments for police officers.\textsuperscript{195} If the protection against self-incrimination and the right to silence is to protect an individual against the arbitrary power of the state, one can find no better example than internally ordered interrogations.\textsuperscript{196} As shown, such a power is not necessarily bad, but it is very dangerous.

Despite appearances, protections and remedies for members under internal investigation may be more fiction than reality. One of the problems identified in earlier chapters is the need to further maximize managerial and investigative accountability in the R.C.M.P. internal investigative process. A problem with the compelled statement authority, as pointed out in this thesis, is that there are no "rules" or procedures to ensure that the circumstance unfold with members.

\textsuperscript{194} While lawyers may be required to respond to the law society regarding allegations, they are allowed to prepare and forward written response at the investigative stage. Lawyers are not questioned \textit{per se} when an allegation is filed, and they can access counsel.

\textsuperscript{195} Friendly, \textit{supra}, note 88 at 712 raises this point.

\textsuperscript{196} With the "formal" ability to compel answers, it is ensured that witnesses will "informally" "cooperate" to avoid the compulsion; see, Fuerst, \textit{supra}, note 14 at 235 and 240.
member understands the processes and obligations before joining the R.C.M.P. There is no training, and at best, inconsistent and often inadequate representation is provided. In addition, there does not appear to be any consistent means of ensuring an accurate record is maintained. It cannot be claimed under such circumstances that a fair and appropriate balance is being maintained between the individual rights of the member and the interests of the R.C.M.P. and society.

In order to avoid adverse investigative or adjudicative findings by a discipline board that could affect the outcome of a criminal trial, Ceyssens suggests that it may be preferable to defer internal proceedings until the completion of the criminal aspect. In order to avoid the use and derivative-use "quagmire," Herzig has suggested that the only way properly to protect an officer subjected to a coercive statement is to employ use and derivative-use immunity upon the performance of the coercive act of ordering. This procedure would avoid trying to provide protection when it is too late (i.e. when an attempt is made to use the statement in an investigation or proceeding\trial). Most important, all parties would know their positions at the outset. Thus, if the department orders a statement, it cannot prosecute the member criminally. Using this process, the incrimination, silence, and derivative evidence debates never arise because there is no possibility of

197 L.R.C.C., supra, note 185 at 47 cites these general problems with the police interview process.

198 Supra, note 120 at 5-45. G. Arthur Martin, "The Privilege Against Self-Incrimination Under Foreign Law: A. Canada" (1960-61) 51 Journal of Criminal Law, Criminology and Police Science 161 at 165 refers to the practice of tribunals being used to conduct a searching examination of those suspected of criminal acts to build a case.

199 Supra, note 73 at 429.

200 Ibid. at 430.
prosecution from an ordered statement. It would also ensure that the police organization use such statements for the purpose stated: to enable the employer to determine what happened. These considerations are relevant to evaluating the complete ordered statement context.

b. Criminal Context

The other area to be considered is the protection that exists for an individual-member at the investigative stage. Even prior to the Charter it was generally held that individuals possessed a right to silence when under criminal investigation. Further, pursuant to the "confessions rule," no statement made to a person in authority outside a courtroom is admissible in evidence unless the Crown proves it was made freely and voluntarily. The distinctions and differences between the testimonial privilege/right against self-incrimination,

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the investigative right to silence and the confessions rule is sometimes difficult to perceive.\textsuperscript{203} Since the proclamation of the \textit{Charter}, however, much of the analysis of the right to silence and investigative protection has occurred under s. 7. Section 7 of the \textit{Charter} states that "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."

Without mentioning s. 7, the Ontario Court of Appeal in \textit{R. v. Esposito},\textsuperscript{204} found there is a common law right to remain silent at both the investigative and trial stages of the criminal process. Further, in \textit{R. v. Woolley}\textsuperscript{205} the right to silence possessed by an accused person in the criminal context was proclaimed to be a "tenet of our legal system." One of the clearer judicial statements regarding incrimination and silence is found in \textit{R. v. Greig}, where Dupont J. of the Ontario High Court asserted that under s. 7 of the \textit{Charter}:

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.\textsuperscript{206}

It was not until the decision of the Supreme Court of Canada in \textit{R. v. Hebert}\textsuperscript{207} that

\textsuperscript{203} As noted, \textit{supra}, the law was settled, even prior to the \textit{Charter}, that a person charged with a criminal offence could not be compelled to testify against her or himself at trial (\textit{i.e.} testimonial protection). This common law principle was further enshrined in the \textit{Charter}, but the right not to be compelled to testify against one's self under s. 11(c) (and s. 4(1) \textit{C.E.A.}), as noted above, is limited to charged persons in the criminal trial process; see, the writings cited, \textit{ibid.}; R.E. Salhany, \textit{A Basic Guide to Evidence in Criminal Cases} (Toronto: Carswell, 1990) at 11.

\textsuperscript{204} \textit{Supra}, note 131 at 362 (Ive. to appeal to the S.C.C. refused, 65 N.R. 244n).

\textsuperscript{205} (1988), 40 C.C.C. (3d) 531 (Ont. C.A.) at 539 as \textit{per} Cory J.A. (as he then was).

\textsuperscript{206} (1987), 56 C.R. (3d) 229 at 237.

\textsuperscript{207} [1990] 2 S.C.R. 151.
any conclusive guidance was provided regarding the right to silence and privilege against self-incrimination under s. 7 of the Charter. The stage for an analysis of the right to silence and incrimination was set in *Re B.C. Motor Vehicle Act*, wherein Lamer J. (as he then was), provided direction regarding the phrase "principles of fundamental justice" as contained in s. 7. Essentially, it was found that ss. 8 to 14 of the Charter are specific illustrations of the principles of fundamental justice to be accorded in criminal and penal law under s. 7. Thus, Lamer J. concluded in *B.C. Motor Vehicle Act* that:

...the 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.... Whether 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.

Madame Justice McLachlin, writing for the majority in *Hebert*, reviewed the jurisprudence on the right to silence and concluded that s. 7 is founded on two common law principles: the "confessions rule" (*i.e.* involuntary statements are inadmissible) and the testimonial "privilege against self-incrimination" (*i.e.* not required to testify at trial). Connecting both these themes is the affirmation that 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

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211 *Supra*, note 207 at 164.
remain silent"\textsuperscript{212} (emphasis added). It is on this basis that McLachlin J. found 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 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.\textsuperscript{213}

The Court recognized "that an accused person has no obligation to give evidence against himself...there is a right to choose."\textsuperscript{214} However, the majority limited the scope of the right to silence (\textit{i.e.} the choice to speak to the authorities) as it relates to criminal police interrogations (and the use of undercover operators) to that period of time when the person is in\textit{ detention}. It was on this point that Sopinka and Wilson JJ. parted with the majority.

Madame Justice Wilson declared that if the right to silence under s. 7

\ldots is to achieve the purpose that it was clearly intended to achieve, [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.\textsuperscript{215} (emphasis added)

The detention distinction may not have a significant bearing on ordered statements, since it could be argued that members are "detained" under statutory authority when they are being ordered to give a statement. The question is whether the internal statement context also provides the officer with a right to choose under s. 7 of the \textit{Charter}.

Prior to \textit{Hebert} then, the self-incrimination privilege at common law only protected a person in a witness box when answering questions.\textsuperscript{216} In \textit{Hebert}, it was made clear that the

\textsuperscript{212} \textit{Ibid.}

\textsuperscript{213} \textit{Ibid.} at 174.

\textsuperscript{214} \textit{Ibid.}

\textsuperscript{215} \textit{Ibid.} at 190.

\textsuperscript{216} Watson, \textit{supra}, note 140 at 115.
right to silence (informed by the confessions rule and protection against self-incrimination) at the investigative stage criminally is about having a choice: first, to speak with authorities; and second, whether to give a statement. Watson posits that Hebert consolidates the confessions and self-incrimination rules as they existed before the Charter and folds them into the embrace of the principle of fundamental justice under s. 7.\(^{217}\) The result is that the Supreme Court of Canada has recognized that, silence, the common law, C.E.A. requirements, and self-incrimination under "conscription" form part of the s. 7 analysis.\(^{218}\)

Watson asserts that all tests for admissibility of statements are based on the common feature of conscription.\(^{219}\) As observed in Hebert, disapproval of conscription even outweighs the pursuit of truth in some instances.\(^{220}\) Paciocco asserts that the purported difference between compelled testimonial disclosures and compelled disclosure of real evidence is one of reliability, causal connection, and the personal autonomy/privacy of mind.\(^{221}\) This, and other developments, lead Kaiser to speculate that s. 7 may even extend the right to silence to allow a witness to refuse to answer questions before an inquiry.\(^{222}\)

From this analysis, it is evident that the courts under s. 7 of the Charter have evolved

\(^{217}\) *Ibid.* at 112.

\(^{218}\) *Ibid.* at 109; see also, Paciocco, *supra*, note 140 at 103.

\(^{219}\) *Ibid.*

\(^{220}\) *Ibid.* at 107-08. In Clarkson, *supra*, note 202, Wilson J. left open the possibility of emergency police questioning and evidence gathering without a warning or waiver (e.g. emergency or public safety); see, M.T. MacCrimmon, "Developments In The Law of Evidence: The 1985-86 Term" (1987) 9 *Supreme Court Law Review* 363 at 391.

\(^{221}\) *Supra*, note 140 at 86-88.

a right to silence and investigative non-incrimination protection in the criminal process that is "triggered" at the moment an individual is "subjected to the coercive powers of the state" by virtue of her or his detention. Whether s. 7 is triggered by an internal/employment process is less clear. This will create an interesting dilemma for the courts, since a member providing a compelled statement under an (statutory and/or superior's) "order" cannot leave the presence of the (criminal, public and/or internal) investigating officer without incurring significant internal repercussions (e.g. dismissal). However, the member is being interviewed/detained within the context of an "administrative" process, and not the criminal process per se. Even more troubling is that the compelled answers can also provide the evidence to support a criminal investigation, charge and prosecution.

c. The Regulatory and Administrative Context

i. Pre-Charter

Paciocco argues that self-incrimination played a vital, but unacknowledged, role in the context of informal proceedings (e.g. investigations) prior to the Charter and influenced the law of evidence. Although the confessions/voluntariness rule is purportedly concerned with reliability, and not self-incrimination, the fact is that incrimination informed the silence-confessions debate.

The Canadian judiciary has not always been comfortable with the witness-accused

223 See also, Broyles v. The Queen, [1991] 3 S.C.R. 595, per Iacobucci J.

224 Supra, note 140 at 82-3.

225 Ibid. at 82-3. Paciocco points to: 1) false statements had to be voluntary to be admissible; 2) only applies to persons in authority (i.e. no compelling by state agents); 3) oppression/waiver is not trustworthiness, but incrimination related; and 4) adverse inferences when silence maintained dependent; see ultimately, the findings of McLachlin J. in Hebert, supra, note 207.
dichotomy, particularly where an administrative inquiry or hearing could be substituted for the criminal proceeding. For example, in *Batary v. A.G. of Saskatchewan*, the Supreme Court of Canada found that someone charged with murder could not be compelled to testify regarding the circumstances of the death at a Coroner's inquest, since it would enable the prosecution to usurp the accused's privilege against incrimination and right to silence. In Cartwright J.'s view, the *C.E.A.* did not have the effect of making an accused compellable at an inquest. In *Batary*, it was found that when an accused was *charged* he or she was no longer a "witness" under the *C.E.A.*, but someone "charged," and as a result the accused could not be compelled to testify. Thus, if a person is charged with a criminal offence he or she is no longer equivalent to a witness, which invokes self-incrimination protection and extends it from the criminal context to other proceedings.

This apparent extension of self-incrimination to non-criminal proceedings was, however, shortened in *Faber v. The Queen*, in which the witness was not charged, but merely a "suspect" in a criminal matter. In a five to four judgment, the majority found that the Coroner's inquiry was not concerned with the investigation of crime, nor was it a trial with an "accused," since the witness had not been charged (but, clearly appeared to be a

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228 Ed. Ratushny, "Self-Incrimination: Nailing the Coffin Shut" (1977-78) 20 *Criminal Law Quarterly* 312; Ratushny, *supra*, note 159 at 34 confirms that once charged the accused cannot be compelled to testify at a Coroner's inquest, so the state merely postpones "charging" to take advantage of this investigative back door.

229 Ratushny (1979), *ibid.* at 80-1.


231 *Ibid.* at 29-32, *per* De Grandpre J.
suspect. Since a Coroner's inquest had not been part of the criminal justice structure in Quebec since 1892, the majority found individuals were compellable and examinable. The dissent, led by Pigeon J., were of the view 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. The fact that the Crown could postpone charging someone until after an inquest permitted the inquest to become an evidential and investigative vehicle for the criminal case.\(^{232}\)

Two years later, the issue of compelling testimony before an administrative-investigative tribunal arose again in Di Iorio & Fontaine v. Montreal Jail Warden,\(^{233}\) in which 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 can be charged with a murder, it would be no less permissible to identify persons involved with organized crime and its activities. Mr. Justice Dickson (as he then was), brusquely declared that:

> Whether 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.\(^{234}\)

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\(^{232}\) Ratushny (1977-78), supra, note 228 at 349; Ratushny (1979), note 159 at 34-5. As noted, there are also protections absent in an inquest that can be disturbing, for example: 1) no specific charge or allegation; 2) no identified case to meet; and 3) rules of evidence are limited, sporadic or non-existent. As pointed out in Chapter 4, Crown counsel can attend a Coroner's inquest in British Columbia to question witnesses.

\(^{233}\) Supra, note 155. The primary issue, which is not as important here, was whether the province was trammelling the criminal law area, thereby making the commission ultra vires and unconstitutional under the division of powers.

\(^{234}\) Ibid. at 222.
In dissent, Laskin C.J.C. was concerned that the province, in the form of an administrative commission or inquiry, would be permitted to 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 explicit concern that the province could use the administrative-investigatory mechanism to impose disclosure on individuals in the criminal context.

In A.G. Quebec v. Begin, the Supreme Court of Canada clearly stated that self-incrimination does not apply to pre-trial/investigative statements.\textsuperscript{235} Ratushny noted that the only conclusion that could be drawn is that an accused did not have the protection of any general principle against self-incrimination in relation to a trial, and the rule that a person is not compellable must be interpreted literally. Although it prevents the accused from being called as a witness, it goes no further in providing protection, and in fact, an accused may incriminate himself or herself by taking advantage of the rule.\textsuperscript{236}

It is evident that prior to the Charter, the Supreme Court was not receptive to a broad application of the privilege against self-incrimination or silence in regulatory or administrative proceedings that were investigative in nature, despite the apparent discomfort this caused for some.


\textsuperscript{236} Ibid. at 42; Paciocco, supra, note 140 at 100-1. In Rothman, supra, note 202, Estey J. in dissent argues that self-incrimination applies, however, Lamer J. (as he then was) accepted Ratushny's analysis and argued self-incrimination is irrelevant to informal proceedings; see, Paciocco at 98-9. Further, traditionally, at least, Canada has not accepted the U.S. position that interrogations are involuntary (i.e. per se coercive and presumed involuntary), and has accepted the Ibrahim position that interrogations are not inherently intimidating (i.e. do not presume involuntary).
ii. Post-Charter

Early in the history of the Charter the Saskatchewan Court of Queen's Bench, endowed s. 7 with an interpretation of self-incrimination that included administrative proceedings. In *R.L. Crain Inc. v. Couture & Restrictive Trade Practices Commission*, Scheibel J. noted that:

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.

The British Columbia Court of Appeal disagreed with this approach, and in *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.*, 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 a privilege would be available.

In the wake of the Charter, the battle lines were again being drawn over the right of the state to compel individuals (or corporations) to attend before a regulatory or administrative inquiry 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 administrative or disciplinary proceedings (*i.e. Wigglesworth*), judicial clarification on the nature of the protection provided by s. 7 of the Charter was required.

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d. *Thomson Newspapers*

When faced with an opportunity to rule conclusively on the scope of the protection against self-incrimination and the right to silence under s. 7 of the *Charter* in a regulatory/administrative investigation process, the Supreme Court was unable to supply a majority judgment. In *Thomson Newspapers*, the appellants were served with orders to appear before the RTPC to answer questions and produce documents, thereby enabling the RTPC to determine whether evidence existed that the corporate company had committed the indictable offence of predatory pricing contrary to the *Combines Investigation Act* (now *Competition Act*).241

Both La Forest and L'Heureux-Dube JJ., found that s. 7 of the *Charter* was not violated, while Sopinka and Wilson JJ., held that s. 7 was breached, and that the impugned measure was not saved under s. 1 of the *Charter* (i.e. it was not a reasonable limit demonstrably justified in a free and democratic society). Mr. Justice Lamer (as he then was), found it was inappropriate to deal with s. 7 under the circumstances because the case also constituted an attack on the *C.E.A.*242

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240 *Supra*, note 12. Paciocco, note 140 at 103. The Ont. C.A. held that the right to silence is restricted to "police" (i.e. criminal) inquiries and is not applicable to anti-combines offenses.

241 *Supra*, note 13.

242 This same division arose in *Stelco*, *supra*, note 12 which was decided at the same time and involved the same issues and legislation. The author will not deal with the positions regarding s. 8 (search and seizure) of the *Charter*. There are several good reviews of the divisions in *Thomson*; see, Fuerst, *supra*, note 14; Kent Roach, "Public Inquiries, Prosecutions Or Both?" (1994) 43 *University of New Brunswick Law Journal* 415 at 417-18. As discussed by Fuerst at 237-40, basically, L’Heureux-Dube J. saw no problems with the compulsion. While LaForest J. saw no problem, he did concede the need for derivative protection because it forces investigations to target earlier and wait until end of investigation. The most strident position is held by Sopinka J. for two reasons: first, he would force administrative agencies to decide if it will be a regulatory or criminal in nature prior to doing investigations; and second, this requires a decision on how to proceed before knowing the seriousness of the conduct to be investigated.
Although La Forest 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 the situation. In his view, an absolute right to refuse to answer questions where the information can most easily be obtained by questioning those responsible for the decisions/action would create a "dangerous and unnecessary imbalance" between the rights of the individual and society's interest in discovering the truth.\(^\text{243}\) Upon reviewing the "inquisitorial" nature of the RTPC process, and the fact that the C.E.A. has legislatively recognized for almost 100 years that the protection against self-incrimination extends only to "testimonial immunity" (and not derivative-use immunity), La Forest J. concluded that s. 7, in this context, does not necessarily extend to "evidence derived from compelled testimony."\(^\text{244}\) However, La Forest J. was prepared to find a limited discretion to exclude derivative evidence from compelled testimony.

Mr. Justice La Forest asserted, by analogy to the s. 24(2) exclusion analysis utilized 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 (\textit{i.e.} "real" not "created" evidence analysis), and evidence that would be virtually undiscoverable without the incriminatory testimony (\textit{i.e.} "conscripted" or "created" evidence). In response to the conscripted evidence scenario, La Forest 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

This is not the situation with ordered statements because the nature of the allegation has already been made (\textit{i.e.} complaint) or the action is known (\textit{e.g.} shooting).

\(^{243}\) Supra, note 12 at 223.

\(^{244}\) Ibid. at 228-9.
fundamental justice" by creating an unfair trial\footnote{Ibid. at 238.} (e.g. evidence that \textit{would} have been found versus evidence that \textit{could} have been found). Overall though, La Forest J. found that admitting independently-existing evidence (\textit{i.e.} even though derived it was not created) does not affect the fairness of the trial, and as such, any compelled testimony identifying the evidence, does not breach s. 7. It is not satisfactorily explained by La Forest J. how this \textit{ad hoc} discretion to exclude derivative evidence, obtained as a result of the use of the self-incriminatory testimony, is co-incident with the right not to be deprived of the protection of s. 7.

Madame 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."\footnote{Ibid. at 249.} In her view, the \textit{Charter} has not created an unassailable right against self-incrimination, rather it has "preserved the division of the rules" regarding witnesses and compellability (\textit{i.e.} ss. 11(c) and 13).\footnote{Ibid. at 255.} With regard to derivative evidence, L'Heureux-Dube J. noted that the \textit{C.E.A.} never extended beyond the "actual testimony" of the witness, and that derivative evidence (improperly) obtained from an accused in pre-\textit{Charter} cases was routinely admitted.\footnote{Ibid. at 255-6; for example see, \textit{R. v. Wray}, \textit{supra}, note 202.} Post-\textit{Charter} decisions have also recognized that "real" evidence will only be excluded if admission would bring the administration of justice into disrepute. The conclusion of L'Heureux-Dube J. is that "[t]here is no inflexible rule
that the admission of derivative evidence will affect the fairness of the judicial process."\(^{249}\)

As a result, s. 7 does not contain derivative-use immunity in relation to compelled testimony before boards of inquiry and related investigative agencies. In the end, La Forest and L’Heureux-Dube JJ. agreed 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. (with whom Sopinka J. agreed in part), felt that any discernment between an "investigatory" versus "prosecutorial" process is "irrelevant when a criminal prosecution is a potential consequence of the... investigation"\(^{250}\) (emphasis added). After canvassing several Commonwealth jurisdictions, and the United States, Wilson J. concluded that the only way to protect a person from being "conscripted" and having derivative evidence from an investigatory proceeding utilized is to exclude such evidence.

Wilson J. rejected the s. 24(2) analogy, arguing a judge's discretion is:

\[
...\text{no guarantee of protection against the use of derivative evidence obtained as a result of a witness's compelled testimony} \ldots \text{exclusion must be a matter of principle and of right, not of discretion.}^{251}\text{ (emphasis added)}
\]

Section 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.\(^{252}\) (emphasis added)

\(^{249}\) Ibid.

\(^{250}\) Ibid. at 162.

\(^{251}\) Ibid. at 179.

\(^{252}\) Ibid.
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 society, which was the result in this case.\(^{253}\)

In agreeing with the reasons of Wilson J., Sopinka J. observed that the right to remain silent under s. 7:

\[\ldots\text{is a right not to be compelled to answer questions or otherwise communicate with police officers or others whose function it is to investigate the commission of criminal offences.}\]

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.\(^{254}\) (emphasis added)

Mr. Justice Lamer (as he then was) declined to pronounce on the s. 7 issue since it would by inference lead to a judicial statement on s. 5 (witness not excused from answering) of the \textit{C.E.A.}, which, if known to the other Attorneys General, would probably have prompted further interventions. Secondly, it was his 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 section that removed the right to refuse to answer questions.\(^{255}\)

In the end, this case did not provide determinative guidance regarding testimonial compulsion from regulatory investigations and the use of evidence derived from such proceedings.\(^{256}\) However, several important factors were determined in this case. First, the entire panel in \textit{Thomson Newspapers} agreed that ss. 11(c) and 13 are not necessarily a

\(^{253}\) \textit{Ibid.} at 182.

\(^{254}\) \textit{Ibid.} at 273.


\(^{256}\) Fuerst, \textit{supra}, note 14 at 235.
complete statement on the right to silence and self-incrimination, in that s. 7 does have some "residual content" that may extend to a situation not contemplated by the specific provisions of the Charter. Second, the Court was unanimous in concluding that the appellants in Thomson Newspapers were subjected to a deprivation of liberty of some form, which triggered s. 7. In particular, even L’Heureux-Dube J. found that she was:

...prepared to accept that as found by Wilson J., an order given under s. 17 of the Act [to appear for examination] may be construed as constituting a deprivation of liberty such as to bring the order under the scrutiny of s. 7.

The Act’s compulsion to appear at a specific time and place to testify, subject to legal consequences for failure to comply constitutes, one could think, just as much of a deprivation of "life, liberty and security of the person."257 (emphasis added)

Third, the "context" and consequences of compelled administrative examinations appeared to remain sufficiently troublesome that an impetus for re-alignment and clarity on self-incrimination and silence was still necessary. Finally, it is an accepted constitutional principle that either the "purpose" or "effect" (i.e. consequences) of a legislative measure can breach the Charter.258 It is on this basis that an examination of the constitutional validity of compelled examinations was still required. It is clear from the reasons that the Justices were experiencing difficulty in determining how, or even whether, s. 7 should apply to investigations and proceedings that were not purely criminal.

e. Spyker

Several months after Thomson Newspapers, the British Columbia Supreme Court in R.
v. Spyker was confronted with a situation in which, during an accused's trial on a charge of dangerous driving causing death, the Crown attempted to introduce a statement the accused had given to a provincial insurance adjuster two days after the accident. Under the provincial motor vehicle insurance scheme a driver is required to provide a statement to the government insurance corporation. Failure to provide a statement is an offence. While the legislation stated that the statements are to remain confidential, except in certain circumstances (i.e. civil action where corporation is a party or written consent), the prosecutor learned of the statement and subpoenaed the adjuster to the trial.

The accused asserted that, inter alia, the use of the statement violated s. 7 of the Charter. The Court found that ss. 11(c) (not compellable in proceeding against self) and 13 (incriminating evidence cannot be used in subsequent proceedings) of the Charter were inapplicable because, respectively, there was no "charge" when the statement was taken and an insurance interview is not a (legal) "proceeding." In relation to s. 7, the Court noted that the insurance scheme provided virtually no protection against the use of the statement. In conclusion, after extracting the few points of agreement from Thomson Newspapers, Shaw J. found that, under s. 24(1) of the Charter (not subsection (2) exclusion):

...the use by the Crown of the statement given by the accused to I.C.B.C. will be in substance the conscripting of the accused to provide testimony against himself. In my view, it is a principle of fundamental justice that a person cannot be forced to provide the testimony (in this case the statement) which incriminates himself or herself without also being provided with protection that the evidence will not be used against


260 At the time, s. 10 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204.

261 Supra, note 259 at 129.

262 Ibid. at 130.
that person in a criminal prosecution.\textsuperscript{263}

Thus, in the case of regulatory or administrative proceedings that compel answers (where failure to do so is an offence) there will be subsequent use-immunity. However, no judicial guidance was offered on the matter of derivative evidence. Ordered statements under the \textit{R.C.M.P. Act} already have statutory use-immunity. The more perplexing question remained as to whether s. 7 will provide derivative-use immunity.

\textbf{f. \textit{S.}(R.J.)}

Although all the Justices continued to agree that there is residual protection of some sort, the Supreme Court of Canada continued to be deeply divided on the scope and content of incriminatory protection under s. 7 in the case of \textit{R. v. S.}(R.J.).\textsuperscript{264} The accused young offender was charged with breaking and entering. Another young offender separately charged with the same offence was subpoenaed by the Crown to testify against the accused. At trial, counsel for the witness/co-accused had the subpoena quashed as a violation of s. 7 of the \textit{Charter}.

The Justices attempted to resolve two issues regarding s. 7: first, are there circumstances in which a witness can be exempted from the compulsion to testify; and second, is there any derivative-use immunity protection. Mr. Justice Iacobucci, writing for a


\textsuperscript{264} \textit{Supra}, note 15.
majority of four (La Forest, Cory and Major JJ.) identified a "partial" or "limited" derivative-use immunity under s. 7. The majority also appeared to accept that a "colourable" attempt to compel testimony from an individual can result in an exemption from testifying. Lamer C.J.C., although accepting the proposed limited derivative-use immunity (making a majority of five), also found that in exceptional circumstances there is a compellability immunity. Madame Justice L'Heureux-Dube (Gonthier J. concurring), consonant with her view in Thomson Newspapers, rejected the limited derivative-use immunity approach and proposed a "fundamentally unfair conduct" analysis under s. 7 to provide a compellability exception. Mr. Justice Sopinka (McLachlin J. concurring) also rejected the limited derivative-use immunity approach and adopted a "compellability approach" under s. 7, which is somewhat similar to the unfair conduct test of L'Heureux-Dube J. Thus, five justices accepted a "limited" ("residual" or "subsequent") derivative-use immunity. With respect to a compulsion immunity: one justice endorsed an exceptional exemption; four justices endorsed a form of "colourable" compulsion exemption; two justices endorsed a fundamentally unfair exemption; and two justices endorsed a prior to compellability approach. The Court, therefore, failed to clarify the state of the law with respect to derivative-use immunity or compulsion exemption.265

i. Limited Derivative-Use Immunity

As a starting point, Iacobucci J., writing for the (five justice) majority, found that a "statutory compulsion to testify constitutes a deprivation of liberty" and "[a] deprivation of

265 Supra, note 263.
liberty may arise by virtue of a compulsion to speak *per se.* Further, "the encroachment upon liberty is complete at the moment of compelled speech, regardless of its character." It was found that both "imprisonment" and an "imminent threat of imprisonment" are sufficient impositions on liberty to attract s. 7.

After completing an exhaustive review of the common law, statutes, pre-Charter and post-Charter case law, American and English law, and policy reasons surrounding incriminatory instruments, the majority announced that "[t]here is a principle against self-incrimination in Canada which is part of fundamental justice." However, it was also pointed out by the majority that although the principle against self-incrimination is not fully and completely expressed in the law, it is not an absolute directive and the principle "may mean different things at different times and in different contexts." The primary policy justification for protection against self-incrimination is the idea that, based on the notion of privacy and that individuals should be "left alone," the Crown must establish a case to meet.

Noting there are two polar, and many interspersant, views on self-incrimination, Iacobucci J. rejected the use of s. 7 as a repository for an absolute right to silence or the common law witness privilege. The majority accepted that the principle of self-

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267 Ibid.

268 Ibid. at 45.

269 Ibid. at 46-48.

270 Ibid. at 38.

271 Ibid. at 49-50 and 60. For example, complete immunity from answering and the related notion of transactional immunity (*i.e.* answer but complete immunity from charges) to
incrimination may demand silence in one context and immunity in another. The question is what form of protection is offered by the principle of self-incrimination in relation to compelled disclosures. Recognizing that there is more than one form of derivative evidence, the majority uses the term to refer to evidence that in fact results from a compelled disclosure. This leads the majority to find that the distinction is between "evidence which is created, and evidence which is merely located or identified." In other words:

Stated succinctly, compelled testimony is evidence which has been created by the witness, whereas derivative evidence is evidence which has independent existence. It is only the class of created evidence which is, by definition, self-incriminatory.

Based on an analysis of the s. 24(2) (exclusion) cases, the majority found that not all derivative evidence must be excluded under the Charter (i.e. real evidence versus conscripted evidence approach):

Accordingly, I think that derivative evidence which [1] could not have been obtained, or [2] the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the Charter in the interests of trial fairness. Such evidence, although not created [emphasis original] by the accused and, thus, not self-incriminatory by definition, is self-incriminatory none the less because the evidence could not otherwise have become part of the Crown’s case. To this extent, the witness must be protected against assisting the Crown in creating a testimonial compulsion, but no pre-trial compulsion.

272 Ibid. at 61.

273 Ibid. at 70. The types of derivative evidence, as identified by the Ontario Law Reform Commission are: 1) evidence that could have been discovered only as a result of the testimony; 2) evidence that was discovered as a result of the testimony, but that could have been discovered without such testimony; 3) evidence that would, or would probably, have been discovered even without the testimony; and 4) evidence that was discovered after the testimony was given, but independently of the testimony.

274 Ibid. at 74.

275 Ibid.
case to meet.\textsuperscript{276} (emphasis added)

Thus, the majority recognized a residual derivative-use immunity for compelled testimony. The question of discovery is to be an inquiry into "probabilities, not mere possibilities," which is to say whether \textit{practically speaking} the evidence would have been located on the facts.\textsuperscript{277} The burden of proof (on a balance of probabilities) remains with the party claiming a breach, which will most likely be possible on the basis of Crown disclosure. However, if disclosure does not adequately enable the accused to demonstrate the derivative evidence issue, it is only necessary that a "plausible connection" be demonstrated between the proposed evidence and prior testimony.\textsuperscript{278} Then, as a practical matter, "the burden is likely to be borne by the Crown, since it is the Crown which can be expected to know how evidence was, or could have been, obtained."\textsuperscript{279} In the case of criminal matters, because of the penal sanctions involved, if a person is compelled to testify he or she will have subsequent derivative-use immunity with respect to evidence which could not have been obtained or appreciated but for the compelled answers. The unresolved issue is whether s. 7 has application to derivative evidence acquired in a regulatory or administrative context.

\textbf{ii. Exceptional Testimonial Exemption}

Although Lamer C.J.C. accepted that a person charged with "a crime or is a serious suspect does not automatically entitle him or her to avoid being compelled to testify"

\textsuperscript{276} \textit{Ibid.} at 81.
\textsuperscript{277} \textit{Ibid.} at 82.
\textsuperscript{278} \textit{Ibid.} at 84.
\textsuperscript{279} \textit{Ibid.}
(emphasis added) and that use-immunity (s. 13) and limited derivative-use immunity (s. 7) will provide sufficient protection against direct and indirect use of evidence, there may be occasions when an exemption (or immunity) to being compelled to testify is warranted.\textsuperscript{280} Thus, Lamer C.J.C. agreed with the majority regarding derivative-use immunity, but he goes one step further and recognized that a person can make application to be exempted from a testimonial compulsion in which forcing the person to testify would violate the case-to-meet principle in a manner that cannot be remedied by an exclusionary rule.\textsuperscript{281} By way of example, Lamer C.J.C. referred to a situation in which testifying might reveal an accused's defence strategy or bring to light previously unknown crimes. Chief Justice Lamer agreed with Sopinka J. that, where it is shown that in all the circumstances, the prejudice to the witness's interests outweighs the necessity of obtaining evidence there should be a testimonial exemption. Chief Justice Lamer would also rely on the guiding factors enumerated by Sopinka J., \textit{infra}, to determine testimonial immunity.

\begin{enumerate}
\item \textbf{Fundamentally Unfair Conduct}

Madame Justice L'Heureux-Dube (Gonthier J. concurring), because of serious practical concerns, and concerns over the characterization of the principle against self-incrimination, rejected the majority position.\textsuperscript{282} Neither was L'Heureux-Dube J. in complete agreement with Sopinka J.'s position on testimonial immunity, \textit{infra}, because his approach "places too much emphasis on determinations at the time the witness is sought to be

\textsuperscript{280} \textit{Ibid.} at 12.

\textsuperscript{281} \textit{Ibid.}

\textsuperscript{282} \textit{Ibid.} at 89.
compelled" which will lead to undue judicial speculation on issues that are better handled at trial.283

Despite the fact that L'Heureux-Dube J. accepted the case to meet principle, it was her view that it has never extended, at common law, to the pre-trial stage.284 After reviewing the case law and rules, L'Heureux-Dube J. concluded that there may be certain exceptions in which the rule or principle of compellability will lead to a fundamental injustice and warrant an exemption (e.g. Batary). The basic proposition, then, is that there are certain very exigent circumstances when, as required by fundamental considerations of fairness, the common law will provide a non-compellability exception.285 The conclusion of L'Heureux-Dube J., unlike the majority, was that the common law protections against self-incrimination "focus specifically on situations in which the state seeks to rely on compelled communications--i.e., words, or actions that may be communicative in character--as a means of proving the accused's guilt."286 Further, there is no rule or principle at common law, as proffered by the majority, that prohibits the use of derivative evidence per se.

Although L'Heureux-Dube J. agreed with the majority that there is a residual principle against self-incrimination under s. 7, it is generally manifested in the "right to silence" and not a broad principle against self-incrimination.287 It was also L'Heureux-Dube J.'s view that the s. 24(2) analogy and "but for" thresholds relied upon by the majority

283 Ibid.

284 Ibid. at 94.

285 Ibid. at 100.

286 Ibid. at 101.

287 Ibid. at 102.
are an inappropriate basis upon which to found self-incrimination protection and exclusion tests. One of the primary concerns is that the derivative approach of the majority "would also logically apply to civil cases where an accused person is compelled to testify" since failure to testify is also subject to imprisonment. In other words:

To recapitulate, the "but for" test advocated by Iacobucci J. is potentially over-inclusive as a test for the self-incriminatory nature of evidence. Both the common law and the Charter draw a fundamental distinction between incriminating evidence and self-incriminating evidence: the former is evidence which tends to establish the accused's guilt, while the latter is evidence which tends to establish the accused's guilty by his own admission, or based upon his own communication. The s. 7 principle against self-incrimination that is fundamental to justice requires protection against the use of compelled evidence which tends to establish the accused's guilt on the basis of the latter grounds, but not the former. (emphasis original)

In L'Heureux-Dube J.'s view, the residual right to silence under s. 7 is only triggered when "an adversarial relationship arises between the individual and state." Since the "dignity of the individual" is the value underlying the common law and Charter, and although the state may legitimately invade many spheres for valid and justifiable investigatory purposes relative to the accused, "it is fundamental to justice that the state not be able to invade the sanctum of the mind for the purpose of incriminating that individual." This led L'Heureux-Dube J. to elucidate the following test:

Fundamentally unfair conduct will most frequently occur when the Crown is seeking, as its predominant purpose (rather than incidentally), to build or advance its case against that witness instead of acting in furtherance of those pressing and substantial purposes validly within the jurisdiction of the body compelling the testimony. The

288 Ibid. at 105.
289 Ibid. at 107-08.
290 Ibid. at 110-111.
291 Ibid. at 112.
292 Ibid. at 114-15.
Crown will not be predominantly advancing its case against the accused when, by calling the witness, it is engaging an a colourable attempt to obtain discovery from the accused and, at the same time, is not materially advancing its own valid purpose.... The principles of fundamental justice under s. 7 do not allow the state to have a general power of interrogation, that is, to permit the state to pass a law requiring all suspected persons to answer per-trial questions, even if such a law prevented later use of those statements at trial.293 (emphasis added)

Thus, the state may still legitimately compel an individual to testify in order to pursue pressing and substantial interests within its valid jurisdiction, "such as advancing the search for truth in a separate criminal proceeding, investigating cause of death by a coroner, exercising administrative regulatory powers, or holding a full and effective public inquiry into a broad matter of public importance."294 Any "incidental" acquisition of derivative evidence pursuant to a valid purpose will not amount per se to a breach.295

Unless a person is in fact "charged," it was L'Heureux-Dube J.'s view that it will be very difficult to establish unfair conduct, and the more remote the witness' liberty interest qua accused, the less proximate is any potential jeopardy, which concomitantly reduces the need for a compellability exception. Clearly, this position is indistinguishable from the pre-Charter, if not Star Chamber, position on the matter of derivative evidence. For example, the Crown can still hold charges in abeyance, and then show-up at a Coroner's inquest, pursuant to its statutory right to do so, and examine the witness (soon to be accused).

iv. Compellability Approach

Mr. Justice Sopinka (McLachlin J. concurring) managed to provide another (more

293 Ibid. at 117.
294 Ibid.
295 Ibid. at 118.
textually limited) analysis on the issue of compelling testimony, and rejected the majority position. According to Sopinka J., the majority position focuses on the protection to be afforded a co-accused once already in the witness-box, while he would prefer to focus on the situation before the witness is in the box. Based on a review of the common law and pre-Charter cases, Sopinka J. concluded that "a person who is for all intents and purposes an accused but has not been formally charged should be able to avail himself or herself of the benefit of an exception" to testify. Mr. Justice Sopinka noted that:

In my opinion, it would be consistent with the development of the common law and the principles of fundamental justice to allow the court to make an exception to the right of the accused to remain silent is seen to outweigh the necessity of having that evidence. This exception would recognize the anomaly of the systematic compulsion of persons accused of a crime to testify [or be interviewed?] in other proceedings while, at the same time, they are entitled to remain silent if interrogated by the police before their trial and granted absolute immunity from testifying during their trial. The absence of such an exception would undermine these rights if not render them illusory.

In Sopinka J.'s view, limited derivative-use immunity addresses the problem at the wrong end, in that "[o]nce the accused has testified, attempting to contain the damage may be like closing the barn door after the horses have escaped." This, of course, would also be the case with ordered statements from police officers. The problem with use-immunity barn doors is even more acute with state endorsed and sanctioned ordered statements during an internal investigation.

Mr. Justice Sopinka concluded that under s. 7 a "charged" person and in some

296 Ibid. at 124.
297 Ibid. at 129.
298 Ibid.
299 Ibid. at 130.
circumstances a "person who is not actually charged," may be entitled to an exception from
the principle that the state is entitled to every persons evidence.\textsuperscript{300} The person claiming the
exemption should do so before the testimony is taken, and must satisfy the judge that "in all
the circumstances the prejudice to his or her interests overbears the necessity of obtaining the
evidence."\textsuperscript{301} Several non-exhaustive factors are set out to be considered in determining
whether the necessity has been turned aside:

1. the relative importance of the evidence to the prosecution in respect of which the
accused is compelled;

2. whether the evidence can be obtained in some other manner;

3. whether the trial or other disposition of the charge against the accused whose evidence
is sought to be compelled could reasonably be held before he or she could is called to
testify;

4. the relationship between the proposed questions to the accused witness and the issues
in his or her trial;

5. whether the evidence of the accused witness is likely to disclose defences or other
matters which will assist the Crown notwithstanding the application of s. 5(2) of the
\textit{C.E.A.};

6. any other prejudice to the accused witness, including the effect of publication of his
or her evidence.\textsuperscript{302}

Mewett prefers the position of Lamer C.J.C. in \textit{S. (R.J.)}, in that there should be no
immunity from testifying unless it is a flagrant or exceptional circumstance, at which time s.
7 would provide that the answers and derivative evidence would not be useable in later

\textsuperscript{300} \textit{Ibid.} at 134.

\textsuperscript{301} \textit{Ibid.}

\textsuperscript{302} \textit{Ibid.}
proceedings.\footnote{303} As Mewett notes, one of the essential issues is the penal consequence of forcing a witness to testify, and this will not be apparent (if ever) until later developments, after the evidence has been obtained (and utilized).\footnote{304}

g. \textit{Branch}

On April 13, 1995, the Supreme Court of Canada released three judgments dealing with s. 7 and the application of the residual principle of self-incrimination and silence protection. The author will deal primarily with \textit{British Columbia (Securities Commission) v. Branch} because it contains the clarifications sought, and applies s. 7 in the regulatory, instead of criminal, realm.\footnote{305} In this case, investigators appointed by the Securities Commission served summonses on corporate directors compelling them to attend for an (investigative) examination and to produce all records. The directors objected on the basis of the right to remain silent under s. 7 because of the potential of criminal or quasi-criminal charges that could arise from the examinations.

By the time of \textit{Branch}, seven Justices (Sopinka, Iacobucci, La Forest, Cory, McLachlin, Major JJ. and Lamer C.J.C.) managed to arrive at a consensus on limited derivative-use immunity and compellability. Mr. Justice Gonthier also concurred with the majority (for a total of eight) on limited derivative-use immunity and compellability, but he also adopted the concerns of L’Heureux-Dube J. relating to evidence in the regulatory context (\textit{i.e.} different standards will apply). Madame Justice L’Heureux-Dube continued to


\footnote{304} \textit{Ibid.}

\footnote{305} \textit{Supra}, note 15.
reject any derivative-use immunity, but did agree, as previously, that fundamentally unfair conduct can lead to a testimonial exemption.

i. Derivative-Use Clarification

The significance of Branch is that the majority found (as did L'Heureux-Dube J.'s flexible approach) that s. 7 has application to regulatory proceedings and investigations. The concern was whether individuals who might subsequently be charged with a criminal or quasi-criminal offence can be compelled to give evidence and produce documents.306

Clarification regarding derivative-use immunity under s. 7 is provided by the majority. First, eight justices now agree that s. 7 of the Charter requires that persons compelled to testify or answer questions in a regulatory matter be provided with subsequent limited derivative-use immunity in addition to the use-immunity provided under s. 13 of the Charter (and s. 5 of the C.E.A.). Second, the accused has the burden of establishing a Charter breach on a balance of probabilities, which means the accused has the evidentiary burden to show "a plausible connection" between the compelled testimony and the evidence to be adduced. Once this connection is established, it falls to the Crown to show on "a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony."307 Third, to trigger subsequent derivative-use immunity the former witness must be involved in a proceeding in which penal sanctions are involved or "in any proceeding which engages s. 7 of the Charter."308 One common

306 The author will not deal with the s. 8 (search and seizure) Charter component of this case.

307 Supra, note 15 at 9.

308 Ibid.
element in all these cases is that the individual faced criminal sanctions (i.e. charges or contempt proceedings) for failure to comply with the compulsion. However, the majority did not necessarily close the door to the application of s. 7 in non-penal matters. Both the penal and non-penal proceedings context will require consideration in relation to ordered statements.

Other important points also arose in the majority's decision (co-written by Sopinka and Iacobucci JJ.). First, the majority concluded that a "liberty interest is engaged at the point of testimonial compulsion." Of particular interest, is the fact that an "investigator" pursuant to s. 128 of the then Securities Act is expressly authorized "to compel witnesses to give evidence on oath or in any other manner..." Second, the majority examined the predominate purpose of such an (investigative) inquiry by examining the regulatory nature and legislative purpose (i.e. protect public interest, ensure honest trading) of the regime. The majority concluded that the purpose of the investigative inquiry was to obtain relevant evidence for the purpose of the instant proceeding, "and not to incriminate" the directors.

Madame Justice L'Heureux-Dube did not accept a derivative-use immunity, and believes that the protection provided for compelled testimony by s. 13 of the Charter will prevent the use of evidence derived from testimony at trial because the testimony to prove the relevance of the (truly) derivative evidence will not be admissible. In other words,

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310 S.B.C. 1985, c. 83.

311 *Supra*, note 15 at 19.

only derivative evidence (i.e. non-communicative) that exists independently and is reliably connected to the accused (by other means) will be admissible. But is that not only part of the problem, since the entire nature of the case changes once the evidence is obtained?

ii. Compellability Clarification

With respect to exemptions from compulsion, it was first noted by the majority in <i>S. (R.J.)</i> that a "colourable" attempt to compel evidence from a witness could be objectionable, but there was no real majority on the test to be applied (<i>supra</i>). A majority consensus, however, was found in this case: first, regardless of the exemption test utilized, if the witness is unsuccessful in obtaining a compulsion exemption, subsequent limited derivative-use immunity will still be available; and second, "the crucial question is whether the predominate purpose for seeking the evidence is to obtain incriminating evidence against the person compelled" or "some legitimate public purpose" (emphasis added).

A court must first determine the "predominant purpose" under, or for, which the evidence is sought. Compelled testimony in a criminal or provincial prosecution must be to obtain evidence to further the prosecution. In other proceedings, such as an inquiry, determining the predominate purpose may be more complex. For example, with a public inquiry the Court will consider the terms of the authorizing statute, but this will not be determinative. Consideration will also be given to the terms of reference. Moreover, the object of compelling a particular witness may be invalid as incriminatory in some instances. If it is established that the predominate purpose is not to obtain relevant evidence for the

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313 Ibid.

314 Ibid. at 9-10.
instant proceeding, but to incriminate the witness, the party seeking to compel the testimony must justify the potential prejudice against self-incrimination, and if derivative-use is the only prejudice, the person can be compelled (since derivative-use immunity is available). The Court is certainly prepared to "infer" the purpose of calling a witness based on the overall effect of the proposed evidence.

It appears that L'Heureux-Dube J. is generally prepared to rely on the majority's predominate purpose test as a "satisfactory proxy for the existence of fundamentally unfair conduct," however, several qualifying remarks are provided.\(^{315}\) First, in the regulatory context, the application of s. 7 should be achieved with greater deference. Thus:

...a standard of conduct which may be fundamentally unfair in the context of compelling the testimony of separately charged co-accuseds may not necessarily be fundamentally unfair in the context of administrative proceedings in a highly complex and tightly regulated field such as the securities industry.\(^{316}\)

This is so for several reasons: the different procedural protections provided to witnesses in different contexts; the participants engaged in this licensed activity of their own volition and for profit; given the market forces and activity obligations participants expect to be questioned; the nature and complexity of the field and the difficulties regulators face in protecting the public; advance notice is given of inquiry to the subject (who can prepare for examination and has the benefit of counsel); and at the hearing the compellee will be treated with courtesy and can consult counsel during the process.\(^{317}\) This thesis has cast doubt on whether these same observations can be made of the ordered statements process in the R.C.M.P.

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\(^{315}\) *Ibid.* at 33.

\(^{316}\) *Ibid.* at 34.

\(^{317}\) *Ibid.* at 34-35.
Madame Justice L'Heureux-Dube J. was also swayed by several other evidential considerations: first, the "inquiries are purely administrative in nature and do not adjudicate upon guilt or innocence"; second, it is a matter of speculation whether it is the company or individual that will be subject to action by the disclosures; and third, it is uncertain at the outset whether any breach of law has occurred. Madame Justice L'Heureux-Dube surfaced concern over the need to be "time sensitive" and conduct expeditious investigations.

The Supreme Court released two other decisions on the same day as Branch dealing with s. 7. On the issue of compellability, in both cases, the majority (of eight justices) stated that the "status" of the person (i.e. charged, suspect, or unindicted co-conspirators) does not determine whether a person is compellable. The focus is on the "purpose or character of the proceedings" and there was no evidence in these cases to suggest that the predominate purpose of the compulsion amounted to "a form of proposed pre-trial interrogation." Therefore, there was no testimonial exemption, but subsequent limited derivative-use immunity applied.

h. Fitzpatrick

The last case to be discussed assists in bringing the constitutional issues surrounding

318 Ibid. at 36-7.

319 In Primeau, supra, note 15 the appellant was charged with murder and another person separately charged with the same murder was subpoenaed by the Crown to testify at the appellant's preliminary inquiry. Jobin, note 15, dealt with appellants that were either charged or suspects in connection with an explosion and fire. The appellants were subpoenaed to testify at one of the accused's preliminary inquiry, and the same accused was subsequently subpoenaed to testify at the preliminary inquiry of another accused.

320 Ibid. at 8 and 106, of the cases cited respectively.
compelled statements into greater relief. In *R. v. Fitzpatrick*\(^{321}\) the Supreme Court of Canada dealt with a case in which the accused commercial fisher was charged with offences under federal legislation for quota violations and the Crown sought to admit "self-reports" that were required to be completed by the fisher under a federal statute. The reports related to fishing activities and failure to provide the self-reports could result in a fine and imprisonment. The majority judgement regarding the admissibility of the statutorily compelled self-reports was authored by La Forest J.

First, the Court re-affirmed its position that there is no broad, absolute, or abstract right against self-incrimination regarding any item that is compelled from an accused.\(^{322}\) Second, it was also re-affirmed that in relation to questioning:

> The court held that in most cases individuals can be compelled to testify at such an investigation, as long as they are provided with immunity at any future criminal prosecution against the use of both their testimony and any evidence that would not have been found "but for" this testimony.\(^{323}\)

Third, in an important observation for the task to be undertaken regarding ordered statements, the Court stated the analysis of this case must begin "on the ground...with a concrete and contextual analysis of the circumstances raised."\(^{324}\)

The majority did not doubt that liberty interests under s. 7 were engaged by the Crown's use of the statutorily compelled information because the accused faced the potential of imprisonment if convicted. As La Forest J. noted, "this court has repeatedly stated that

\(^{321}\) (1995), 102 C.C.C. (3d) at 144.
\(^{322}\) Ibid. at 153-4.
\(^{323}\) Ibid. at 154.
\(^{324}\) Ibid. at 155.
the threat of imprisonment engaged s. 7 of the Charter." However, the majority found that in this case/context s. 7 did not prevent the use of the compelled information. In launching into the contextual analysis, La Forest J. stated several reasons why the general principle against self-incrimination in this (regulatory) context does not require immunity against the use of the reports that the fisher had to create under the regime. First, it is pointed out that the information provided by the fisher was not provided in a proceeding in which the individual and state are "adversaries." Second, there was little, if no, "coercion" imposed on the accused in the preparation of the self-reports, albeit the reports were mandatory (and made a person subject to a penalty for non-compliance).

The Court found that no "adversarial relationship" existed at the time of the compulsion to complete the reports since the essential purpose of the reports was not to accumulate information that could be used later, nor was it compiled pursuant to an "investigation into wrongdoing." In other words, the purpose of the information from the self-reports was to regulate, monitor and control the fishery, not for the specific purpose of charging. Unlike Thomson Newspapers and Branch, in which individuals were being "compelled to testify" during an investigation into wrongdoing, here the self-reports were not compelled or created in an adversarial or "even inquisitorial relationship with the state." Under the regime, the state and fisher were not adversaries but "partners" working to protect

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325 Ibid. at 152-3.
326 Ibid. at 157.
327 Ibid. at 158.
328 Ibid.
329 Ibid. at 159.
a resource.

With respect to state "coercion," the Court found that if there was any, it was muted, which was not the situation in the earlier cases, supra. In the above cases the individuals were subpoenaed to testify on pain of contempt and had no "choice in the matter."330 In this case, the Court found that the fisher was not compelled to participate in the fishery, and entered into the industry (and the attending obligations) with "free and informed consent."331 Moreover, the fisher received copies of the relevant information governing quotas. In such a case, the fisher "must be presumed to be aware of the terms and conditions" of the fishing licence, including the obligation to complete reports.332 If this fisher believes he is being compelled against his will, then, according to the Court, he is "free to resign" and "be released from this obligation" of self-reporting.333 In this case the individual "voluntarily assumed the obligation" to provide reports and therefore it is not possible to permit this obligation to be avoided.334

This led La Forest J. to state that the two fundamental purposes behind the principle against self-incrimination are: first, to protect against "unreliable confessions"; and second, to protect against the "abuse of power by the state."335 In this case, the Court did not believe it was dealing with a true "confession" and there was little danger of abusive state

330 Ibid.
331 Ibid.
332 Ibid. at 160.
333 Ibid. at 161.
334 Ibid. at 162.
335 Ibid.
conduct under this statutory scheme. As shown by this thesis, ordered statements provide a quintessential example of coerced confessions in which there is every danger of abusive state conduct. Based on the foregoing cases, it appears that an argument can be made that s. 7 of the Charter has application to ordered statements, especially as it relates to subsequent limited derivative-use immunity and compulsion in circumstances in which criminal sanctions are immediately or imminently present. However, depending on the circumstances, the application of s. 7 to a purely internal investigation or proceeding may be less likely where no criminal liability exists.

7. Ordered Statements

Based on the jurisprudence, s. 7 of the Charter has two possible applications to ordered statements. First, s. 7 may provide subsequent limited derivative-use immunity against information obtained from an ordered statement. Second, s. 7 may provide the possibility of a limited compulsion exemption from providing an ordered statement in certain circumstances. There are, however, several complicating features. First, at the time of the compulsion in all of the foregoing cases, there was a penal sanction for non-compliance (i.e. summary or indictable offenses or contempt proceedings). Second, it is unclear whether the mere presence of criminal liability outside of the compulsion authority is sufficient to trigger s. 7. In other words, is s. 7 triggered if the compulsion authority does not provide for a penal/criminal sanction for non-compliance, but the possibility of a criminal charge can arise from the content of the compelled answer? Third, is s. 7 triggered when an ordered

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336 Ibid. at 162-3. As a result, the use of the statutorily compelled statement in this regulatory prosecution was not contrary to s. 7 of the Charter; see also, Brundrett, supra, note 263 at 2.1.25.
statement is obtained in relation to a purely internal process where no penal provisions exist? The answers to all three questions will be crucial in determining the extent of the application to s. 7 to ordered statements.

a. Deprivation of Liberty?

Does s. 7 of the Charter now afford R.C.M.P. members a right against self-incrimination, a right to silence and immunity from compulsion? Significant to this inquiry is the extent to which a member can be compelled to incriminate herself or himself in the internal and/or criminal context, either by testimonial or derivative evidence. The first question to be answered is whether the member is subject to a deprivation of life, liberty or security of the person by being required to provide a statement. A majority did agree in Thomson Newspapers that compelling a person to attend before an investigative board involved a deprivation of liberty within the meaning of s. 7 of the Charter. In fact, the majority in Branch indicated that a statutory compulsion to testify (or be examined) constitutes a deprivation of liberty which arises by virtue of the compulsion to speak per se. Under s. 40 of the R.C.M.P. Act (and the member’s oath of office) there is clearly a compulsion to answer questions. The question is whether or not this is sufficient to trigger s. 7. The author will set out four possible arguments to support the position that there is a deprivation of liberty.

The general view is that s. 7 of the Charter will only be triggered if imprisonment or

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337 Supra, note 12, per Wilson J. who 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, Thandi v. Can. (Min. of Employment & Immigration), [1985] 1 S.C.R. 177.

338 Supra, note 15 at 24.
The first basis on which s. 7 of the Charter may have application is if the member could be charged with a criminal or penal offence for failing to comply. There are three possible ways in which a member may face a true penal sanction for not providing an ordered statement. First, it is possible that a member could be arrested and/or charged with obstruction under the Criminal Code if he or she failed to provide an ordered statement. In this instance the member is refusing to comply with an Act of Parliament and the investigating officer is in the execution of a duty authorized by the R.C.M.P. Act. As noted in Chapter 7, a Newfoundland police force charged one of its members under s. 129 of the Criminal Code for obstructing a police officer in the execution of a duty. Although the obstruction charge in Newfoundland was unsuccessful, unlike the Newfoundland police officer, an R.C.M.P. member does have a statutory duty to provide a statement (and arguably, infra, attend when summoned/ordered). Second, s. 126(1) of the Criminal Code expressly states that anyone

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339 See, Bryden, *supra*, note 77. Unlike the United States, the Canadian courts do not see economic rights as part of s. 7. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65 (S.C.C.) ("Prostitution Reference") and *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 316 the Court divided on the scope of the liberty interests protected by s. 7. Lamer C.J.C. is clearly of the view that s. 7 basically only applies to situations where physical liberty is at stake. LaForest J. is of the view that liberty does not mean unconstrained freedom, but it does mean more than mere freedom from physical restraint. The Court is clearly reluctant to extend s. 7 to protect purely economic or contract liberties. More recently, in *Godbout v. Longueuil (City)*, File No. 24900 (31 October 1997) three justices of the S.C.C. agreed that the right to liberty goes beyond the notion of mere freedom from physical restraint and protects within its scope a narrow sphere of personal or individual autonomy (human dignity and privacy) wherein individuals may make inherently private choices free from state interference. By their very nature they implicate basic choices going to the core of what it means to enjoy individual dignity and independence (see, La Forest at para. 65-66).

340 Although some may say this is fanciful, the possibility of the R.C.M.P. laying obstruction charges when members failed to provide statements has surfaced in the Force on a couple of occasions that the author is aware. Section 34(2) of the Interpretation Act, R.S.C. 1985, c. I-21 provides for the application of the Criminal Code to offenses created by an Act of Parliament.
who "without lawful excuse, contravenes an Act of Parliament [e.g. *R.C.M.P. Act* and *Regulations*] by wilfully doing anything it forbids or by wilfully omitting to do anything that it requires to be done [e.g. provide an ordered statement] is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." While some may assert that it is unrealistic for a member to be charged, it must be noted that Lamer C.J.C. has expressly cited this provision to squelch concerns that his physical liberty test for s. 7 is insufficiently broad to cover most state action.\(^{341}\) Third, failure to attend an interview or provide an ordered statement could constitute an offence under the *R.C.M.P. Act*. Section 50 of the *R.C.M.P. Act* states that "[e]very person who, (a) on being duly *summoned* as a witness or *otherwise* under Part... IV [i.e. Discipline]... makes default in attending, (b) being in attendance as a witness in any proceeding under... Part IV... (iii) refuses to answer any questions that require an answer, .... is guilty of a *summary conviction offence*" (emphasis added). It appears that this section contemplates testimonial proceedings of some sort, and in fact the other subparagraphs refer to "proceedings," but the word "otherwise" in paragraph (a) could be construed to apply to a member who has been requested/ordered under s. 40 (Part IV) to attend for the purposes of taking of an ordered statement. A member could potentially be arrested for the offence of failing to attend and give an ordered statement as the police have authority to arrest an individual found committing a summary conviction offence under s. 495 of the *Criminal Code*.\(^{342}\) The irony here is that if s. 50 does not apply to ordered statements, it does

\(^{341}\) *Children's Aid Society, supra*, note 339 at 348-9.

\(^{342}\) In *Moore v. R.*, [1979] 1 S.C.R. 195 the Supreme Court found the principle of identification extended beyond "criminal offenses" to permit an arrest for summary conviction and/or provincial offenses where the officer observes the offence.
clearly apply to a witness member who is summoned to a hearing and testifies. The result is that, because of the penal/criminal provisions for failing to attend and answer questions, a witness member summoned to testify in an adjudication proceeding would apparently have subsequent derivative-use immunity in any criminal prosecution of that witness member, while the suspect member ordered to answer questions during an investigation would not have derivative-use immunity in any subsequent criminal prosecution. Any one of the foregoing mechanisms would involve a liberty interest under s. 7. Using this approach, s. 7 would be triggered regardless of whether the ordered statement was obtained in a purely criminal, purely internal or mixed context. However, as will be discussed below, the lack of penal sanctions in the internal process would impact on whether derivative-use immunity or compulsion exemptions are available.

A second approach is to argue that ordered statements do in fact interfere with a liberty interest that is, or should be, protected by s. 7. For example, it can be asserted that consistent with the forms of liberty to be protected by the Charter, a member is in fact physically restrained, detained, arrested, or coerced, criminally or administratively, when providing a compelled statement. The argument here is twofold. First, that ordering a member to provide a statement interferes with his or her physical liberty by a state agent (view of Lamer C.J.C.) or the member’s right to personal autonomy (dignity, privacy) and fundamental decision making. Second, that the form, content and/or consequences of the ordered statement process constitute an interference with liberty that is already considered worthy of protection under the Charter.

For example, LeDain J. in R. v. Therens defined "detention" within s. 10 (right to

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343 Children’s Aid Society and Godbout, supra, note 339 per Lamer C.J.C. and LaForest J. on the scope of liberty captured by s. 7.
counsel) 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 counsel. (emphasis added)

Although the purported detention or liberty interference may be occurring within the administrative-employment realm, it can be argued on the evidence presented in this thesis that the underlying reasons for providing the right to counsel under s. 10 and protecting liberty under s. 7 are present when an ordered statement is demanded. This is particularly true when the potential for, or actual, criminal liability is present as found in the two ordered statement cases examined in Chapter 7.

Further, based on the review in Chapters 6 and 7 of R.C.M.P. policy, practice and

344 [1985] 1 S.C.R. 613 at 642. The Supreme Court has adopted a more subjective-objective approach when considering the issue of detention. In R. v. Thomsen (1988), 40 C.C.C. (3d) 411, a majority of seven justices of the S.C.C. agreed that detention can include any of the following:

1. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

2. In addition to the case of deprivation of liberty by physical constrain, there is a detention within s. 10 of the Charter when a police officer or other agent of the state assumed control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.

4. Section 10 of the Charter applies to a great variety of detentions of varying duration... In R. v. Simpson (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at 501 it was recognized that there is common law authority for police officers to detain someone on the basis of "articulable cause" (which is less than reasonable grounds): Jones III, supra, note 73 at 9 defines "custodial interrogation" as "questioning instituted by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way."
the context of ordered statements, is there a true delineation to be made between an investigator of the internal and criminal/statutory offence qua police? The internal-criminal investigator, a member of the R.C.M.P., is acting under the authority of an Act of Parliament (i.e. R.C.M.P. Act). This makes it difficult to assert that the internal investigator is not functioning as an "agent of the state" with "coercive powers," especially where there is a legislated duty to investigate the allegation. Moreover, there is a clear legal obligation on the member to answer questions, and significant "legal consequences" accrue for not answering (i.e. a charge under the Code of Conduct which will lead to discipline, if not dismissal). The nexus between the state, criminal, internal and public investigation roles, and the authority to obtain statements in this circumstance are of such proximity that liberty interests must be protected. Based on the review conducted in this thesis of R.C.M.P. management, culture, discipline, and practice, even without the formal detention analysis, there is a valid basis to argue that the member under investigation is "psychologically detained" or "psychologically coerced", since the member may believe there is no choice but to provide a statement, regardless of whether or not the member is actually ordered.\textsuperscript{345}

Even more significant, is the fact that there is not necessarily any right to instruct counsel during the taking of an ordered statement. As noted previously, 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.\textsuperscript{346} (emphasis added)

\textsuperscript{345} *Ibid.* at 643. As noted by Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 733 (*sub nom. R. v. Videoflicks*), a court should not fail to consider and recognize the "subtle and coercive pressure which an employer can exert on an employee" (emphasis added).

\textsuperscript{346} R.C.M.P. A.M., *supra*, note 33. The words of the majority in *Big M Drug Mart*, *supra*, note 258 at 336-7 are apt in that "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
A suspect in the criminal process may not have a right to have counsel present during the taking of a statement either, however, unlike a member, the criminal suspect, as noted in Therens, at least has the choice whether to provide a statement to the authorities. A member, however, has no such choice in this situation, even assuming the member has access to competent legal representation. This is very troublesome when, as shown, the member may be directed to provide information under the auspices of an internal ordered statement for the purpose of, or that goes to, the criminal investigation and prosecution.

The above policy may be in violation of the right to counsel under s. 10(b) of the Charter. First, the officer, as noted above, is clearly detained (by legislative authority) within the meaning of Therens and Thomsen, yet the opportunity to instruct counsel is not provided or may be denied. Even if a court somehow constitutionally exempts this as an "administrative detention," it is still possible criminal consequences may arise from the denial of the right to retain, instruct, and be informed of the right to counsel, in that the R.C.M.P. will have conscripted the member by investigatively relying on the evidence and/or seeking to utilize any derivative evidence at a subsequent criminal proceeding.

Paciocco asserts that although s. 10(b) of the Charter is not on its face a self-incrimination provision, it does require valid information and waiver. In his view, s. 10 vindicates

indirect forms of control which determine or limit alternative courses of conduct available to others" (emphasis added).

347 Supra, note 344; see also Hebert, note 207; Walter S. Tarnopolsky, "The Lacuna In North American Civil Liberties--The Right to Counsel in Canada" (1967-68) 17 Buffalo Law Review 145 at 153 and 163. At 147, Tarnopolsky notes that because of the division of powers, the Bill of Rights only applied to matters in the federal jurisdiction (i.e. the Preamble and s. 5(3) confirmed this view). As Tarnopolsky points out, under the Bill of Rights there was no absolute right to counsel criminally or administratively, in fact the right to counsel did not even include the right to have counsel present during police interrogation.

348 Supra, note 140 at 96.
underlying rights and protections of detainees such as the right to silence and protection against self-incrimination.349 This gives s. 10(b) a predominate role in silence and self-incrimination protection at the pre-trial or investigative stage. The Supreme Court of Canada has made clear the importance of a suspect/person being able to get legal counsel.350 In R. v. Collins, Lamer J. stated that "The use of self-incriminating evidence obtained following a denial of the right to counsel will, generally, go to the very fairness of the trial and should generally be excluded."351

In light of the strict protections provided by the Supreme Court to protect the right to counsel it is hard to imagine that a member/police officer could be compelled to provide a statement without any protection under s. 10 (or s. 7). In fact, the Supreme Court of Canada recently considered the circumstances in which a police officer was interviewed by departmental investigators and a statement obtained. The issues of detention and the right to counsel were central aspects in R. v. Calder, a case in which a police officer was charged with attempting to purchase the sexual services of a person under 18 year of age, extortion

349 Ibid. at 97.

350 There is both an "informational" and "implementational" aspect to s. 10(b); see, R. v. Brydges, [1990] 1 S.C.R. 190 (advise of duty counsel and legal aid); R. v. Bartle, [1994] 3 S.C.R. 173 and R. v. Pozniak, [1994] 3 S.C.R. 310 (informed of access to immediate, free legal advice, including 1-800 numbers); R. v. Feeney, [1997] S.C.J. No. 49 (22 May 1997) (Q.L.) (immediately upon assuming control over movement by direction or demand); Clarkson (waiver), supra, note 202; R. v. Whittle (1994), 92 C.C.C. (3d) 11 (S.C.C.) (waiver); R. v. Manninen, [1987] 1 S.C.R. 1233 (two duties once advised: 1) reasonable opportunity to exercise right and 2) cease questioning or eliciting until reasonable opportunity to consult); see also, Watson, note 140 at 119; Sopinka et al., note 160 at 370.

351 [1987] 1 S.C.R. 265 ("Collins Test"); see also, R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.); Fenney, ibid. where the majority has held that conscriptive evidence obtained in violation of the Charter will generally be excluded under the first trial fairness test of the Collins Test. This will be examined in more detail below.
and breach of trust. The Court noted that:

The trial judge held, in his ruling on the *voir dire*, that the direction given to the appellant by the police dispatcher to attend at the police station was, in fact, an order. Further, he held that the interrogation was not a mere disciplinary proceeding under the *Police Services Act*, R.S.O. 1990, c. P. 15. The trial judge observed that the respondent was cautioned, was interrogated by two senior officers and was not left on his own from the time he arrived until his suspension. The trial judge accepted the respondent's perception that he was obliged to attend and to answer questions. The trial judge held that the respondent had been detained, and that he should have been advised of his *Charter* rights. The failure to so advise the respondent was a breach of his [counsel] rights under the *Charter*.

In this case, the first statement from the police officer was inconsistent with his testimony at the trial, at which point Crown, consistent with *Kuldip*, attempted to rely on the first statement to challenge the credibility of the officer. The trial judge found the first statement to be inadmissible because of a breach of the right to counsel under the *Charter*. The majority (six justices), distinguished *Kuldip* on the basis that it did not involve the use of testimony that had been found inadmissible, and agreed with the trial judge that pursuant to s. 24(2) the admission of a statement obtained in violation of the *Charter* would affect the fairness of the trial and must be excluded.

It is evident that the courts and R.C.M.P. will have to be cognizant of the right to

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352 *Supra*, note 68 at 137.

353 *Ibid.* at 139.


355 *Ibid.* at 146-7. A reserve discretion to admit evidence "in very limited circumstances" despite an earlier *Charter* inadmissibility ruling was provided by five justices, although La Forest J. did express some difficulty in imagining any such circumstances. In dissent, McLachlin J. felt that getting at the truth outweighed the right to a fair trial in this situation (*i.e.* fabricate lies without fear of cross-examination); see also, David S. Frankel, "Charter, Section 24(2): Real Evidence - The "But For" or "Discoverability" Test in Criminal Law Update '96 -Charter & Evidence (Vancouver, B.C.: Continuing Legal Education Society of B.C., April 20, 1996) at 2.2.02; Rose and Scott, *supra*, note 68; Brundrett and Martin, note 263.
counsel when considering investigations and ordered statements. Moreover, given the indistinguishability of investigations when one investigator is conducting the criminal and internal investigations, failure to administer the Charter right to counsel, or actively denying counsel, are all matters that a court will have to consider when examining the liberty issue. Failure to administer the right to counsel may also leave investigators in jeopardy of allegations of neglect of duty. In addition, the R.C.M.P., could be open to remedies under s. 24(1) of the Charter if charges are pursued against a member and a constitutional violation is found (e.g. fail to provide or deny right to counsel results in order to pay legal fees of member when judge stays charge).

An ordered statement may also raise questions about arbitrary detention under s. 9 of the Charter: the member is being detained under statute and required to respond to questions internally on the basis that there "appears" to be a Code of Conduct contravention yet any statement and derived evidence can be used to support a criminal investigation and/or charge. This does not seem to constitute a minimally acceptable legal standard upon which to institute such a powerful authority. This is particularly true when ordered statements have been used to further criminal investigations and prosecutions. The formal and informal consequences that can attend a member for failing to be cooperative during an investigation have been detailed in earlier chapters. It may be that the detention features and liberty interests involved in the ordered statement process will prove sufficient for a court to find that s. 7 is triggered.

The possible third approach to argue that s. 7 is triggered is simply to assert that the nature of the compulsion (i.e. testimonial) and/or penalty at the time does not matter. In other words, when the courts refer to a statutory or testimonial compulsion in $S. (R.J.)$,,
Branch, Spyker, and Fitzpatrick, this includes an ordered statement. In addition, it would be asserted that it is not the sanctions that exist at the time of the compulsion, but the potential sanctions against the member by the body before which the derivative evidence is presented (e.g. criminal, penal or non-penal sanctions) that determine whether s. 7 is triggered. This position arises from the statement of the majority in Branch that "it goes without saying that in order to trigger the derivative use immunity, the former witness may only claim such protection in a subsequent proceeding where he or she is an accused subject to penal sanctions or in any proceeding which engages s. 7 of the Charter" (emphasis added).

Thus in a criminal proceeding where the Crown attempted to utilize derivative evidence from an ordered statement the member could rely on s. 7 to provide limited derivative-use immunity.

The next question is whether internal adjudication proceeding sanctions would trigger s. 7 under this approach. The difficulty is that the courts have shown great reluctance in extending s. 7 to protect purely economic or contractual interests or liberties. There have been a number of cases that have dealt with the issue of whether s. 7 applies to internal or professional disciplinary proceedings. In general, the weight of authority suggests that s. 7 does not apply to disciplinary proceedings where there are no true penal consequences.

356 Supra, note 15 at 9.

357 For example, see Charboneaus et al. v. College of Physician and Surgeons of Ontario (1985), 22 D.L.R. (4th) 303 (H.C.J.) (does not confer right to practice medicine); Re Branigan and Yukon Medical Council et al. (1986), 26 D.L.R. (4th) 268; Re Isabey and Manitoba Health Services Commission et al. (1986), 28 D.L.R. (4th) 735 (Man. C.A.) (restrictions on medical practice do not amount to deprivation); Re Beltz and Law Society of British Columbia et al. (1986), 31 D.L.R. (4th) 685 (B.C.S.C.), revd on other grounds 91 C.L.L.C. 17,003 (S.C.C.) (assuming does extend to economic rights, paying fees to practice law does not infringe); Re Charalambous and College of Physician and Surgeons of British Columbia (1987), 5 A.C.W.S. (3d) 335 (B.C.S.C.) (does not apply to evidence procedures internally); Re Bassett and Government of Canada (1987), 35 D.L.R. (4th) 537 (Sask. C.A.) (does not encompass right to
While some cases have applied s. 7 to disciplinary matters the more likely result is that non-penal matters are not covered.\textsuperscript{358} It may be of importance, however, that in most instances the disciplinary proceedings considered provided a clear and detailed process before a board constituted to hear and consider the allegations. In the case of ordered statements there are no such assurances during the investigative process. Furthermore, these bodies did not also have concurrent criminal jurisdiction. Taking an ordered statement in cases in which criminal liability is intertwined with the subject matter of the internal investigation may provide some impetus to find a deprivation. On the other hand, if the internal investigation is related to a purely internal \textit{Code of Conduct} matter, with no possibility of criminal liability, a court would be less inclined to find a deprivation. To accept that s. 7 applies to ordered statements under this approach will require the courts to simply take the reasoning of pursue occupation or profession); \textit{Belhumeur v. Comite De Discipline du Barreau du Quebec} (1988), 54 D.L.R. (4th) 105 (Que. C.A.) (does not prevent an advocate from being compelled to testify in discipline proceedings against advocate); \textit{Walker v. Prince Edward Island} (1993), 107 D.L.R. (4th) 69 (P.E.I. C.A.) (does not include right to practice profession); \textit{Koptyo v. Law Society of Upper Canada} (1993), 107 D.L.R. (4th) 259 (Ont. Div. Ct.), leave to appeal to C.A. refused and to S.C.C. refused (does not guarantee a right to particular livelihood or disciplinary proceedings); \textit{Re Green and Attorney General of British Columbia et al.} (1986), 2 A.C.W.S. (3d) 92 (B.C.S.C.) (liberty not infringed by subjecting police officer to disciplinary proceedings); \textit{Landry v. Gaudet} (1992), 95 D.L.R. (4th) 289 (F.C.T.D.) (R.C.M.P. adjudication process does not constitute deprivation). As noted by Bryden, \textit{supra}, note 77, unlike the United States, economic, contractual and employment rights receive less protection in Canada under s. 7.

the Supreme Court of Canada at face value.

The fourth and final approach is to assert that s. 7 should in fact apply to the ordered statement and internal process. In this case, it would be pointed out that the failure to comply can subject the member to additional discipline under the Code of Conduct for disobeying an order from a superior officer. It is quite clear that an internal statement and discipline scenario carries a penalty for non-cooperation that is legislatively imposed. Although the member who refuses to give an internal statement may not be placed in gaol (except as outlined in the first possible approach) the member is certainly subject to being penalized (e.g. suspensions without pay, informal payment of fines and dismissal). This approach would clearly be going against the cases that suggest that economic and occupational interests are not protected by s. 7. However, given the seriousness that dismissal from employment can constitute, it may be that s. 7 should have application. The

359 The duty of an R.C.M.P. member to obey a "lawful order" from a superior arises from the oath of office taken by every member. Pursuant to s. 14(1) of the R.C.M.P. Act, R.S.C. 1985, c. R-10 as am. by R.S.C. 1985, c. 8 (2nd Supp.) "Every member shall, before entering on the duties of the member’s office, take the oath of allegiance and the oaths set out in the schedule." The Schedule outlines the following Oath of Office: "I, ..........., solemnly swear that I will faithfully, diligently and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police, and will well and truly obey and perform all lawful orders and instruction that I receive as such, without fear, favour or affection of or toward any person. So help me God." Pursuant to the R.C.M.P. Act (i.e. s. 40), the Regulations, and the Commissioner’s Standing Orders, it can also be asserted that members have a duty to provide a statement when lawfully ordered. Section 18(d) of the R.C.M.P. Act indicates that it is the duty of members "to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner." Further, the Commissioner’s Standing Orders (Duties of Members) (not published) signed by the Commissioner on June 7, 1991 state that "In addition to the duties prescribed by the Act and Regulations, members of the RCMP must perform those functions of an administrative... or other support nature, as required for the efficient operation of the RCMP." Members "must also perform operational functions as are required for the efficient operation of the RCMP." Section 40 of the Code of Conduct states that "A member shall obey every lawful order, oral or written, of any member who is superior in rank or who has authority over that member." Last, s. 50 of the Code of Conduct states that "A member shall not knowingly contravene or otherwise breach any oath taken by the member pursuant to section 14 of the Act."
observations of McEachern C.J.S.C. are apposite:

I do not think it is possible to treat any disciplinary proceedings under this [police] disciplinary code (except those conducted informally on a "man to man basis" where no entry is made in an officer's record) as other than serious. In today's society, where career decisions must be made at an early age, and many of our citizens do not have a second chance, and where all policemen are assumed to be career officers, and where good conduct is obviously an important factor in promotion and therefore salary, and where pension and other benefits depend in part upon salary in the closing years of a career, it is clearly untenable to argue that a recorded conviction for a disciplinary default - even for using one naughty participle - is not serious. If a senior officer of this police force considers the complaint serious enough to engage this formal hearing procedure with its full panoply of legalities, then it is per se serious, and this is so regardless of the nature of the alleged offence or the maximum penalty which is recommended. I think right-thinking citizens would agree.\textsuperscript{360} (emphasis added)

It seems that a member of the R.C.M.P. who is being compelled to give a statement can assert a deprivation of "liberty" in several senses: to the extent that failure to comply can result in further criminal sanctions against the member (Lamer C.J.C. in \textit{Prostitution Reference} and \textit{Children's Aid Society}), the privacy and autonomy zone (La Forest J. in \textit{Children's Aid Society}), as contemplated by the state agent, detention, coercion, right to counsel analysis (\textit{Therens}, \textit{Thomsen} and \textit{Calder}), or the broadest sense of a compulsion \textit{per se} and/or penalty at time of use (\textit{Branch}). The author also suggests that consideration should be given, in the context of a ordered statement as outlined in earlier chapters, to the general literature and policy reasons behind limiting police interviews of civilians which are generally believed to be inherently coercive.\textsuperscript{361} There is little doubt that a member is engaged in an "adversarial" relationship with the Force/state and is patently subject to "coercion" and "abuse" as contemplated in \textit{Fitzpatrick}. In part, this highlights the artificial and impractical

\textsuperscript{360} Joplin, supra, note 1 at 409.

\textsuperscript{361} Jones III, supra, note 73 at 9 notes that \textit{Miranda} warning in the U.S. is premised on the inherently coercive nature of custodial interrogations.
distinction in *Wigglesworth* and the other cases on the basis of a penalty for the invocation of ss. 7 and 11 of the *Charter*.

b. **The Principle Against Self-Incrimination**

If there is a deprivation of liberty, the next question is what impact, if any, does the (apparently contextually variable) principle(s) of self-incrimination (and silence) contained in s. 7 of the *Charter* have on ordered statements? First, can the Force continue to compel statements from members internally? Second, if ordered statements are valid, do members now have the benefit of derivative-use immunity? In other words, do ordered statements accord with the principles of fundamental justice enshrined in s. 7? As highlighted throughout this section, the possible answers or results to these questions are very much dependent on the contexts in which these issues can arise.

i. **Context**

Based on the earlier review of policing and the R.C.M.P. regime, the "context" of ordered statements is somewhat different from that of a person appearing before an administrative-investigative proceeding (or a strict criminal proceeding). First, unlike the criminal context, there is no right to silence. Second, unlike a securities investigation, an internal investigator is compelling a member to provide responses in a forum that is not the subject of scrutiny, attended by legal counsel, or necessarily characterized by the "usual courtesy" that attends securities inquiries. As noted above, the "right" to have counsel present during questioning is subject to the vagaries of policy. Moreover, unlike a securities investigation, an internal investigation is not being undertaken by an independent investigator. The internal investigator is a statutory envoy of the employer, state, and
public, and is generally engaged in concurrent criminal and public complaint investigations. To argue internal investigations are conducted separately from other investigations, in particular criminal investigations, based on the findings of this thesis, is unsustainable under the current process. Even if it is accepted that the criminal investigation is separate from the internal investigation, the Force is not trying to determine if there are grounds upon which to initiate an investigation, which is the scenario confronted in both Thomson Newspapers and Branch. Nor can it be asserted that the internal investigator is engaged in routine questioning or inspections that occur in other contexts. In the case of ordered statements, the investigator is conducting an inquiry on the basis that the member has done something wrong internally and/or criminally.

The significance of having legal counsel should also not be underestimated in this process. As stated by McEachern C.J.S.C. in Joplin, "a layman, even a policeman, cannot be expected to properly master the laws of evidence and criminal procedure in his own defence." For example, R.C.M.P. policy states that an employee/member is 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. This thesis found that obtaining legal advice during an internal investigation is not the usual practice, and if advice is obtained it is usually from a non-legally trained representative. Given the complexity of the accountability regime, and regardless of whether or not the member did engage in misconduct, any reasonable and prudent member would certainly want to have legal advice in such a situation. Based on the information received during research for this thesis, it appears

362 Supra, note 1 at 409.

363 R.C.M.P. A.M. Bulletin 1786, "Approval of Legal Fees For Employees" at 1.b.1. (91-08-15).
many members are providing statements (voluntarily or ordered) without the benefit of legal advice, a situation ripe for exploitation, given the breadth of an internal investigation.

There is little question that, as apparently required by Fitzpatrick and Kerr, a member is locked in an "adversarial relationship" when a compelled statement is demanded. Ordered statements are not related to some innocuous empirical and reporting function to regulate a commercial activity. Ordered statements are specifically obtained by a state agent during the course of an investigation into wrongdoing after a complaint has been filed. At the moment an ordered statement is sought the member is clearly aware that a complaint has been filed and that it may involve criminal, public and internal allegations of misconduct. It is also clear that "coercion" is pervasive in this exercise, since the member is being specifically compelled to provide a statement and has no choice in the matter. Failure to provide a statement can lead to sanctions such as dismissal (or perhaps arrest and charges as outlined above). Ordered statements do not involve a situation like Kuldip in which the person chooses to testify, here the member is being forced to create evidence which can be derivatively used in investigations or proceedings. It is clear that the R.C.M.P. is not just trying to find out what happened, and unlike Branch, the purpose of an ordered statement can be, and on the research/interview evidence is, to incriminate the member.

Ontario (Police Complaints Commissioner) v. Kerr (1997), 143 D.L.R. (4th) 471 (Ont. C.A.) application for leave to appeal filed March, 1997 (Court File No. 25865) found that notebook entries completed by police officers prior to a public complaint were compellable because at the time they were made 1) there was no adversarial setting (i.e. before complaint filed and the purpose of requiring the notes is not to use them against the officers), 2) coercion was not imposed (i.e. officers aware of obligations to keep notes when making decision to join), 3) the principles underlying self-incrimination were not in jeopardy (i.e. (a) unreliable confessions and (b) protect against abuse of power by state) (notebooks not made under stress), and 4) proceeding was not a criminal prosecution. The other feature here is that the officers enjoyed a statutory exemption from testifying and so they argued the notebooks were being used to incriminate them contrary to this provision. In fact, by conducting the Fitzpatrick analysis the Court accepted that a s. 7 liberty interest was triggered.
Ordered statements have only existed legislatively in the R.C.M.P. since 1986, although, as the Marin Commission noted, there was a significant change to the "Standing Orders" of the Commissioner of the R.C.M.P. in 1962, which authorized a charge for disobeying an order if a member refused to answer questions during an internal investigation.\textsuperscript{365} 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.\textsuperscript{366} This was also a topic of contention before the Legislative Committee, wherein 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.\textsuperscript{367}

Clearly there is a need to ensure that a minimal guarantee of fundamental justice is provided to members who find themselves the subject of an internal investigation, particularly in light of the related investigations and attending public obligations that accrue to the R.C.M.P. in such situations.

Moreover, it has been found that members receive no prior information regarding the accountability regime in the R.C.M.P. before joining, at the time of joining, during training, or after being posted to the field. At least Fitzpatrick received a copy of the rules under which he was operating \textit{before} he started fishing. It has been established that members cannot be presumed to know the terms and conditions of employment, and therefore it cannot

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\textsuperscript{365} Supra, note 4 at 32.
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\textsuperscript{366} Ibid. at 153; see also generally, Gary E. Reed, \textit{Organizational Change In The RCMP: A Longitudinal Study} (M.A. thesis, Simon Fraser University, Political Science, 1984) (unpublished).
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\textsuperscript{367} Supra, note 7, Issue No. 11 at 11:115.
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be said that members are voluntarily and knowingly submitting to the accountability regime or ordered statements.

Based on the evidence unearthed during this study, there is every reason to believe that R.C.M.P. members are in need of protection against abuse of power by the state, which is also their employer. Members are employed in a para-military hierarchy that is operated by commissioned officers who are very much committed to self-preservation, status, control and the reputation of the Force. The author found no comfort or assurance that members are being adequately protected and that the proper limits as to the nature and extent of questioning are being set in every case. Many of the members interviewed by the author were not adequately knowledgeable of even their basic rights and obligations in the course of internal investigations. Nor is it a fanciful notion to suggest, based on the information identified in this thesis, that members can be subjected to improper treatment by the R.C.M.P.

Based on the threshold to initiate an internal investigation, it also appears ordered statements can operate as a dock from which, to quote Ratushny, "fishing expeditions" can be launched.\textsuperscript{368} Investigations can be undertaken where there "appears" to be an infraction. There is no clear elucidation of this term, making the threshold to institute an investigation almost non-existent, and perhaps arbitrary. It is open to the R.C.M.P. to investigate any allegation whether based on reasonable grounds, mere suspicion, or because it wants to. These contextual features must be taken into account when considering whether derivative-use immunity and/or compulsion exemptions will be provided.

\textsuperscript{368} Supra, note 159 at 349.
ii. Derivative-Use Immunity

Given the serious consequences of criminal charges and/or formal disciplinary action, one has to ask if it is reasonable for a member to rely on the use-immunity provided under s. 40(3) of the R.C.M.P. Act? As shown, there is nothing to prevent the R.C.M.P from using an ordered statement as a mechanism to obtain evidence for the purpose of conducting and furthering an investigation, be it internal, public or criminal. As the testimony of former Commissioner Simmonds specifically points out, ordered statements permit the Force to obtain "independent evidence" from the statement. The findings discussed in Chapter 7 indicate the extent to which this authority can be misused to acquire otherwise unavailable evidence. There is little doubt about the intentions of R.C.M.P. management to obtain derivative evidence.

There is no question that Wilson and Sopinka JJ., based on Thomson Newspapers, would find s. 7 of the Charter is triggered by s. 40(2), especially where the statement provides derivative evidence which could be used against a member in a subsequent criminal proceeding. 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. 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 or communicatory derivative evidence.

Although Thomson Newspapers, S. (R.J.), and Branch only dealt with "testimonial compulsion" in the sense of being summoned to a hearing of some form, there are sound reasons to believe the principle against self-incrimination may extend to ordered statements from R.C.M.P. members. First, because members can potentially be the subject of criminal sanctions for failing to provide a statement or convicted of a criminal/penal offence. Second,
Thomson Newspapers and Branch were also dealing with "investigations" per se. Third, the authority to compel in the foregoing cases, as with ordered statements, was statutorily based. Fourth, Fitzpatrick implicitly concedes that compelled statements under different circumstances (i.e. adversarial and coercive) would have the benefit of subsequent derivative-use immunity. Albeit in an administrative or employment context, it is clear that state agents are compelling statements from members pursuant to statutory authority in adversarial and coercive circumstances that could lead to criminal prosecutions. This should at least attract limited derivative-use immunity.

There are, however, several potential problems: first, the member must show (evidentially) a plausible connection between the compelled statement and the impugned evidence; second, that the evidence would not have been found "but for" the statement (although in the criminal setting the Crown seems to have the actual burden to show it would have been found); and third, the derivative evidence must be used in a proceeding in which the accused is subject to penal sanctions or any other proceeding which engages s. 7 of the Charter.369

This approach places two onerous burdens on a member. First, the member is required to answer and incur the legal liability of any administrative and criminal repercussions before being able to argue the evidence was derivatively prejudicial. Second, having the onus of proving it was derivative may not be a problem criminally, but it could be internally since there is limited statutory requirement upon the R.C.M.P. to disclose its case.

369 Branch, supra, note 15 at 9. It is unclear how the recent adoption of the conscriptive approach in Feeney, supra, note 350 and Stillman, note 351 regarding s. 24(2) may impact the s. 7 approach to derivative evidence.
to an accused member.\textsuperscript{370} It must also be noted that many uses of the ordered statement, derivative or otherwise, will not be captured by judicial review under s. 7. For example, using an ordered statement to make decisions about suspension, forms of discipline (\textit{i.e.} formal or informal) and whether to institute a statutory investigation will never be brought before a court. This is hardly a situation which accords with the tenets of fundamental justice in Canada.

In the case of an ordered statement or derivative evidence that surfaced during a criminal trial of a member there appears to be a sound basis to assert s. 7 derivative-use immunity. It is clear that the criminal disclosure obligations could result in the release of ordered statements. As previously noted, the \textit{Crown Policy Manual} states that ordered statements are to be forwarded to the prosecution service. The difficulty though, is what if the Crown is provided access to an ordered statement when the member is the accused? Going back even one more step, what if it is found that the ordered statement investigatively resulted in evidence being identified that would not otherwise have been known, and it is included in either the criminal or internal case? In addition, what if the criminal investigation is completed and forwarded before an ordered statement is obtained, but the investigator obtains knowledge during the internal that enables the investigator to adapt his or her testimony at the criminal trial, or, when passed on to the Crown permits non-evidentiary applications? These questions highlight the difficulties that could arise when an ordered statement is now obtained.

There should be little problem applying the derivative-immunity protection in criminal cases to clear instances of self-conscripted evidence that the Crown or investigator would

\textsuperscript{370} Eberts, \textit{supra}, note 117 at 103, argues that the \textit{individual} is being forced to seek redress from the court if the administrative investigation is being improperly conducted.
never have otherwise located. However, given the intermingled results of one investigator conducting all the investigations, it could become difficult to prove or establish the plausible connection. This is particularly so where the member or court never knows about the Force's use of the statement to make decisions about suspensions and discipline.

The availability of limited derivative-use protection is still more complicated with respect to internal adjudication proceedings. Aside from the internal investigator having the benefit of the statement, it was found in Chapter 7 that ordered statements are forwarded to internal prosecutors (Appropriate Officer's Representative) as part of the case, despite the "use" protection. This raises interesting derivative issues. First, is an internal adjudication process a penal or other proceeding that engages s. 7? Based on Wigglesworth and the other s. 7 cases reviewed above, it is not likely that the internal adjudication is a "penal" proceeding (even though a concurrent purpose is to protect and represent public interests). Unfortunately, however, there is no real guidance on what "other proceedings" (as referred to by the majority in Branch) engage s. 7. On the other hand, following the principles of the s. 7 cases, since a member can be summoned to (and possibly subjected to a summary conviction offence for not attending) an adjudication proceeding, it seems that s. 7 could arguably be engaged. At a practical level, however, even if a member is formally summoned, the internal practice apparently is not to compel suspect members to testify.

Alternatively, if an Adjudication Board is bound by the principles of fundamental justice under s. 7 in the manner in which it conducts proceedings, it could provide a basis to argue for derivative-use immunity. Based on s. 40(3) and Gustar, it appears improper to use ordered statements to make decisions about suspensions or take other administrative action against the member. The question is whether the principles of fundamental justice also extend to derivative evidence in an internal proceeding. The question here is not whether the
body is competent to provide *Charter* remedies, rather, it is whether the body is bound by the principles contained in s. 7. In other words, even if s. 7 is not triggered, an internal hearing to comply with the principles of fundamental justice must not admit derivative evidence. In the case of Adjudication Boards, while it is possible to argue that derivative-use immunity attaches to ordered statements, the success of such an argument is not likely given the non-penal employment sanctions that can be imposed.

As a result of this conclusion, an interesting contradiction arises. If a suspect member provides an ordered statement and does not have limited derivative-use immunity internally, he or she may tactically be forced to take the stand and respond to evidence derivatively obtained (which cannot occur if no ordered statement is taken). As a result, internal proceedings that precede criminal trials can provide evidence that can be used against the member in the criminal trial (*i.e.* member chose to testify). However, a witness-suspect member compelled to testify at a Board of Inquiry, E.R.C. or P.C.C. hearing may enjoy derivative-use immunity because they are compellable to testify on pain of a criminal sanction. Even more interesting is the fact that a witness member called to testify at another member's internal hearing and later charged criminally would have derivative-use protection because he or she is subject to criminal sanctions for not attending and answering questions. Thus a former witness member has more potential protection than a subject member charged with internal and criminal offenses.

By itself, the fact that derivative evidence would be utilizable in a disciplinary hearing may be less objectionable to some, if one accepts the distinction made in *Wigglesworth* and other cases (*i.e.* that such "offenses" were not matters to be dealt with in the *Charter*). But, it is suggested, the jeopardy created by the possible criminal and internal application of derivative evidence should re-focus the s. 7 analysis. Members are not individuals engaged
in a commercial enterprise for profit. Nor can it be assumed that members are aware of their extensive employment obligations regarding accountability before joining. The template of employment must raise the expectations for s. 7, especially if we accept L'Heureux-Dube J.'s flexible context analysis. The employment context of members, even with the attendant public interest in accountability, may place it below the criminal standard, but it is certainly higher than the commercial enterprise standard on the principle scale. Dismissal in employment law is commonly referred to as professional capital punishment.

From the R.C.M.P.'s perspective, for perceptual, policy and fairness reasons, it may be better to start assigning at least two investigators, one internal and the other criminal, since the objective, presumably, is to avoid the problem of enabling the state to act on tainted evidence to conduct the investigation or make decisions. Given the expected difficulty of not showing a connection to, or perhaps rebutting reliance on, derivative evidence, the R.C.M.P. (or Crown) should consider declaring its intentions on whether to prosecute before taking internal steps which result in immunity for a suspect member. This would also avoid any reliance on tainted evidence to make the decisions, and go a long way to addressing employee concerns. If the criminal matter is adjudicated first, the decision to prosecute can only be made on, and the prosecution itself founded upon, independent evidence that did not arise from the compelled statement. However, if the same investigator conducts both the internal and criminal investigations, there is always a danger of contamination from improperly obtained derivative evidence. Even when there are separate investigators, as noted in Chapter 7, the ordered statement still poses a problem because it can directly or indirectly be utilized in a manner that adversely affects the criminal trial (e.g.

371 Keenan, supra, note 105 at 191.
internal investigator reviewing ordered statement with, or using it as a basis to question, the
criminal witness before testifying).

iii. **Compulsion Exemption**

The confounding feature of the compulsibility analysis is that, unlike instances of pure "testimonial" compulsion (e.g. preliminary inquiry), the compulsion in relation to ordered statements is prior to a formal hearing. The *R.C.M.P. Act* is somewhat novel to the extent that it requires responses from members outside the traditional context of testimonial "proceedings" as identified in the *C.E.A., Charter* and cases reviewed. Normally, suspect individuals, especially in criminal matters, are free to exercise the right to remain silent outside of a formal proceeding during the investigative phase. The result here is that members under investigation for a *Code of Conduct* violation can be required, upon demand, to provide a statement that may provide evidence upon which a criminal charge and other proceedings can be based.

The question, though, is whether members are now also potentially exempt from providing ordered statements? The first step is to identify, as directed by *Branch*, the "predominate purpose" of a compelled statement. The R.C.M.P. would generically assert that ordered statements are necessary to enable it to find out what happened. More specifically, however, the purpose of a compelled statement, as noted in *Special Cst. "A"*, is to determine if there has been a contravention of the *Code of Conduct*. Is this a legitimate purpose? Given the need to manage the R.C.M.P. (and presumably protect the public) it would seem so, but the R.C.M.P. is also going to use the statement to make decisions about further investigations (*i.e.* criminal), suspensions (in some cases without pay), the
disciplinary form (i.e. formal vs. informal), and in the cases of informal discipline the sanctions. As noted above, in R.C.M.P. policy an ordered statement will be used where there is an immediate need to find out what happened, and an investigation has not been conducted. It must also be recalled that a former Commissioner confessed that the Force uses ordered statements to obtain derivative evidence. The two ordered statement cases discussed in Chapter 7 also established instances of inappropriate requests for, and uses of, ordered statements. In both instances the policy reasons to sustain ordered statements did not exist. The findings of the Marin Commission and comments before the Legislative Committee referred to above also clearly indicate that the R.C.M.P.'s purpose in ordering statements is not necessarily related to the purpose behind the statute. Derivative evidence, based on Commissioner Simmonds' testimony, is at least one of the purposes. Given the context and findings outlined in the preceding chapters, the author believes that ordered statements, as currently constituted, are an unfair mechanism for dealing with employee accountability.

In any event, an acceptable statutory purpose is not determinative of the issue, and the object of compelling the specific member to provide a statement will also be considered in a specific case. This is where matters become interesting. For example, what happens when the investigator, during the criminal investigation administers the right to counsel and police warning to a member, the member refuses to answer, and the investigator then turns around and orders the member to respond (presumably under an internal investigation)? Further, which is the predominate purpose when the same investigator is concurrently conducting the internal and criminal investigation? Although an ordered statement enjoys statutory use-immunity, it is conceivable that situations will arise wherein the predominate purpose in ordering the statement is clearly to incriminate the member criminally and/or further a
criminal investigation. Even if the Force does show that the potential prejudice to the right against self-incrimination is only derivative-use, the member will still have derivative-use immunity criminally. The Force must exercise caution though regarding the predominating purpose, especially when it takes improper steps such as telling members that a statement made during a "debriefing" is in confidence and then participants are interviewed to obtain statements that are submitted to the Crown as a basis to charge one of the members who spoke during the debriefing about actions taken during the incident.\textsuperscript{372} The statement obtained during the first ordered statement case studied in Chapter 7 also indicated fundamental violations of the R.C.M.P.'s policy on when such statements are to be obtained. The author can envision investigational circumstances arising in which the direction to provide a statement will be so suspect that an exemption from complying may constitutionally be available. This will be particularly likely where it can be shown that the very purpose of the ordered statement is to further the criminal investigation and/or prosecution. However, if no criminal liability is present, and no penal provisions exist internally, it is unlikely that an exemption will be found.

In moving to a s. 1 analysis, it is apparent that certain fundamental constitutional and policy questions about the treatment to be accorded police officers as a profession will be raised. Thus far, the context outlined by this theses raises some important issues about the constitutional, policy and managerial appropriateness of the ordered statement authority.

8. Section 1 Analysis

In the cases reviewed, although s. 1 of the \textit{Charter} was usually raised as an issue, the

\textsuperscript{372} M26.
Court did not *per se* conduct a s. 1 analysis (other than in *Thomson Newspapers*) to determine if the specific legislative provision was constitutionally valid. Instead, the Court, while conducting the s. 7 analysis, either readily accepted that the authority was valid, or incorporated a recognizable s. 1 analysis within the self-incrimination review regarding the principles of fundamental justice. For example, in *Primeau* and *Jobin*, the Court accepted the principle that the state has a right to testimonial evidence. In *Branch* and *Fitzpatrick* the Court appears to incorporate the consideration of s. 1 into their s. 7 analysis on whether the deprivation of self-incrimination protection was in accordance with the principles of fundamental justice. It may be that the s. 7 principles of fundamental justice analysis outlined above extinguishes the necessity of a s. 1 analysis (*i.e.* if the provision does not accord with the principles of fundamental justice it cannot be justified in a free and democratic society), however, it is still a worthwhile exercise to conduct a s. 1 analysis.

Traditionally, if a court found that s. 7 of the *Charter* was violated by a required statement under s. 40(2) of the *R.C.M.P. Act*, the onus would be upon the Force to convince the court on a "preponderance of probabilities" that the limit is justified. 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 a provision as unconstitutional.\(^{373}\) Thus, the purpose of the legislation (employee accountability) may be constitutionally valid, but its effects (conscription\(\backslash abuse\)) may breach the *Charter*, making the impugned provision

\(^{373}\) *Big M Drug Mart, supra*, note 258.
unsustainable.\footnote{Ibid., per Dickson C.J.} 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 premises surrounding ordered statements. In \textit{S. (R.J.)} the majority cautioned against relying too heavily on "effect" and "status" when considering self-incrimination.\footnote{Supra, note 15 at 54.}

It is important to be cognizant of the fact that self-incrimination is considered to mean different things in different contexts. As stated earlier, the author believes that ordered statements deal with employment status, and as such, members deserve more protection than is available regulatorily, but less than criminally. As pointed out by Tomkins and Bix, albeit in the United States context, the courts seldom abrogate self-incrimination rights in the public interest in criminal cases, yet government and social enforcement interests are highest in the criminal context.\footnote{Adam Tomkins and Brian Bix, "The Sounds of Silence: A Duty To Incriminate Oneself?" [1992] \textit{Public Law} 363 at 368.} There is as strong a public interest in solving major criminal offenses as there is in holding public officials accountable.\footnote{Dolinko, supra, note 98 at 1121-2.} However, if criminal enforcement does not provide grounds to override protections against incrimination, why would it be more acceptable administratively where there is less at stake? The traditional response is that administrative and regulatory matters do not have the same implications for a person as a criminal matter. Although this is a potential response, the author maintains that employment is deserving of greater deference than commercial activity, given the individual, familial, social and stigma implications which can arise.
Accepting that s. 40(2) is a limit on a member’s right against self-incrimination contained in s. 7, it follows that its containment in an Act of Parliament, in this case the *R.C.M.P. Act*, creates a "limit prescribed by law" within the meaning of s. 1. A finding that s. 40 is a reasonable limit demonstrably justified in a free and democratic society would require the satisfaction of two criteria under s. 1. It is important in this analysis that the administrative "purpose" of ordered statements not be permitted to overshadow the criminal purpose or consequences that can arise.

**a. The Oakes Test**

Chief Justice Dickson in *R. v. Oakes*[^378] established a two branch analysis, known as the "Oakes Test," to justify a legislative measure under s. 1. Like the s. 7 self-incrimination analysis, it is generally acknowledged that the Oakes Test will vary depending on the context.[^379] In this case, the context will be disciplinary, but the criminal implications attached to an ordered statement, in the form of derivative evidence, must also be noted in the analysis.

**i. Legislative Objective**

First, the legislative *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 R.C.M.P. misconduct is at such a level, or could attain such proportions, that the need to maintain internal discipline requires ordered statements. Such an assertion would most certainly be founded on such findings as those of the McDonald Commission into R.C.M.P. activities in the 1970s. However, based on the review of R.C.M.P. Public Complaints Commission ("P.C.C."), E.R.C., and other data in Chapters 6 and 7, it cannot be stated that statistically R.C.M.P. misconduct represents a pressing and substantial concern.

On the other hand, at least as posited by the R.C.M.P., 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. Of course, the fact that ordered statements are, at least formally, seldom used by the R.C.M.P., and other police departments manage to operate successfully without statutory authority to compel statements, mitigates against the substantial and pressing concern argument. This is especially so given the contrasting consequences and effects of an ordered statement for a member. As shown, ordered statements can have serious consequences that extend well beyond the disciplinary process and are not circumscribed or limited to

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disciplinary control and internal accountability.

ii. Proportionality Test

This raises the second criterion: are the "means" reasonable and demonstrably justified? Is the requirement to provide an ordered statement reasonable and justified? In particular, has the legislature "balanced" the interests of society with the member's right not to be forced to incriminate himself or herself? Chief Justice Dickson proposed a three part "proportionality test" in Oakes to make this determination.

A. Rational Connection

First, the means, in this case the ordered statement, must be "rationally connected to the objective."

More importantly, the provision for ordered 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, a consistent observation is that members are being singled out for a special form of review, in that other professions are not necessarily the subject of an ordered response, despite the obvious power wielded in such professional positions. In addition, an investigation into misconduct by self-regulating professions is not being undertaken by the employer/state, nor is there the concurrent criminal mandate, in that the profession is not also responsible for filing criminal reports or conducting criminal investigations. In relation to civilian

381 For example, generally speaking, lawyers are asked for a written response to an allegation. The lawyer is given time to prepare and craft a response to an allegation of misconduct. Any investigation or inquiry before a discipline board in most professions ensure natural justice and the right to counsel is provided. This is not necessarily the case within the R.C.M.P.
employers, there is also no added criminal and public responsibility or mandate when dealing with an employee. Although other public sector employers must be accountable to the public, there is no concurrent criminal mandate.

There is no question that members should be accountable for their actions, and it is in the interests of the Force that members provide an "accountability statement." There is a serious question of good faith, however, in light of the obvious misuses to which the ordered statement could be and have been put. Further, as previously noted, in both its 1989-90 and 1990-91 reports, the P.C.C. is calling for policy from R.C.M.P. management that would require a statement from a member whose conduct is the subject of a "public complaint" under Part VII of the R.C.M.P. Act.382 Apparently, when requested for explanations under Part VII (which is not a disciplinary investigation), some members declined to make a statement, as was their right. In the P.C.C.'s view, members should have no option to decline to give statements, and the Force had not resorted to ordered statements frequently enough as part of the internal/disciplinary investigation.

If the R.C.M.P. were to bend to such pressure, a member could be ordered to provide a statement whenever there is a complaint, regardless of whether it involved a contravention of the Code of Conduct. This does not appear to accord with the spirit of the legislation and highlights the arbitrary uses to which a statement can be put. With regard to the P.C.C., it appears the ordered statement is a vehicle to which it would routinely resort, without any consideration being given to the rights of, or obligations of fairness to, the member.

In Borovoy’s view, "[p]olice officers are endowed with extraordinary powers for the protection of the public" and as such are not exempt from providing a "reasonable accounting" of their conduct.\(^{383}\) Representing the Canadian Civil Liberties Association before the Legislative Committee on Bill C-65, Borovoy remarked that R.C.M.P. officers are "especially vulnerable" to criminal charges, and in this regard a limited immunity for answers was necessary, but it should not exempt the use of the answers in a civil or administrative action.\(^{384}\) A more detailed analysis has revealed that individual members are prone to systemic employment vulnerabilities that may not have been contemplated by Borovoy or other ordered statement advocates.

It has been suggested that such explanations from members are not unlike the accountability that is generally required from anyone in an employer-employee situation (e.g. factory workers).\(^{385}\) With respect, this is an over-simplification. As Goldstein observes, policing is an occupation that is sometimes, by its very nature, "adversarial," "emotionally charged," "hostile," and often requires "physical force."\(^{386}\) It is safe to say that the average employment situation in Canada does not place an employee in situations that remotely resemble this occupational climate. The factory worker is probably operating under

\(^{383}\) A. Alan Borovoy, When Freedoms Collide (Toronto: Lester & Orpen Dennys, 1988) at 254.

\(^{384}\) Supra, note 6, Issue No. 6 at 6:7-8.

\(^{385}\) Borovoy, supra, note 383 at 254-5.

\(^{386}\) Herman Goldstein, Policing A Free Society (Cambridge, Mass.: Ballinger Publ., 1977) at Chp. 7. Anthony V. Bouza, The Police Mystique (New York: Plenum Press, 1990) at 5 observes that "Cops deal with people who are in trouble or disarray...They are not invited to festivals or happy events, but to brawls. They observe the human animal’s dark underside. Cops get called to control nasty instincts and curb wicked appetites. They are summoned when things get out of hand...to deal with hurt children, blood, human misery, and anguish..."
a regime/collective agreement that sets out the obligations and procedures for the employee and employer when there is an allegation of misconduct. Further, as part of a union, the factory worker probably has recourse to funded counsel and representation during a discipline investigation. Most importantly, misconduct can be ultimately adjudicated by an independent third party. These factors, as repeatedly pointed out, are not present for R.C.M.P. members.

In addition, most employers are not operating under legislated duties to investigate criminal conduct of their employees, public complaints, as well as to apply discipline. In light of the legislated duty to investigate criminal, public, and internal allegations of misconduct, the R.C.M.P. is in a different situation than other employers. In general, there is no "obligation" on an employer to pursue, or make a criminal complaint against an employee who has engaged in improper conduct, whereas the police have legal, ethical and social obligations to conduct just such inquiries. Further, the finder of fact, in this case the R.C.M.P. as an organization, is wearing several hats: manager, supervisor, accuser, investigator, determiner of misconduct, form of discipline, adjudicator, disciplinarian, and final level of appeal. The factory worker may have to answer questions, but generally the final arbiter of misconduct does not work for or run the company.

Holding police officers accountable is an objective of significant merit, both socially and internally, however it is not rationally connected to the various arbitrary and unfair "uses" of ordered statements. 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? This question is very pertinent when the variety of conduct caught by the ordered statement net can range from
pilfering paperclips to abusing prisoners. The rational connection case for ordered statements is not as persuasive when the circumstances and entire context highlighted by this thesis are taken into account.

B. Minimal Impairment

The second criteria of the proportionality test revolves around whether the use of ordered statements impairs a member’s right to silence or to be free from self-incrimination as little as possible? Under s. 40, a disciplinary investigation can be instigated when there "appears" to have been a contravention, which is accompanied by the attending authority to require a statement. Given this 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 its haste to appear to the public as responsive, particularly where serious allegations are involved, may resort to an ordered statement rather than wait for the results of a thorough and complete criminal or internal investigation. In fact, Section 39(1) of the R.C.M.P. Regulations state that "A member shall not act or conduct himself or herself in a disgraceful or disorderly manner that brings discredit on the Force." The conduct captured is extremely broad.

This issue flows through much of the American literature on this topic, supra, notes 72-3.

M107, who has experience in the discipline process, confirmed that some senior officers are very prone to wanting to rely on the ordered statement authority in the aftermath of high profile incidents to get responses from members. Responding to pressure from high profile events is not speculative in light of the dramatic announcement of Commissioner Murray that he is considering disclosing "in the public interest" the results of the Airbus leak investigation; see, Jim Brown, "RCMP changes mind on probe of Airbus leak", The Vancouver Sun (15 January 1997) at A5. Until this statement, the Force had maintained for over 10 years that such information is not disclosable. Many members, at the time, commented on the apparent political and public pandering that this shift represented. In fact, the P.C.C. has argued with the Force for years that disciplinary information should be released, and this is an issue that may form a
Special Cst. "A" and the findings of Judge Marin speak to this very issue. If anything, not having the ability to rely on ordered statements may ensure management does not exploit this mechanism in the pursuit of a criminal charge. If a member has committed a criminal act the need for "public accountability" must follow, but should it arrive on the horns of an "internal" accountability-disciplinary mechanism?

The Marin Commission conducted a thorough inquiry of the use of ordered statements and concluded that "the abandonment of the ordered statement will not alter, to any significant degree, management's ability to administer the Force with efficiency" (emphasis added). The Marin Commission received substantial input from members of the R.C.M.P. who asserted that ordered statements had little credibility and were not necessary to successfully conduct an investigation. This raises serious doubts that s. 40 can be found to impair minimally a members fundamental right to justice and fairness.

It is in this regard that 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

reference case for the courts. See also, John W. Ekstedt, "The RCMP and the Canadian Public - Fallout from the Mulroney Affair" (March, 1997) Blue Line Magazine at 28 where he notes that "there is evidence that the organization of the RCMP and its relationship with its political masters may be developing in ways which are not in the best interest of Canadians...the relationship between the RCMP and the executive of government needs clarification."

390 Supra, note 23.

391 Supra, note 4 at 153.

392 Ibid.
adhere to these principles.\footnote{393}{Supra, note 174 at 219.} (emphasis added)

The Supreme Court should not be seduced by arguments that administrative efficiency and convenience in managing the Force (as well as public accountability) are bases for insisting that members not have the protection of non-incrimination.

It has also been suggested that providing statements is merely a condition of employment, one which members accept upon engaging with the R.C.M.P.\footnote{394}{Borovoy, supra, notes 383-4; see also, Willette, supra, note 172.} If the consequences of an ordered statement were strictly limited this might appear reasonable, but two points must be made. First, although a recruit may have some notion that accountability is an important "condition" of employment, there is no pre-employment or training information provided regarding the accountability process. Most new members have no appreciation that the rights available to other Canadian citizens will no longer apply to them upon engagement. Second, as this thesis found, members cannot be considered knowledgeable about their rights or the accountability regime. The invocation of the current scheme has created a complex and inter-related process of possible investigations and hearings that would mystify even the most capable legal mind. Without question, many members are performing their duties with little or no understanding of the current accountability program.

In the end, the question is whether the ordered statement is necessary to complete a thorough Code of Conduct investigation? It seems incongruous for a police organization, which is in the business of investigating, and in possession of advanced investigative skills and technology, to assert that it would be stymied and unable to hold members accountable
without the ability to order responses to questions. Even if one accepts the administrative accountability argument, this 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 members should not be held to a high standard of conduct, however, this does not entitle the R.C.M.P. to possess a mechanism that would enable the member to be "conscripted" against himself or herself for the purposes of successfully laying a criminal or disciplinary charge.

Even if it is assumed that the internal and criminal investigators are always different individuals, it would be naive to believe that an internal investigator, either formally or informally, would not make known to the criminal investigator crucial evidence arising from an ordered statement that could convict a member of a crime, particularly if it were heinous (e.g. sexually assaulting a child while on duty). Given our understanding of Force management and culture, there is an incredible desire to do what is perceived to be proper, regardless of the legal niceties, such as fairness and presumption of innocence.

On the other hand, what if the member 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 member? A review of the R.C.M.P. Act and Regulations does not provide any guidance on this issue. Moreover, given the significance of an ordered statement, is it proper to permit the R.C.M.P. to create its own policy surrounding internal investigations and the investigative "use" of ordered statements outside of a criminal, administrative or civil proceeding? Are Charter protections to be accorded on the basis of someone's occupation, without any rational analysis of what, in some instances, appears to be misguided rhetoric, disinformation and unsubstantiated assumptions?
C. Effects and Objective

The third and final factor of the "proportionality test" is the proportionality between the "effects" and "objective." In Oakes, Dickson C.J.C. felt that the more deleterious the effects of the measure on the Charter right, the more important the objective must be for society. Thus, all the above criteria may be met, but the severity of the effects may not justify the limit.

As the Ouimet Report notes, removing the privilege against self-incrimination "places an additional and powerful weapon in the hands of law enforcement" (emphasis original). Lewis 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. This undercuts the argument that ordered statements are necessary to hold police officers accountable in the discipline process. Commenting on the problem of developing procedures for investigating "public complaints," the authors of the Solicitor General's Report on the 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." The systemic effects of ordered statements are not limited to one context, and any negative permeation is closely intertwined with the overall health of any department. Thus, for a member it is not

395 Supra, note 153 at 68.

396 Supra, note 3 at 140. This indicates that internal accountability is possible without the ordered/duty statement.

really a question of special treatment, but fair treatment.

It might be possible to sustain s. 40(2) if the effects were limited to the disciplinary forum, but given the problem with derivative evidence, it is very possible the "deleterious" effects of an ordered statement would be perceived by a court as disproportionate to the objective. This is particularly so where the difference may amount to a criminal conviction or acquittal and not just a disciplinary disposition. The author suggests that a constitutional (or policy) balance has not been achieved between the interests of the Force (and community) in holding members accountable and protecting members' individual rights to be treated fairly.

b. Possible Results

A successful argument under s. 1 will depend on the ability of the Force to convince a court that there is a clear delineation between an internal and statutory investigation, and that there is no possibility that the contents of an ordered statement would be the basis for a criminal investigation. This would significantly reduce any argument regarding the "effects" of the ordered statement on the member's right not to be placed in a position of incrimination. The statutory versus internal context will be a critical factor under this head of examination.

If a court found that s. 40(2) of the R.C.M.P. Act was not justified under s. 1 of the Charter, it could declare it to be of "no force and effect" under s. 52(1) of the Constitution Act, 1982. However, s. 52 may provide 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 possibilities here. First, as with s. 7 derivative-use immunity, the court could accept that ordered statements are necessary (i.e. accords with principles of fundamental justice), but derivative evidence is not to be admitted in any proceeding (a possibility if the comments of L’Heureux-Dube J. regarding availability in S.(R.J.) are valid). This would accord with the statement of the then Solicitor General of Canada, Perrin Beatty, regarding the R.C.M.P. Act 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 not be used in criminal trials and, perhaps, but not likely, in internal proceedings. This would certainly be the result based on the findings in Branch. However, Lamer C.J.C.’s (at time of judgment) comments on the possible inequalities that can arise regarding the application of s. 5(2) of the C.E.A. in Kuldip, are pertinent, in that "it is up to Parliament to redress the unfairness by amending or repealing the problematic elements of the provision."

9. Section 24 Analysis

In reviewing the cases, it also appears the Supreme Court of Canada has collapsed the

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400 Supra, note 10 at 638.
s. 24 *Charter* remedies (subsection (1) or exclusion under subsection (2)) into the s. 7 self-incrimination analysis. This is evident in the "but for" test finally agreed upon in *Branch* to deal with derivative evidence. However, in *S. (R.J.)*, the majority spent considerable time considering the s. 24(2) cases to try and arrive at a meaningful test for the exclusion of compelled evidence. The following review will be of assistance in reconciling the ss. 7 and 24 approaches to evidence.

Assuming a court finds that an ordered statement violates the protection against self-incrimination under s. 7 of the *Charter*, would the derivative evidence be excluded under s. 24 in an administrative or criminal proceeding? Recall that s. 40(3) precludes the use of the statement or answer, *per se*, in either proceeding, so the only issue is derivative-use. First, it will be necessary to establish that s. 7 was violated in the *course of obtaining the evidence*. The invocation of a required response and the related *Charter* breach will be clear, however, whether the evidence was "discovered" or derived as a result of the breach/statement may not be as clearly demarcated. The next question, 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* identified the Collins Test factors to be considered for excluding evidence under s. 24(2).\textsuperscript{401} A convenient summary of the factors to be considered under the Collins Test is found in *R. v. Strachan*:

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 wilful, 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

\textsuperscript{401} *Supra*, note 351.
relates to the disrepute that would arise from exclusion of the evidence.\textsuperscript{402}

It was initially believed that the Collins Test for s. 24(2) exclusion distinguished between real versus conscripted evidence.\textsuperscript{403} There was also disagreement on whether all three factors had to be considered under the Collins Test. For example, Iacobucci J. in \textit{R. v. Elshaw} adopted the position that the British Columbia Court of Appeal "misunderstood the nature" of the Collins Test by not excluding evidence that was found to affect adversely the fairness of the trial, despite any consideration of the other factors.\textsuperscript{404} Instead, Iacobucci J. adopted the minority statement of Sopinka J. from \textit{Hebert}:

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 \textit{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 \textit{exclusion} of evidence, and not alternative grounds for the \textit{admission} of evidence.\textsuperscript{405} (emphasis original)

Stuart saw this analysis as "problematic" because he did not believe it was intended to create an automatic exclusion of evidence that affected the fairness of the trial.\textsuperscript{406} Although Supreme Court of Canada rulings have continued to use the complete \textit{Collins} analysis, it appears that the Court has endorsed the view that trial fairness will be taken as a strict basis

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\textsuperscript{403} Paciocco, \textit{supra}, note 140 at 114-15 indicates the real versus conscripted distinction was premised on self-incrimination, but feels later cases seem to reject self-incrimination as the basis for \textit{Collins}; see also, Frankel, note 350.
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\textsuperscript{405} \textit{Supra}, note 207 at 207-8.
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for exclusion under s. 24(2). Further, the Supreme Court has recently abandoned the real versus self-incriminatory typology and adopted the conscriptive versus non-conscriptive classification system to determine exclusion.

This recent change in course by the Supreme Court is advantageous to the argument that ordered statements and derivative evidence must be excluded in a criminal trial, since they create an unfair trial based on the coerced and self-incriminatory nature of the statements and evidence. The case for exclusion in an administrative proceeding is less clear because of the tendency of the courts not to provide constitutional recourse in non-penal matters.

a. Trial Fairness

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, unlike the admission of real evidence which would existed regardless of the breach, will make the trial unfair." In Stillman, Cory J. abandoned the real versus conscripted evidence approach and adopted a "non-conscriptive" versus "conscriptive" classification of evidence regarding the first Collins factor. As stated by Cory J., "[i]f the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the Charter breach in a form useable by the state), the evidence will be classified as non-conscriptive"

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408 See, Stillman, supra, note 351 and Feeney, note 350.

409 Supra, note 223 at 617; also Collins, supra, note 351; Sopinka et al., note 160 at 401 discusses trial fairness and self-incrimination.
The crucial element is not whether the evidence is real (i.e. tangible), "it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter (emphasis added). 411 On the other hand, "[e]vidence will be conscriptive when an accused, in violation of his [or her] Charter rights, is compelled to incriminate himself [or herself] at the behest of the state by the means of a statement, the use of the body or the production of bodily samples" (emphasis added). 412 Further, "derivative evidence" was defined by Cory J. as a subset of conscriptive evidence "whereby an accused is conscripted against himself [or herself] (usually in the form of an inculpatory statement) which then leads to the discovery of an item of real evidence." 413 Where evidence is conscriptive and obtained (or derived) in violation of a Charter right it will be excluded (with rare exceptions) under trial fairness without consideration of the other Collins factors. 414 However, under the "discoverability or but for principle" if the Crown can establish on a balance of probabilities that (1) the police had an alternative non-conscriptive (i.e. independent source) by which to obtain the impugned evidence or (2) that it was inevitable that the evidence would have been discovered by the police, its admission will not generally render the trial unfair. 415 If the evidence is conscriptive and the Crown establishes on a balance of probabilities that the evidence would have inevitably or independently been

410 Stillman, supra, note 351 at 352.

411 Ibid.

412 Ibid. at 353.

413 Ibid. at 359.

414 Ibid. at 350.

415 Ibid. at 360-5.
discovered so as to satisfy the trial fairness test, the court must consider the remaining two factors (i.e. seriousness and effect of exclusion) of the Collins Test.\footnote{Ibid.}

Even prior to Stillman, and the Hebert analysis regarding the right to choose to speak to an agent of the state,\footnote{Supra, note 207.} it was settled by the Privy Council in Ibrahim v. R. 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."\footnote{Supra, note 202, per Lord Sumner; see also the other cases listed at note 202. Sopinka et al., note 160 at 347 note that "Due to the perceived lack of control over the interrogation process courts have cautiously reviewed any exchange of comments between an accused and a person in authority..."} Even without the statutory or Charter exclusion, an ordered statement may not be considered voluntary and admissible in a criminal proceeding.\footnote{However, in R. v. White (1996), 24 M.V.R. (3d) 149 (B.C. Prov. Ct.) it was noted that statements made under compulsion of statute are considered voluntary; see also, Trumbley v. Metro Toronto Police Force (1986), 55 O.R. (2d) 570 (C.A.) at 593 (see S.C.C. decision, note 125) where it was held that the voluntary rule for statements to persons in authority did not apply to disciplinary processes; Nason, supra, note 56 found no reason that fact reports made at the request of a senior officer were inadmissible.}

This does not address the fact that, as identified in Chapters 6 and 7, the R.C.M.P. utilizes statements to obtain derivative evidence to prove cases against members. Charter rights can become meaningless for members if the R.C.M.P. is permitted to rely upon ordered statements to further criminal investigations.

The Stillman analysis raises some interesting issues for ordered statements. The Force in most instances would not be using the statement per se, in a proceeding, since s.
40(3) of the *R.C.M.P. Act* precludes the use of the statement. However, there are two issues that are raised with respect to trial fairness. First, there is little doubt that members are being conscripted at the behest of state agents in the creation or discovery of evidence in the form of a statement. If it is successfully asserted that the ordered statement authority is contrary to a member’s right against self-incrimination and/or silence under s. 7, the statement and any derivative evidence should be excluded from a criminal trial. It has been amply demonstrated in this thesis that the right to silence and protection against incrimination are not fully available under the current accountability regime in the R.C.M.P.

The second issue arising from *Stillman (Therens, and Calder, supra)* is that the R.C.M.P. is conscripting members to provide statements without properly dealing with the right to counsel. The member, unlike an accused who unknowingly speaks to an undercover operator while in custody, is not exercising a choice whether to speak. Members have no effective choice but to comply with the ordered or face further sanctions. The statement may not be obtained in a criminal-*Charter* context, but as noted above, there is a detention and application of the powers of the state, within the meaning of *Hebert* and *Calder* (i.e. right to counsel). As identified in the two ordered statement cases discussed in Chapter 7, the Force, even though it clearly detains members to obtain ordered statements, does not provide, or actually believes it can deny, the right to counsel. Despite being detained and under investigation for criminal/internal offenses, in both of the cases discussed, the members were not advised of the right to counsel. After reviewing Force policy and practices regarding investigations, the author asserts that the R.C.M.P. cannot credibly claim that there is no overlap or connection between criminal, internal and public complaint investigations. The simple fact that in most instances the same investigator conducts the criminal, internal and public complaint investigations, make the right to silence, non-incrimination and the right to
counsel live issues under the *Charter*. Consistent with the facts in *Stillman*, as demonstrated in this thesis, ordered statements and internal accountability in the R.C.M.P. is concerned with "the abusive exercise of raw physical authority by the police." 420

Given the fact that the Supreme Court of Canada has recognized that the rights to silence, non-incrimination and counsel are "fundamental tenets" of a fair trial, the introduction of any *conscripted or derivative evidence* from an ordered statement should be found unfair during a criminal trial. As a result, an ordered statement and any derivative evidence must be excluded. However, if the Crown can establish on a balance of probabilities that the evidence would have been inevitably or independently discovered, the trial fairness threshold may be met. As already identified with the derivative-use protection under s. 7, this is where the R.C.M.P. and Crown will find themselves in a constitutional quagmire. For example, on the facts of the first ordered statement case discussed in Chapter 7, an investigator allegedly used the member’s ordered statement to conduct his investigation and question the main criminal witness. How can it now be stated that the witness, R.C.M.P. and Crown did not benefit from and rely on the ordered statement in the criminal context? It is clear that ordered statements will raise issues regarding trial fairness in criminal matters. The lack of non-penal sanctions in internal proceedings will raise considerably difficulty regarding trial fairness.

**b. Seriousness**

A breach of the right to silence or protection against self-incrimination in the criminal

420 *Supra*, note 351 at 344.
context is considered to be serious violation.\textsuperscript{421} Generally speaking, and in practice based on the two cases reviewed in Chapter 7, the ordered statement will not be required to prevent the loss of evidence, or on an urgent basis, although such a situation is not impossible to envisage. In fact, it could be asserted that the actions of the investigators in denying the right to counsel and improperly using ordered statements constitutes flagrant abuse. It certainly will not be difficult to assert bad faith in some instances. Furthermore, in most circumstances, there will be other investigative measures that could provide the same evidence as the member. There is a danger that required statements could be the subject of abuse, particularly without any legislated priority as to the timing of the s. 40(2) investigation (\textit{i.e.} internal is to be held in abeyance until the criminal aspect is concluded).

For a member, the final adjudication (\textit{res judicata}) of the criminal charge is the only true guarantee the derivative evidence from the ordered statement will not prejudicially arise. 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, 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 evidence found as a result of the statement. In \textit{Therens} and \textit{Broyles},\textsuperscript{422} good faith is essentially rejected as a basis to mitigate the seriousness of the violation.

As discussed earlier, R.C.M.P. policy directs investigators that they can deny the

\textsuperscript{421} \textit{Stillman, supra}, note 351; \textit{Feeney}, note 350.

\textsuperscript{422} \textit{Supra}, notes 344 and 223 respectively; see also, \textit{Hebert}, note 207, \textit{per} Sopinka J., who indicates that some of the bench believe that good faith can never mitigate the seriousness of the violation.
right to consult counsel during the interview of a "suspect member." As was the case in Calder, if the member is detained, and the internal conscripted statement produces direct or derivative inculpatory evidence that the Crown seeks to introduce at a criminal trial, the member will be able to assert a violation of the right to "retain and instruct" (i.e. implementational component) counsel and to be informed (i.e. informational component) of that right under s. 10(b) of the Charter. If a proper nexus is made between the denial of counsel, the internal ordered statement and/or 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.423 The denial of the right to counsel is considered to be an extremely serious breach of the Charter. As observed by Iacobucci J., 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."424 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.425 (emphasis added)

Although these comments speak to trial fairness, it is also clear that any violation of the right to counsel is considered to be one of the most serious breaches constitutionally.

423 See, Calder, supra, note 68; also, Brydges, Bartle, Pozniak, Manninen, Feeney, note 350; Stillman, note 351.

424 Supra, note 404 at 351.

425 Supra, note 407 at 166.
Successfully 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. Based on some of the investigative tactics revealed in this thesis, the improper and/or deliberate use of the same investigator to conduct both the criminal and internal investigations may also be considered a serious violation by the courts. This will be particularly true where internally conscripted evidence directly or indirectly surfaces in a criminal trial.

c. Effect of Exclusion

The determinative factor here will be the effect on the trial and repute of justice in not admitting the evidence. In Brydges, it was noted that repeated judgements from the Supreme Court have held that the seriousness of the offence charged is not a justification for admitting evidence if the fairness of the trial is involved. It will also be important whether the evidence obtained as a result of the statement is essential to a conviction. This is a double edged argument though: 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 (i.e. Branch).

In most cases, excluding direct or derivative evidence obtained from an ordered statement would not affect the repute of justice. The premise underlying such cases as Stillman and Feeney is that everyone, regardless of the nature of the crime or the likelihood that they committed the crime, is entitled to the full protection of the Charter. In fact, the exclusion of derivative evidence would serve to reinforce the message that police forces will have to conduct thorough and fair internal investigations, without relying on transgressions of

426 Supra, note 350.
the right against self-incrimination to provide accountability. As stated by Iacobucci J. in *R. v. Burlington*:

Short-cutting or short-circuiting [Charter] rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).427

Police officers are no less deserving of constitutional protection. Any denial of equal protection under the Charter for members will represent a serious erosion of the reputation of justice and the accountability process. It is respectfully suggested that any judicial condonation of ordered statements that have been obtained contrary to the right to silence, non-incrimination or counsel cannot be admissible under the third Collins factor.

d. The Connection

As concluded above, conscripted derivative evidence from an ordered statement that could not be located or appreciated but for the member's statement should be subject to exclusion in a criminal proceeding under s. 24(2). The situation is less certain with respect to internal adjudication proceedings. As noted in the cases, without penal sanctions, the necessity to exclude derivative evidence will not be great. However, two alternative arguments could be made that derivative evidence should not be admissible in adjudication proceedings. First, pursuant to s. 45.1(10) (and s. 24.1(6)) of the *R.C.M.P. Act*, "an adjudication board may not receive or accept any evidence or information that would be inadmissible in a court of law by reason of any privilege under the law of evidence" (emphasis added). If members enjoy protection against the use of derivative evidence under

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s. 7, arguably an Adjudication Board should find the evidence inadmissible. The problem, as already noted, is that Adjudication Board proceedings probably do not trigger the s. 7 protection. Based on the adversarial nature of the proceedings, the unique employment-criminal context/overlap and the issues at stake for a member, the author submits that s. 7 should be triggered to protect members. A second argument for exclusion of derivative evidence may be based on Mooring v. Canada (National Parole Board), in that it now appears that administrative boards have authority to exclude evidence under the common law (fairness, rules of natural justice and principles of fundamental justice) if it was improperly or unfairly obtained or it is not credible. Thus, it may be that derivative evidence cannot be used because, based on the common law principles reviewed by the Supreme Court, which endorsed exclusion, derivative evidence would have been improperly obtained.

Although a member must establish a plausible connection between the ordered statement and the derived evidence, in S. (R.J.) the majority noted that evidence that could not have been obtained, or the significance of which could have been appreciated, but for the

428 On the other hand, it has been traditionally accepted that self-incrimination protection is a "privilege;" see Ceyssens, supra, note 120 at 4-5; Meade v. Canada (1991), 81 D.L.R. (4th) 757 (F.T.D.) found that the self-incrimination protection and the right to silence under s. 7 did not apply to a military Board of Inquiry.

429 (1996), 104 C.C.C. (3d) 97 (S.C.C.); see also, Cardinal v. Kent Institution, [1985] 2 S.C.R. 643 (act fairly). To be a "court of competent jurisdiction" to exclude evidence under s. 24(2) of the Charter the tribunal must have jurisdiction over the 1) the parties, 2) the subject matter, and 3) the remedy sought; see also, R. v. Mills, [1986] 1 S.C.R. 863 (preliminary inquiry), Weber v. Ontario Hydro, [1995] 2 S.C.R. 929 (damages) and Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5 (questions of law) regarding the jurisdiction to determine constitutional validity. With respect to the jurisdiction to declare law invalid under s. 52(1) (no force or effect) of the Constitution Act, 1982 the tribunal must have the authority, expressly or implicitly, to determine questions of law, see Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854.
compelled evidence will generally be excluded in the interests of fairness of the trial.\textsuperscript{430} This means there is a fairly broad exclusion available to deal with derivative evidence from an ordered statement in a criminal trial at least.

10. Observations

Based on the above legal analysis it appears that members will generally enjoy derivative-use immunity in a criminal trial with respect to ordered statements. There may also be occasions when members will be constitutionally exempt from providing an ordered statement. Whether derivative evidence from an ordered statement will be excluded in an internal adjudication hearing pursuant to s. 7 is less clear. As noted, several interesting issues are raised by the fact that coerced statements can be obtained by stated agents who have the combined roles of conducting internal and criminal investigations. In such cases the presence of collateral criminal sanctions and apparently unique situation faced by members under the present regime, may re-focus the s. 7 analysis. However, the weight of authority and analysis suggests that limited derivative-use immunity and/or exemptions from providing an ordered statement will not be available in purely internal matters where no criminal liability exists.

The R.C.M.P., instead of consolidating the investigation process, should be delineating investigations and investigators in order to mitigate against derivatively tainting investigations. However, given recent R.C.M.P. policy changes, and increased reliance on single investigators, it does not appear that serious consideration has been given to the problems that could arise. In fact, the author was recently advised that the internal

\textsuperscript{430} Supra, note 15 at 81.
investigation section in "E" Division does not believe that these decisions have any bearing on ordered statements.\textsuperscript{43}\textsuperscript{1} If the R.C.M.P. is interested in legal and ethical legitimacy with the courts, public, and members, it must take steps to ensure that the ordered statement authority is re-examined. Several recommendations and options will be examined in Chapter 9 to determine what steps are available to the R.C.M.P. to try and re-balance the scale so it fairly and properly protects member, public and management interests.

\textsuperscript{43}\textsuperscript{1} M97.
CONCLUSION

"Truth, like all other good things, may be loved unwisely--may be pursued too keenly--may cost too much"1

Knight Bruce, V.C. (1846)

1. Discussion

Compelled statements from police officers in response to allegations of misconduct raise a number of difficult and complex questions that have not been thoroughly examined. This thesis attempts to show how ordered statements within the Royal Canadian Mounted Police ("R.C.M.P.") impact upon individual members and the organization itself. To do so, it was necessary to place this phenomena within both an historical context and the employment context experienced by members. Based on interviews with members and others, and an examination of various other materials, it was possible to show how this legal mechanism works not only in theory, but in actual practice. The results revealed a marked disparity between official accounts and the real life experiences and accounts of members. The results also fill gaps in the academic literature and hopefully contribute to theory. More directly, several of the fundamental accountability and employment assumptions in this area have been brought into question. The material and findings discussed in this thesis not only challenge some of the basic premises that inform the employment context of R.C.M.P. members, they seriously question the function of and need for ordered statements. It also establishes that the specific employment and organizational context must be more adequately considered when examining the issue of compelled statements from employees.

1 Pearse v. Pearse (1846), 1 DeG. & Sm. 12 at 28.
In order to properly consider the issue of ordered statements in the R.C.M.P., it was necessary to draw together several threads from policing and accountability, some of which had not previously been considered. The overall context in which ordered statements operate is very important because it fundamentally informs the impact of such a device.

Accountability in policing, and the R.C.M.P. in particular, consists of a complex web of criminal, internal, administrative, public, and civil mechanisms to review allegations of misconduct. The complexity of the accountability regime must be taken into account when considering the position of members who are the subject of an allegation.

The first thread of this thesis consists of several strands. By way of background, context and comparison, this thesis described and evaluated the strands of internal management, culture and discipline in policing. Police organizations are highly centralized, paramilitary bureaucratic hierarchies. The R.C.M.P. is probably one of the most successful examples in the world of a paramilitary police organization. Aside from the usual communication and organizational difficulties that arise in bureaucracies, police organizations are unique in that the lowest ranking individual exercises the greatest discretion. To maintain control and to achieve organizational goals, the R.C.M.P. relies on extensive rules and policies, close supervision and pervasive surveillance techniques to regulate the activity of members.

A key variable that surfaces from the review of police organizations, management and culture is the power relations that exist between the two cultures in policing (i.e. management/officers vs. operations/rank-and-file) and the impact this has on personnel. This is particularly evident in the R.C.M.P. To some extent all police organizations are status oriented, closed and rigid in command structure and thinking. Education is not overly valued, avoiding mistakes is paramount, and questioning the system, management or
supervisors is not condoned. These factors generate mistrust between management and operations; a mistrust which is made worse by conflicting organizational, legal and societal demands and objectives. There is a definite and palpable division between executive/administration and rank-and-file/operations in policing. Although police are frequently considered to be a homogenous occupational group with the same interests at all levels, this thesis shows that is not the case. Due to history, tradition and rank structure, the R.C.M.P. is a perfect example of two cultures operating within a single police structure.

Discipline is another strand that is central to the first thread of this thesis. Although there are two general approaches to discipline, the negative/punishment orientation is still frequently encountered in the R.C.M.P. over the corrective or remedial approach. The R.C.M.P. has relied heavily on the paramilitary model and internal discipline mechanisms to regulate misconduct. In matters of discipline, the R.C.M.P. can be heavyhanded and largely punishment orientated. This is not surprising in light of the R.C.M.P.'s successful reliance upon paramilitary training methods, traditions, hierarchy and surveillance measures to control its personnel. The R.C.M.P. has not experienced systemic corruption and brutality like many other police organizations. Some credit for this must go to the paramilitary and internal discipline model. The difficulty is that such an approach is not in tune with developments in human resource management and philosophy or acceptable to newly recruited members. While "change" is occurring in R.C.M.P. training and management practices, only time will tell the extent to which the core ethos of the discipline/punishment regime will be impacted.

While vulnerability and control are two important features in internal accountability and discipline in policing, they appear central to the R.C.M.P. model. Police recruitment, training and management practices are in many respects oriented towards engendering and
maintaining the vulnerability of operational police officers. Another aspect of management and operational relations revealed in this thesis is the unceasing struggle over control and surveillance of operational personnel through the various strategies and structures of hierarchy, supervision, status, rules, policies and discipline. Even in the face of pervasive criticism of police management practices and purported changes in philosophy, the classic paramilitary approach is showing considerable resiliency.

While police managers have every right to control and manage their subordinates, there is little doubt that internal supervision, accountability and discipline can be tyrannical and oppressive. This thesis found a number of internal methods, legitimate and illegitimate, used to effect control. Internal systems of accountability and discipline have considerable influence over police officers. The data collected for this thesis demonstrates the extent to which feelings of vulnerability and lack of control are being constantly reinforced by internal accountability and discipline mechanisms/practices that are seen by members as punitive and in some instances patently abusive. One finding from the research is that the form of employee representation in the R.C.M.P., which was created, paid for and run by management, contributes to the actual or perceived vulnerability of members. Unlike other police employees who enjoy some protection by membership in an employee association, this feature is lacking in the R.C.M.P. Members simply do not have the numerical, moral or financial support to challenge improper actions by management. Denying the right to choose the form of employee representation by members undermines the R.C.M.P.'s newly proclaimed empowerment and management philosophies.

A second thread that relates to ordered statements is the various external mechanisms that deal with police conduct. This thesis examined the role of the rule of law, consent, political accountability, police boards, consultative committees, media, prosecutors, judicial
review, criminal charges, civil suits, human rights complaints, Coroner's inquests and public inquiries as external mechanisms that are integral to the police accountability framework. Unlike other public and private employment contexts, the likelihood of a police officer being influenced by or encountering one or all of these mechanisms, given the nature of their employment, is very high. One of the main reasons for this is that law enforcement officers frequently find themselves in situations where the use of force and adversarial interaction is inevitable. The complexity of the external accountability framework to hold officers accountable serves to highlight the unusual employment context of the police. The review of these mechanisms made it clear that the external police accountability regime is much more complex and multi-faceted than many commentators have acknowledged. The author attempted to show the advantages and disadvantages of each external mechanism reviewed, but found that none of the various mechanisms provide a complete response to achieving accountability. However, they do present a web of review that can respond to a wide variety of police actions. Aside from purely internal review, it is clear that the media, political elites, lawyers, citizens and other agencies all have an important role in monitoring and reviewing police misconduct. It is also evident that a number of these external mechanisms raise issues requiring a complicated balancing of interests.

The other feature that arises from this review of external mechanisms is that officers accused of misconduct, aside from any internal review, can be exposed to a number of invasive external mechanisms. It is clear that police officers are not necessarily immune from external accountability. Certain police actions can automatically trigger various external review mechanisms, while in other cases it takes an actual assertion or complaint of misconduct to set the mechanism in motion. Regardless of the forms or avenues of external review ultimately pursued by the complainant, it is clear that police officers are subject to a
number of non-police, public and independent investigations and proceedings that can place the officer’s action under intense scrutiny. The very nature of policing and the uncontrolled exposure it can impose on police officers just for doing their job is of significance. While other employees and professions may be similarly governed by some of these external mechanisms, conduct codes and statutory requirements, the very nature of their employment does not normally involve confrontational and volatile interactions with their "clients." The implications that an ordered statement and/or its disclosure could pose for a member in these circumstances are profound.

A third thread examined was the role of civilian review or oversight. Although this thesis focused on the functional and legal validity of ordered statements, an overarching issue has been the nature and role of civilian review of police misconduct. For the more extreme critics, external and internal accountability mechanisms are a complete failure in holding police officers accountable. The less extreme position recognizes that police involvement in accountability is not only practically required, but makes sense.

The striking feature about much of the debate regarding police accountability is that it is based on assertions that are untested or uninformed. The "accountability debate" over police misconduct allegations usually centres on the independence of the investigation and the independence of the adjudication. Complete or significant independence of the investigation and adjudication of complaints against the police is one end of the spectrum. Police associations and rank-and-file officers have recently moved to the middle by expressing the desire for some civilian oversight in the process. At the other end of the spectrum, police management usually asserts their right to unfettered managerial control free from civilian review.

The controversy is frequently over who is in the best position to oversee the process.
The drive to impose civilian review is generally motivated by the belief that internal police control of misconduct is not impartial, adequate, effective or accountable. In other instances, civilian review is endorsed as a mechanism to provide increased public satisfaction and confidence by introducing an external check in the accountability regime. It is also asserted that civilian review is critical to maintaining, or regaining, police legitimacy and demonstrating that the police are responsible to society, particularly one that is multi-ethnic. The test is finding a police conduct review system that maximizes both the police officers’ incentives to perform well and citizen confidence in that performance.

The unfortunate feature of much of the discussion surrounding police misconduct and the prospects for civilian review is that it does not adequately address the fact that the relationship between serious allegations and review is inherently and inevitably adversarial. Although many would like to assert otherwise, it is simply not feasible to believe that any fairly serious allegation, given the potential consequences for the officer, is anything but adversarial. As a consequence, certain reliable safeguards must be introduced to convince police officers that mediation and informal resolution are insulated and worthwhile. In addition, some civilian reformers have not fully understood police culture, management, internal discipline and accountability expectations. Further, achieving balanced accountability and consensus is made more difficult when society is increasingly polarized, budgets are reduced and governments respond to media hysteria.

The assumption that civilian review will necessarily increase the substantiation rates of allegations of police misconduct and increase public satisfaction have not been borne out. If anything, substantiation rates are lower in external civilian review regimes. While some may question substantiation rates as an indicator of success, it cannot be ignored that such data is frequently and inappropriately cited in attacks on traditional internal police control. It
is also not clear yet whether full or partial independence of investigations and/or adjudications can meet the public demand or expectations for civilian oversight. There continues to be high levels of complainant dissatisfaction in many jurisdictions that have some form of civilian review/oversight. A survey of complainants for the R.C.M.P. Public Complaints Commission ("P.C.C.") found very low rates of satisfaction by complainants. More work is needed to identify what features of civilian review/oversight are successful at producing greater public satisfaction. Further, low rates of substantiation should not be the sole marker for success or failure; unless of course it is also assumed that most police officers engage in misconduct. The contrary view would be that low rates should be expected in a system that is for the most part operating properly.

While the concerns and perceptions of complainants and society are central to the civilian review process, the critical issue for the individual officer remains the fact that a particular civilian review regime, either on its own, or in concert with internal and/or other external review mechanisms, can factually or perceptually impose demands and expectations on officers that are not fair, balanced, informed or reasonable. This is why scapegoating is a real concern for police officers whenever discussing internal, external or civilian review. Almost without exception, the subject of becoming a scapegoat arose during interviews with members. Interestingly, this concern seemed to be exacerbated in the R.C.M.P. by two factors: first, the specific labour relations context of members (i.e. no independent employee representation); and second, the very limited capability of the External Review Committee ("E.R.C.") to deal with management's actions.

Civilian review in the R.C.M.P. over internal matters is provided by the External E.R.C. and public complaints by the P.C.C. Several interesting features were found about the R.C.M.P. regime. In interviews and discussions with members and investigators (who
are not in routine contact with the process) it was apparent that, aside from knowing that public complaints and investigations can be undertaken against them, members were uninformed about the process, the differences between the types of complaints/investigations, the jurisdiction of the P.C.C. and E.R.C., and a member's basic rights and obligations under the various sub-regimes. The members interviewed were vaguely aware they had certain "rights," but either seemed to believe that they never had to give a statement or that they always had to give a statement. Misunderstandings and misinformation about obligations were widespread among the members and supervisors interviewed.

The result is that many of the members interviewed were suspicious and outright mistrustful, especially those who perceived that they had naively cooperated or trusted the Force in the past and then were unfairly or harshly treated. If anything, some of the premises upon which the new regime for the R.C.M.P. is based have not proven to be valid. The purported independent civilian review, although present, is in the view of many, crippled by its inability to take action beyond making recommendations. This is particularly so with the E.R.C.. The residual and discretionary authority vested in senior R.C.M.P. managers to determine or control grievance jurisdiction and the discipline process has left many members doubtful about the effectiveness of the E.R.C. The length of time to obtain a review by either external agency has also undermined the civilian oversight process. The restrictions on the jurisdiction of the E.R.C. leaves, or is perceived to leave, many members on their own to try and deal with internal issues. While Division Staff Relations Representatives ("DSRRs") can provide assistance, if the R.C.M.P. proves to be recalcitrant the member has no option but to submit or go to court. The financial costs associated with going to court preclude most members from adopting this course.

A fourth thread that runs through this thesis is the importance of the employment
context of police officers in discussing accountability. A recurring obligation in any employment is the possibility of an interview by management in conjunction with an investigation. Forcing public employees to answer for their conduct under pain of losing their jobs, it is said, is not any different from the problem confronting a private employee in a similar predicament. This thesis questions whether the just-like-any-other-employee approach is valid in the policing context generally, and the R.C.M.P. in particular. This approach does not consider fully the complex and conflicting authority, duty, responsibility and accountability regimes that exist within the public sector. Based on the multifarious accountability investigations and adjudications that can arise, the consequences for a member when an allegation of misconduct is made are markedly different and more far reaching than for a private employee.

The very function of policing places officers in adversarial roles with individuals or groups in society. Policing also operates in a setting that is unlike other professions. Due to the nature of police work and the authority exercised by police officers, an individual officer is more likely to be thrust into situations that will lead to allegations of misconduct. It cannot be ignored that police officers are frequently involved in direct conflict with their "clients" and are called upon to use force as part of their job. While the necessity of accountability is clear, it must be fair, consistent, and fully consider the employment context. It must also recognize that police officers can be vulnerable to false allegations of misconduct. Police officers can also be vulnerable to a multi-faceted "system" regardless of the veracity or seriousness of the allegation. Whether or not the officer did anything wrong, or the seriousness of the misconduct, can become lost in the labyrinth of review.

It has been argued that police employees accept the duties and obligations of being a public servant when they accept employment. However, the voluntary acceptance analysis
does not acknowledge that the employer, particularly the R.C.M.P., can unilaterally amend or change the "conditions of employment" by amending legislation pertaining to codes of conduct and how officers will be held accountable. While changes to employment conditions and their voluntary acceptance may not be unique in policing, the form, nature and consequences of changes in policing can be. It is also assumed by some that the rank-and-file have an effective say in changes to the employment and accountability regime. It is further assumed that police officers, upon engagement, are fully apprised of the rights they will be giving up and the new obligations undertaken when employment is accepted.

In relation to employment in the R.C.M.P., it was found that prospective candidates are not informed of the employment obligations in the area of accountability and discipline during the application process. Further, cadets are not advised of their obligations and rights under the accountability framework at the time of engagement. During recruit training the R.C.M.P. provides virtually no training on the accountability process. Operational members are not provided with any comprehensive in-service training regarding the accountability framework. Limited training has recently been provided to some supervisors and detachment commanders but it was not highly regarded. The notion that members voluntarily and knowingly accept the conditions of employment is open to question by these findings. Given the fundamental importance of accountability to individual members, the R.C.M.P. and public, the notice and training provided to members by the R.C.M.P. is clearly inadequate. Some responsibility for this also lies with the P.C.C. and E.R.C.

The employer's "right to know" is the general premise upon which the need for ordered statements is asserted. Others note that the police frequently function in isolated or low visibility situations where there is an absence of witnesses. Concern over the blue wall of silence is also expressed in this regard. Claims are also made that providing protection
against self-incrimination or not having compelled statements would place too great a burden on the disciplinary process. This thesis asserts that the legislative, criminal and public responsibilities of police departments fundamentally alter the traditional notion of the employer's right to know. It also questions whether the orthodox employer-employee analysis can be applied strictly in the police accountability context given the overlapping and conflicting demands that must be addressed.

The unsettling feature of most discussions of ordered statements in the R.C.M.P. is that it is mostly one-sided from a managerial perspective. Further, the P.C.C. has moved from a position in which it asserted that R.C.M.P. members should, as a matter of policy, be required to be available for questioning by the P.C.C., to demanding it as a substantive position. The P.C.C. asserts that the failure of members to account for themselves or provide statements in relation to public complaints brings the police into disrepute. Thus, compelled statements are not necessarily restricted to the employer's right to know, but can encompass the civilian P.C.C.'s and/or public's right to know demands.

This thesis identified four main concerns about the ordered statements process. First, there is the concern that ordered statements will be used for illegitimate purposes, in particular to defeat the rights of members to silence and non-incrimination in the criminal context. Second, there is evidence to indicate that the R.C.M.P. uses ordered statements for incriminatory purposes and the protections afforded ordered statements, the employment context, and the legal and employment representation provided members are ineffective in preventing such consequences. Third, it is implausible to assert that members have voluntarily accepted this regime as a condition of employment because they were/are not informed about the rules, obligations or rights applying to them. Members also do not have effective and timely access to legal counsel to protect their rights. Last, the R.C.M.P. does
not really need ordered statements to conduct effective investigations into misconduct and hold members accountable. It is apparent that, on occasion, the R.C.M.P. can operate a modern day Star Chamber when it can compel its members to answer questions, in private, without a formal charge, on the slightest of suspicion, without proper legal representation, and despite statutory assurances to the contrary, rely on the responses for investigative and/or adjudicative purposes.

One of the more disconcerting findings is that members do not always have adequate representation or access to counsel during an investigation or compelled interview. It was found that, for several reasons, the vast majority of members are being subjected to investigations and questioning without the benefit of legal counsel. It is also clear that ordered statements are not adequately monitored or subject to scrutiny to avoid abuse. More troubling is the fact that members are not educated and knowledgeable about the accountability process. There is also no accessible, effective or adequate redress for members internally and externally to deal with ordered statements and possible inappropriate actions by the R.C.M.P.

This thesis found that concerns about general police interview practices have application to the interview of suspect members. Contrary to the popular perceptions of some, subject officers cannot always rely on their supervisors or the administration to treat them fairly and properly during misconduct investigations. Concerns about the manner in which ordered statements are obtained and used by the R.C.M.P. were found. The purported protection of compelled statements is mostly illusory. It was found that ordered statements may be directly or derivatively used by investigators to conduct investigations, to prepare criminal, internal and public complaint cases or prosecutions.

The current R.C.M.P. regime is limited in its ability to restrain improper, either
intentional or unintentional, practices during internal investigations. Aside from the possibility of obtaining improper admissions, investigators/supervisors are placed in an impossible position by having conflicting obligations to protect the public, the agency, the unit, subordinates, members and their own career and personal interests. Further, the pressure to obtain a statement can be the greatest when a member is the most vulnerable organizationally, legally, physically and mentally. What is clear from the research is that internal, employment, public accountability, civil liability and criminal responsibility are not watertight compartments and that ordered statements are surfacing inappropriately despite purported protection. Further, it was found that internal adjudication boards are not considered as qualified or objective in handling discipline cases.

Traditional wisdom in criminal investigations is that interrogations and statements of suspects are required to successfully prove a case, but the studies have mixed results. Most crimes can only be solved if the public is able to supply information about the identity of the perpetrator. Most offences cleared by charge are solved no matter what the investigator does. In the absence of good independent evidence prior to the interrogation, it makes little difference whether the suspect denies the offence or says nothing. While further and more current research is needed to determine the significance of the identity issue in police accountability, one examination of the "place" where complaints of police misconduct arise suggests that investigations by any agency would not be greatly hampered by an absence of witnesses.\(^2\) Since identity is usually not at issue in police misconduct cases, at least on an individual or collective basis (i.e. known police officer, unknown police officer working for a specific department, or unknown officer working in a specific area, time, car, location), it

\(^2\) Peter G. Barton, "Civilian Review Boards And The Handling Of Complaints Against The Police" (1970) 20 University of Toronto Law Journal 448 at 452.
seems that ordered statements would do little to advance an investigation other than to
incriminate the officer. While this may be endorsable in a purely internal context, it is
contrary to the principles underlying the Canadian criminal justice system when there is also
criminal liability.

There is also support for the view that ordered statements exist and are utilized for
the reinforcement of the power and control that the Force can exert over members. The
indoctrination process experienced by members during recruiting, training, and operational
service, along with strict discipline and limited employee representation, exert a powerful
influence over members which may make it unrealistic to expect that members are able to
properly protect themselves without outside intervention.

There is no convincing evidence that ordered statements are necessary to deal with
internal investigations in the R.C.M.P. First, other police departments have successfully
operated without a statutory mechanism to obtain internal statements. Second, there are
generally witnesses to police conduct, but even if there are not, if the member does not
respond to the allegation the R.C.M.P. can properly take the necessary administrative (e.g.
suspension) or investigative action. If an allegation is registered and the suspect member
refuses to respond, the R.C.M.P. can act on the best information it has at the time. If the
member refuses to respond to an allegation, he or she will have to face the natural
consequences of that decision. It must also be noted that witness members have obligations
to report misconduct and answer questions, which is not the case with civilian witnesses to
criminal misconduct. Third, the R.C.M.P. is one of the most sophisticated and best
technologically equipped police forces in the world and can reconstruct what happened or
successfully investigate an allegation without a response from the member. In the case of
serious incidents, such as shootings, highspeed pursuits and assaults, forensic analysis can
usually determine the course of events. Further, internal and public accountability cases are established on a civil standard, which is well below the beyond a reasonable doubt standard that the police are accustomed to satisfying in criminal cases. Fourth, in general, non-internal investigations by the R.C.M.P. tend to gather evidence against a suspect prior to interrogating, rather than interrogating first as part of a fishing expedition. If criminal investigations can succeed by interviewing suspects last, or not at all, there is little reason to believe internal investigations would be stymied without an account from the member. In 1976, the Marin Commission examined the use of ordered statements and concluded that the abandonment of the ordered statement would not significantly alter management’s ability to administer the Force with efficiency. As found in this thesis, ordered statements in the employment context of the R.C.M.P. do not instill confidence that the Force fairly, properly and consistently administers this invasive authority.

The findings with respect to the lack of notice, training, and qualified and accessible legal representation for members provides a deeper perspective on the underlying values that are still operating in the R.C.M.P. Members do not have moral or financial support from an employee organization to protect them from questionable employer action. The very nature of police work, the complexity of the accountability regime, and internal employment context of the R.C.M.P. places members in a much different and more vulnerable situation than other public or private sector employees. While compelled employee answers may be sustainable in a supportive and balanced labour-management context, such is not the case in the R.C.M.P.

There is evidence that the R.C.M.P. can use ordered statements to obtain evidence which it can then use against members. Further, as shown, an ordered statement can adversely affect a criminal case against a member. As highlighted by this thesis, the
potential for misuse of the ordered statement authority or the statements themselves is too
great to permit the R.C.M.P. to have this authority as it is currently constituted, regardless
of the number of times it is exercised. As others have pointed out, if police officers are not
treated fairly, how can we expect them to treat others fairly. Disparities between the
treatment and conduct expected of members and how they are treated internally has led to
considerable cynicism.

The final thread in this thesis relates to the legal and constitutional position of ordered
statements. The issue of compulsory statements was rejuvenated by Supreme Court of
Canada decisions under s. 7 of the Charter regarding incrimination, silence and evidential
immunity. The Supreme Court of Canada held in R. v. Wigglesworth that proceedings of an
administrative nature (i.e. discipline) instituted for the protection of the public were not the
type of "offence" proceedings to which s. 11 of the Charter applied. However, in British
Columbia (Securities Commission) v. Branch, the Supreme Court of Canada under s. 7 of the
Charter settled on limited derivative-use immunity where an individual is compelled to testify
or investigatively conscripted to produce evidence. Limited derivative-use immunity
supplements use-immunity (i.e. cannot use statement/testimony) by preventing the use of any
evidence created or derived from the statement/testimony (that could not be found or
appreciated but for the conscripted answers) to establish a case/prosecution. In addition, the
Court recognized an immunity from testimonial compulsion in certain limited circumstances.
It was also found that other fundamental protections such as the right to silence, right to
counsel and disclosure have also been the subject of Charter decisions that have application

Constitutionally, there are a number of concerns regarding ordered statements, parallel processes and subsequent proceedings as they pertain to R.C.M.P. members. There are numerous non-evidentiary uses and advantages to which ordered statements can be applied. Compelled statements can provide access to or create evidence that would otherwise be unavailable in the criminal, disciplinary, administrative and civil processes. They enable investigators to direct their inquiries and tactics. They can assist other governmental and non-governmental bodies by providing evidence or strategies (i.e. tactically enables prosecutors to prepare cases). The ordered statement authority may also provide a means to respond inappropriately to public pressure, provide publicity or intimidate members. Compelled statements can also be misused by management.

While the author does not endorse eliminating interviews by the police, the same concerns that motivate arguments for circumscribing police interviews criminally also apply to internal interviews. In some instances the express object of the investigative stage criminally, which is applicable to internal cases, is to isolate the suspect and gather evidence to support a successful prosecution. Unlike interviews of civilian criminal suspects, however, suspect members do not necessarily have the same protection when under criminal investigation. The critical factor to remember is that the police are typically result-oriented, whether conducting a criminal, internal, or public complaint investigation.

The central constitutional issue regarding ordered statements is that R.C.M.P. members are forced to incriminate themselves by answering questions and providing evidence that can be used against them. As this thesis has amply demonstrated, complaints about

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police misconduct are not straightforward matters and the line between criminal and internal investigations is generally nonexistent or murky at best. The former Commissioner of the R.C.M.P. testified to this fact before the Legislative Committee by confirming that ordered statements are used to acquire derivative evidence that can be used against a member. The cases of *R. v. Kuldip* (use of testimony from previous judicial proceedings), *R. v. Stinchcombe* (criminal disclosure), and the civil cases that have dealt with s. 40(3) of the *R.C.M.P. Act* provide examples of how protection against the use of ordered statements is limited. Subject members are ill-advised to rely on s. 40 to conclusively prevent the "use" of their statements.

It appears that members should generally have limited derivative-use immunity in a criminal trial with respect to evidence derived from ordered statements. There may also be occasions when members will be constitutionally exempt from providing an ordered statement because of the criminal implications. Whether derivative evidence from an ordered statement will be excluded pursuant to s. 7 in an internal adjudication hearing is less clear. Several interesting issues are raised by the fact that coerced statements can be obtained by *state agents* that have combined roles to conduct internal and criminal investigations. The fact that the R.C.M.P. as an employer is also responsible for the criminal investigation fundamentally distinguishes the member's situation from other non-police employees. In such cases, the presence of collateral criminal sanctions and the fairly unique situation faced by members

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under the present regime may re-focus the s. 7 *Charter* analysis for adjudication hearings. Further, *Calder* clearly established that directing suspect subordinate police officers to provide statements without administering the right to counsel will result in the statement being excluded in a criminal trial. However, the weight of authority and analysis suggests that limited derivative-use immunity and/or exemptions from providing an ordered statement will not be available in purely internal matters where no immediate or future criminal or penal liability exists.

On the premise that there is an argument that s. 7 of the *Charter* is violated, the requirements of s. 40 of the *R.C.M.P. Act* were considered under ss. 1 and 24 of the *Charter*. Because the ordered statement authority is purportedly limited to internal accountability, it is not likely that ss. 1 or 24 will find the section to be wholly unconstitutional. However, the availability of limited derivative-use immunity, limited compulsion exemption and the right to counsel should provide protection in the criminal context that prevents the use of evidence derived from ordered statements. The background provided by this thesis regarding the inappropriate use of ordered statements, however, raises fundamental policy issues that should prompt a re-examination of this authority by the R.C.M.P. If the R.C.M.P. wishes to enhance its legal and ethical legitimacy with the courts, public and members, it must take steps to ensure that the ordered statement authority is regulated. The objective is to at least ensure member's are provided the same protection as anyone else when it comes to dealing with a criminal allegation. The author believes that a more rigorous, balanced and prospective approach is necessary to ensure compelled statements from members are not improperly used to conduct investigations and undermine

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9 *Supra*, note 5.
individual rights. At the same time public integrity must be maintained. The following recommendations are made in an effort to improve the process with respect to ordered statement in the R.C.M.P.

2. **Recommendations**

The R.C.M.P. should take steps to properly inform prospective applicants and recruits of their accountability obligations and the framework they will be employed under. This must include notice to candidates about the nature and extent of accountability expected by/from the R.C.M.P. Further, recruits must be thoroughly schooled in the various types of complaints, investigations, and adjudications, and their rights and obligations pursuant to each. This approach will ensure that recruits adopt and accept that accountability is important, what conduct is expected and acceptable, and it will assist in reducing improper and unacceptable investigative practices during accountability investigations. An extensive and detailed program to properly educate members, supervisors and investigators about the regime must also be undertaken. This can be accomplished by incorporating training concerning the accountability process into current investigational, managerial and self-study courses. Given the immense importance of accountability, it is simply unacceptable to rely on complicated and lengthy policy manuals or sketchy pamphlets to educate members.

Steps should also be taken by the R.C.M.P. to ensure competent and qualified legal advice is readily available to members *during investigations*. As a matter of course, members who are the subject of a criminal investigation should have relatively unrestricted access to legal advice. The current bureaucratic technicalities to obtain legal advice are time consuming, inconsistently applied, untimely and subject to the vagaries of other interests. The current process seems designed to prevent or dissuade members from obtaining legal
advice. In fact, the research found that most members do not get legal advice when under investigation. The fact that government counsel, who do not act in the interests of the member, provide opinions on whether a member qualifies for counsel is also of concern. With respect to internal investigations, it is evident that members are not being provided access to competent and qualified legal representation at the investigative stage. There is a clear disparity between the manner in which the interests of the R.C.M.P. and Commanding Officers are fully represented internally compared to those of individual members. At a minimum, the R.C.M.P. will need to ensure sufficient numbers of competent and qualified legal counsel are available to members to deal with internal matters. One Member Representative per several thousand members is clearly inadequate. It will also be necessary for the R.C.M.P. to provide compensation and benefit packages that are commensurate with the quality and level of counsel that should be provided to members to deal with this difficult area. Given the overlap and duplication created by having criminal and internal counsel to deal with such matters, consideration should be given to retaining private counsel to provide legal services to members on both criminal and internal matters. A mixed model of private counsel and members who are lawyers would also provide an important training, experience and professional model for representing members within the organization. A mixed model for representation has the advantage of outside counsel experience and inside experience from lawyer members. It would also provide a means to secure a future pool of experienced internal adjudicators with some practical experience.

Regardless of what changes are made to the ordered statement process, the R.C.M.P., particularly in "E" Division, should reconsider how investigations are handled. Instead of consolidating internal and criminal investigations, these investigations should be separated. This includes assigning different investigators. Delineating between the investigations and
investigators will mitigate against derivatively tainting investigations. As recommended by
the E.R.C. and P.C.C., where possible, investigations should not be conducted by direct or
immediate supervisors. In addition, the current policy direction that legal counsel can be
excluded from an ordered statement interview must be rescinded.

There are a number of changes that should be considered with respect to internal
adjudication proceedings. First, consonant with the reported change in management
philosophy, and the move to empowerment and community-oriented policing in the
R.C.M.P., peer review should be adopted for misconduct. Instead of relying on
commissioned officers, a pool of trained adjudicators from all ranks should be created to sit
on adjudication panels. This approach is also more in keeping with the "profession" status
sought by the police. Second, it is evident that adjudicators must be better trained and
schooled in legal and evidential principles. Simply holding a law degree to be the Chair of
an adjudication board is not sufficient. It is highly desirable for the Chair to have completed
the bar admissions course and have some experience in the practice of law. This would
assist in providing a broader, more informed and professional perspective. If the mixed
model for providing representation to members is adopted the time and cost associated with
developing trained adjudicators would be significantly reduced. Third, adjudication hearings
should be open to the public except in limited situations (e.g. victim issues, informant
identity, secret investigational techniques). Introducing the light of public examination would
assist in providing fair treatment for members and should raise the standards of practice
before and by the adjudication boards.

The issue of managerial accountability should also be examined. It was evident
during interviews that members often feel powerless to protect themselves and although the
E.R.C. represented an improvement from historical practice, it is not seen as truly effective.
The inability of the E.R.C. to make binding recommendations to the Commissioner is perceived as a weakness by many. Based on the treatment that a member can encounter in the R.C.M.P. with respect to internal matters, particularly disciplinary issues, and the current form of employee representation, the author recommends that the E.R.C. be given the authority to make binding decisions. The author does not reach the same conclusion with respect to the P.C.C. The reason for this is simple. If the Commissioner ignores a decision of the E.R.C., there is little repercussion. However, if the Commissioner ignores the recommendations of the P.C.C., he does so with greater risk. Because of the publicity that attends public complaints and hearings, the Commissioner is much more restricted in his ability to ignore recommendations. It is much more likely that an improper response to P.C.C. recommendations than ignoring E.R.C. recommendations could result in sanctions against the Commissioner.

The R.C.M.P. should not deny members the right to choose their form of employee representation. The fundamental problem is that denying members the right to choose their form of representation contradicts fatally any assertions by the R.C.M.P. that its members are being empowered to make decisions under a new management philosophy. In the face of such a contradiction, more than one member said that the new approach is nothing but "B...S..." or pure "rhetoric." Actions speak louder than words and in this case, members are clearly unconvinced about the "new" way in the R.C.M.P.

A number of options are available to address ordered statements. The first option

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is to make no change to the current authority and its use. The are several advantages with 
this option. The R.C.M.P. will maintain its ability to readily obtain statements when it 
wants. From the Force's perspective, it does not represent any change to the current state of 
affairs and maintains continuity, control and vulnerability. It also perpetuates the belief that 
members are more accountable. Further, the Force can still rely on statements and 
derivative evidence to conduct investigations. There are also several disadvantages. To 
retain the authority and practices as currently constituted will only fuel destructive relations 
with operational personnel. Despite purported protection, ordered statements can and do end 
up in criminal, civil and administrative processes/hearings that result in members and/or the 
R.C.M.P. being found liable. Ordered statements are used to question a member's 
credibility or advance other legal processes. Challenges under ss. 7, 10 or 24 of the Charter 
could result in limited derivative-use immunity, exclusion immunity, evidence exclusion, 
stays of proceedings, financial remedies and/or adverse judicial comments against the 
R.C.M.P. because of ordered statements. At a minimum, to avoid any constitutional 
repercussion in criminal matters, the R.C.M.P. should conduct and await the completion of 
any criminal investigations/proceedings prior to an ordered statement being taken.

The difficulty though, is that the cases on when an ordered statement has been

Dalhousie Journal of Legal Studies 93; Gerry Ferguson and Marli Rusen, Discipline of 
Municipal Police In British Columbia (Report To The Commission Of Inquiry Into Policing in 
British Columbia, 1993) at 200-1; Steven B. Rynecki and Michael J. Morse, Police Collective 
Bargaining Agreements: A National Management Survey (Police Executive Research Forum and 
National League of Cities, 1981) chp. 4 at 26-28; Royal Canadian Mounted Police Public 
Complaints Commission, Annual Report 1988-89 (Minister of Supply and Services, 1989) at 89; 
Rene J. Marin, Reference: Section 40 RCMP Act Ordered Statements Report (November 1996); 
Laurence Lustgarten, The Governance of Police (London: Sweet and Maxwell Ltd., 1986); 
Bryon L. Warnken, "The Law Enforcement Officers' Privilege Against Compelled Self-
Incrimination" (1987), 16 University of Baltimore Law Review 452.
obtained under s. 40 are much broader in nature than the R.C.M.P.'s current conception.\textsuperscript{11}

The "E" Division practice of assigning the same investigator to conduct the criminal and internal investigations significantly increases the likelihood of \textit{Charter} intervention. This will result in a much larger number of potential statements from members being affected by ss. 7 and 24 than the R.C.M.P. realizes. For example, in \textit{Calder} the courts were simply not prepared to tolerate or distinguish between questions/answers that go to criminal or internal accountability when state sanctioned investigators summon a subordinate to attend an office and then conduct an interview.

The second option is to clarify, restrict and \textit{codify} the ordered statement process pursuant to legislative authority.\textsuperscript{12} While statutory amendments may prove difficult, it is possible that detailed regulations and/or \textit{Commissioner's Standing Orders} (which have legislative status) can be created that detail how and when ordered statements may be taken. Similar to police bills of rights in the United States, the R.C.M.P. can statutorily create the circumstances and conditions under which ordered statements will be taken. For example, agreement could be attained that ordered statements can/will only be taken: after the member is fully advised in writing of the allegations; interviews will only occur during the member's scheduled hours or during business hours (excluding weekends); advance notice will be provided of an interview; counsel can be consulted and/or brought to the interview; washroom and meals breaks will be mandatory; the interview will be tape recorded unless


\textsuperscript{12} See, Perez, Rynecki and Morse, and Warnken, \textit{supra}, note 10.
the member declines; and derivative-use immunity will be available if criminal allegations are involved. With proper consultation, reasonable and fair conditions could be legislated to ensure consistency in the process. It would also be possible to recognize and accommodate the R.C.M.P.'s concern that it may need a statement in urgent situations or where there is no other way to determine what happened.

The more thorny problem is what to do if the member declines to provide an ordered statement. Since it is anticipated that ordered statements will only be used as a last resort, this problem should be infrequent. If the member refused to answer questions, the Force could still take disciplinary measures based on the refusal to comply with an order. In that case, the member could determine for herself or himself, with the advice of counsel, whether the repercussions of giving a statement outweigh the failure to provide one. Provided the Force does not take the stance that failure to comply with an order to provide a statement automatically constitutes grounds for dismissal, there should not be a problem with this approach. Another alternative is to record the reasons for the member's refusal and then determine whether those were valid grounds for declining to answer. If the grounds prove valid, and the member is not otherwise discharged, no discipline for declining to answer questions should follow.

There are several advantages to this option. The member would be more fully protected and the process more transparent. Further, unlike mere policy statements about when ordered statements may be taken, an incentive would created to comply with legislative requirements because failure to do so could itself constitute a Code of Conduct violation by the investigator. It would also provide a process similar to other professions (e.g. notice, counsel, protection). Improper use of the ordered statement authority and derivative use of evidence would be more difficult. Investigators would also be forced to conduct complete
and thorough investigations before utilizing the ordered statement authority. The notion of employee accountability would remain in tact and the Force could ultimately find out what happened.

There are several potential disadvantages. The Force would not have the unregulated ability to use s. 40 as it currently does. It would take some time to develop and apply the new procedures, but in light of the current status of training and knowledge, the training obstacle should not be significant. The statement would still potentially be available in other forums such as a civil action and/or criminal disclosure. Without penal sanctions for failing to comply, derivative evidence could still be used in internal proceedings (although it would not be available in criminal proceedings).

A third option would be to "draw adverse inferences" if a member refused to provide an ordered statement. The adverse inference approach could be achieved in two ways. First, s. 40 could be amended such that statements would not be ordered but refusal to answer questions may result in an adverse inference being drawn against the member in future adjudication proceedings. It is expected that this approach will be adopted in British Columbia with respect to complaints against municipal police officers. This approach has also been adopted in a limited way in Britain with respect to certain criminal matters.

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13 See, Lustgarten, P.C.C., Marin, and Perez, supra, note 10.

second variation would be to simply adopt the P.C.C. approach, and leave it to adjudicators to draw adverse inferences in circumstances where it seems appropriate without any legislative amendment. Under this option, the member would not be disciplined for refusing to provide an ordered statement, but would expose himself or herself to the possibility of an adjudicator, without any explanation from the member, drawing an adverse inferences.

There are several advantages. The member could maintain his or her right to silence. There would be an ability to weigh the consequences of not providing a statement at the time. Potential derivative-use and immunity issues would be avoided criminally and internally. An adverse inference, whether statutorily or adjudicator based, would permissible and not mandatory. The member may also successfully justify the reasons for a refusal at a subsequent hearing to avoid the inference. This process probably formalizes what is already happening informally in the minds of most adjudicators when members have not provided statements, ordered or voluntary.15

There are disadvantages. The member may feel that she or he is put in an impossible situation by the consequences. There is a natural repulse that occurs, influenced by the criminal context, by drawing adverse inferences for exercising the right to silence. This is amplified when the reason for refusing to answer is the existence of a concurrent or anticipated criminal investigation. If the internal adjudication precedes any criminal trial, the


15 For an example of the practical inference in operation see, Massad Ayoob, "Lethal Force: Investigating the Officer-Involved Shooting" (August, 1986) 10 Police Product News 36.
member could be forced to take the stand to avoid the inference and in so doing, disclose key
evidence that goes to a criminal defence.

A fourth option would be to rely on a Board of Inquiry under s. 24.1 of the R.C.M.P.
Act to obtain an accounting from a member. Pursuant to s. 24.1 the Commissioner can
appoint a Board of Inquiry to investigate and report on, inter alia, the conduct, performance
of duties or discipline of members or the Force. Under this approach, members are
statutorily compelled to testify and can be charged with a summary conviction offence for
failing to attend or testify (s. 50). In addition, members are only provided use-immunity
with respect to any testimony in subsequent adjudication proceedings (but not civil or
criminal proceedings) (s. 24.1(8)). The provisions of the Canada Evidence Act and Charter
should address the use shortcomings.

There are advantages to this option. Such a mechanism would probably be used
infrequently. Where necessary, the Force could still obtain an explanation from its
employee. Because of the penal sanctions for failure to comply, the member would have
limited derivative-use immunity criminally and possibly internally. If competent and
qualified legal counsel were provided to the member, this process would be more in tune
with other professional regimes that deal with misconduct. It would also avoid the
investigative abuses and excesses that currently occur.

The are also several disadvantages. A Star Chamber like process is not completely
avoided because unless the Commissioner orders otherwise, the hearing is in private
(negating the advantages of public scrutiny) (s. 24.1(9)). From the Force's perspective, such
a procedure may be too costly, complex and time consuming. Investigations would be
restricted and/or adversely affected by not having access to statements (a dubious claim based
on witness member obligations, access to reports and notebooks, forensic or scientific technology). While "E" Division claimed it officially only takes 2-3 ordered statements a year, evidence was found that the order statement authority is unofficially used or threatened. Moreover, current practice could change with "E" Division using the ordered statement much more aggressively. The author was informed that the practices in relation to the use of ordered statement authority can vary widely across the Force/divisions.

A fifth option is to eliminate s. 40. This would remove the statutory authority to order statements and the attendant protection. This option, or a variation thereof, is apparently endorsed by the DSRRs. This option would have to be carefully examined. Removing s. 40 of the R.C.M.P. Act does not necessarily eliminate the member’s obligation to obey an order to provide a statement. For example, s. 40 of the Royal Canadian Mounted Police Regulations provides that a member must obey a lawful order of a superior officer. It was this form of authority (i.e. regulatory or oath of office based) that enabled the Force to obtain ordered statements from members prior to its enactment in a statute. Removing s. 40 would also eliminate the statutory protection against the use of an ordered statement in subsequent criminal, civil or administrative proceedings. As noted, in some respects this use protection is broader than provided in other jurisdictions. Some use protection is better than none. The ability to assert limited derivative-use immunity in criminal proceedings may be adversely affected if the member is not subject to any penal sanctions for failure to comply with the compulsion. Eliminating s. 40 would probably vitiate any argument that a member is compelled to provide an ordered statement on pain of a penal sanction. If s. 40 were removed, it may be that members would have the ability at common law to rely on the self-incrimination privilege, but to do so at the investigative stage outside of a formal
"proceeding" may prove difficult. Eliminating s. 40 without further research on the above issues is not advised.

Of all the options, the author believes the Board of Inquiry or codification of the ordered statements process offer the best choices. By adopting the Board of Inquiry approach, members would be legally and constitutionally provided the greatest protection. The Board of Inquiry is also more in keeping with a professional model of policing. The Board of Inquiry provides the Force a further opportunity to introduce peer review into the internal process. Instead of relying solely on commissioned officers, the Commissioner could assign members from the non-commissioned ranks to a Board of Inquiry. The introduction of the mixed model for representation of members recommended above would provide trained and experienced members to sit on the Board. It may also be possible to appoint a qualified civilian or former jurist to a Board which would further enhance its credibility and standards. In the alternative, codifying in the Commissioner’s Standing Orders the format and procedure for obtaining ordered statements would also provide a fair and balanced approach with minimal statutory amendment. While reducing complexity must be a goal, the Commissioner’s Standing Orders provide a viable legal option to ensure members are properly protected. Either option will also ensure public confidence is maintained in the process. The R.C.M.P. would also have residual and controlled authority to obtain explanations from suspect members.

Reaching beyond the facade of the employer-employee and criminal-true penal consequence rationalizations, it is clear that ordered statements raise legal and policy questions that must be better handled than under the current regime. The above recommendations provide direction to improve the current framework and take into account the need to provide better protection for members. Interviews and research material
confirmed that the current ordered statement and discipline processes do not address properly the dignity, privacy or fairness that members should be accorded. Based on the evidence presented in this thesis, ordered statements cannot be safely invoked in the current format. It must be noted that proper procedures for obtaining statements and evidence protects not only members, but also the public, by ensuring admissible evidence is obtained. Exclusion of evidence from an internal investigation because of improper investigational techniques would adversely affect public confidence in the R.C.M.P.

If this thesis demonstrates anything, it is the fundamental importance of the internal accountability process in the R.C.M.P. being based on fairness, trust and respect; not coercion, mistrust, disrespect, deception and lack of proper support. If the expectation is that the police will be fair and extend the full benefit of the law to citizens, they must also receive the same consideration. Similarly, if policing is to be a "profession", members should be accorded the basic rights and due processes available to any professional.

It is the author's view that despite some of the findings unearthed by this thesis, the R.C.M.P. can count on continued loyalty from members. Building on that loyalty, steps can be taken to address the issues identified to improve morale and organizational effectiveness. It would be unfortunate if the findings documented in this thesis are dismissed as infrequent, aberrant or isolated incidents. However, even if the findings do not represent typical management behaviour, they occurred frequently enough to call for redress. The repercussions from a single discipline-case-gone-wrong are enormous and impact not only the member and organization, but other members and the public.

Recruits joining the R.C.M.P. today tend to be older and have more life and work experience than in the past. They are less prepared to work under unfair conditions. All members are becoming cognizant of the disparities that exist between their employment
context and that of other public and police sector employees. The pressure from within and without the Force to make significant changes is certain to increase. The issues identified by this thesis must form part of that change. The question for R.C.M.P. management is whether it will lead the process of change or have it imposed by others from outside the Force.


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APPENDIX A

Interview Guide

1. Name
2. Sex
3. Race
4. Rank
5. Years Service
6. Current Posting
7. Previous Postings or experience
8. Current Status (under investigation, suspended, under discipline, medical, performance, none)
9. Training regarding accountability process
   a. Application
   b. Swearing-in
   c. Depot
   d. In-service
   e. Other
10. Subject of an accountability investigation (internal, public complaint or criminal)
    a. General positive or negative experiences
    b. Specific positive or negative experiences
11. Feel knowledgeable about the accountability process
12. Types of investigations or differences
13. Obligations to give a statement when under investigation
14. Rights/obligations during investigations

15. Aware that statements made to informally resolve a public complaint are protected

16. Requests for legal counsel

17. Aware of or used a Member Representative

18. General
R.C.M.P. Training Academy Questions

Craig S. MacMillan  
[address]

February 15, 1996

Commanding Officer  
R.C.M.P.  
Training Academy  
Regina, Saskatchewan

Dear Sir:

Re: Graduate Research

I am a member on Leave Without Pay (Education). I am currently conducting research for a Ph.D. thesis at the University of British Columbia, Faculty of Law. My thesis supervisor is Dr. John Hogarth.

The general topic area of my thesis is police accountability and discipline, which will include an examination of compelled answers from employees.

In order to provide a qualitative and/or quantitative context for this topic, I would like to obtain information regarding training at the Academy.

I am not interested in the personal details of any cadet/member, and I do not believe that any of the information I am seeking is sensitive and/or subject to privacy limitations. However, if I am wrong in this view, since this information is sought for "research purposes," I am prepared to give an undertaking regarding disclosure, pursuant to s. 8(2)(j) of the Privacy Act.

Based on the foregoing, I would like to obtain the following information:

1. A complete copy of the training syllabus for a cadet/member;
2. What specific training (and the length of time) is provided regarding:

a. a members/cadets responsibilities, obligations and/or rights under the:
   i. *R.C.M.P. Act,*
   ii. *R.C.M.P. Regulations,*
   iii. *C.S.O.'s,*
   iv. policy,
   v. *Charter,* and/or
   vi. common law
   in relation to allegations of misconduct;

b. the "public complaints" process and/or the R.C.M.P. Public Complaints Commission;

c. the *Code of Conduct*;

d. "ordered statements" under the *R.C.M.P. Act*;

e. representation, assistance and/or roles of:
   i. DSRR’s,
   ii. Member Representatives,
   iii. Force funded legal counsel, and/or
   iv. private legal counsel,
   in relation to allegations of misconduct;

f. the role and/or mandate of the R.C.M.P. External Review Committee;

g. the "grievance" process.

3. If possible, copies of any training material provided to members/cadets on items 1 & 2.

4. Any other information you feel is relevant to this topic.

   I have completed most of my research and I plan to start writing in March.
Any assistance you can provide will be greatly appreciated.

I look forward to hearing from you in the near future.

Yours Truly,

Craig S. MacMillan (Ph.D. Candidate)

[phone numbers]
APPENDIX C

Member Representative Unit Questions

Craig S. MacMillan
(address)

February 15, 1996

R.C.M.P. Headquarters
Member Representative Unit
G-502 "HQ"
1200 Vanier Parkway
Ottawa, Ontario
K1A 0R2

Dear Sir:

Re: Graduate Research

Further to our phone conversations, I am writing to confirm that I am conducting research for a Ph.D. thesis at the University of British Columbia, Faculty of Law. My thesis supervisor is Dr. John Hogarth.

The general topic area of my thesis is police accountability and discipline, which will include an examination of compelled answers from employees.

In order to provide a qualitative and/or quantitative context for this topic, I would like to obtain information on certain aspects of the internal discipline process.

I am not interested in the personal details of any member/complainant, and I do not believe that any of the information I am seeking is sensitive and/or subject to privacy limitations. However, if I am wrong in this view, since this information is sought for "research purposes," I am prepared to give an undertaking regarding disclosure, pursuant to s. 8(2)(j) of the Privacy Act.

Since I do not know what information can be retrieved from your records system, I thought it would be best to outline all the information I am looking for and then we can discuss any practical limitations that may limit access.
With the foregoing in mind, I would like to try and obtain the following information:

1. The total number of Member Representatives in your office.

2. The number and length of time(s) any positions were vacant.

3. The total number of:
   
a. formal (and/or informal) requests for assistance,
   
b. members formally represented,
   
c. hearings conducted,
   
d. files,

handled by your office.

4. What types of files your office handles (i.e. only dismissal cases or all formal disciplinary cases).

5. The total number of times your office was contacted to provide assistance to a member:
   
a. before an "ordered statement" was taken,
   
b. during the taking of an ordered statement,
   
c. after an ordered statement was taken,

from a member.

6. Whether "ordered statements" have posed any concerns for your office or the Force generally (i.e. disclosure).

7. Any policy and/or procedural limitations on your office's mandate to represent members (i.e. when can a member obtain your services and/or limits on you mandate).

8. Any other information you feel is relevant.

I have completed most of my research and I plan to start writing in early March. Any assistance you can give in this project would be greatly appreciated, and I am prepared to meet/speak with you at your earliest convenience.
I look forward to hearing from you in the near future.

Yours Truly,

Craig S. MacMillan (Ph.D. Candidate)

[phone numbers]
February 15, 1996

R.C.M.P.
"E" Division
Complaints & Internal Investigation Section
657 West 37th Ave.
Vancouver, B.C.
V5Z 1K6

Dear Sir:

Re: Graduate Research

Further to our phone conversation, I am writing to confirm that I am conducting research for a Ph.D. thesis at the University of British Columbia, Faculty of Law. My thesis supervisor is Dr. John Hogarth.

The general topic area is police accountability and discipline, which will include an examination of compelled answers from employees.

As discussed, in order to provide a qualitative and/or quantitative context for this topic, I would like to obtain information on certain aspects of the public accountability/internal process.

I am fully prepared to assist in the process of identifying any of the information I am requesting. I am also prepared to give an undertaking regarding disclosure, pursuant to s. 8(2)(j) of the Privacy Act. I am not interested in the personal details of any member/complainant.

As I recall, you indicated that your office recently implemented a new computer program for public complaints and internal investigations. Where possible/practical, I would like to get information for each of the last five years, but I am prepared to rely on the last two years where necessary/applicable.
Further, since I do not know what information can be retrieved from your system, I thought it would be best to outline all the information I am looking for and then we can discuss any practical limitations.

With the foregoing in mind, I would like to try and obtain the following information:

1. The total number of:
   a. regular (and/or special constables), and
   b. civilian

   members in "E" Division.

2. The total number of:
   a. calls for service in "E" Division,
   b. files generated by members, and/or
   c. (estimated) contacts with the public.

3. The total number of public complaints:
   a. received by "E" Division (since, as I understand it, the PCC numbers may not be the same as yours), and
   b. disposed of as frivolous and/or vexatious in "E" Division.

4. The total number of statutory/criminal investigations of members in "E" Division.

5. The total number of statutory/criminal investigations:
   a. not forwarded to Crown for consideration,
   b. forwarded to Crown for consideration,
   c. forwarded to Crown recommending charges,
   d. that led to charges, and/or
   e. that led to convictions.

6. The total number of internal/Code of Conduct investigations:
   a. in the Force, and/or
b. in "E" Division.

7. The total number of internal/Code of Conduct investigations arising from:
   a. public complaints, and
   b. internal complaints.

8. The total number of "ordered statements" taken in "E" Division.

9. As I understand it, few ordered statements are actually taken in "E" Division; therefore, I would like to review these few files to try and identify some of the variables that arise in the ordered statement scenario. For example:
   a. the nature/type of allegation(s),
   b. the forms of investigation under way, and
   c. the point at which statement was taken.

10. How is an ordered statement handled on the file/investigationally once it is obtained.

11. How often is the public complaint, statutory/criminal and/or internal investigator the same person.

12. The total number of:
   a. criminal defence:
      i. requests,
      ii. subpoenas,
      iii. court orders, and/or
      iv. court rulings,
      for disclosure of ordered statements;
   b. civil action
      i. requests,
      ii. subpoenas,
      iii. discovery,
iv. court orders, and/or

v. court rulings,

for disclosure of ordered statements;

c. internal investigations disclosed criminally and/or civilly without the inclusion of ordered statements.

13. The total number of members in "E" Division suspended:

a. with pay, and/or

b. without pay.

14. The average length of time that a suspension in "E" Division lasts.

a. with pay, and/or

b. without pay

15. The total number of public mischief and/or criminal charges laid/recommended against complainants as a result of an improper public complaint.

16. The total number of civil actions instituted by members in "E" Division as a result of a public complaint.

17. The total number of:

a. requests for Force funded legal counsel, and

b. denials of Force funded counsel

in "E" Division.

18. The average length of time to get a response for Force funded legal counsel.


20. The average length of time to complete:

a. public complaint investigations,

b. internal/Code of Conduct investigations,
c. statutory/criminal investigations, and/or

d. adjudication proceedings.

21. The total number of sanctions:
   a. informally, and/or
   b. formally

imposed on members in "E" Division.

22. The frequency and/or total number of times the various:
   a. informal, and/or
   b. formal

sanctions were imposed on members in "E" Division.

23. The number of adjudication proceedings undertaken.

24. The total number of voluntary resignations that arose from allegations of misconduct in "E" Division.

25. The task and role of your section (and the various members) in the accountability process (an organizational chart representation may be of assistance).

26. How or what formal in-service training/education is provided to members (by rank/position) regarding:
   a. public complaint procedures/investigations,
   b. internal procedures/investigations,
   c. statutory/criminal procedures/investigations,

arising from allegations of misconduct.

27. Anything else you consider relevant to this topic.

Since all of the foregoing information may not necessarily be available from your office any direction you can provide as to the appropriate source would be appreciated.

I have completed most of the research for my thesis and I plan to start the writing in March. Any assistance you can give in this project would be greatly
appreciated, and I am prepared to meet/speak with you at your earliest convenience.

I look forward to hearing from you in the near future.

Yours Truly,

Craig S. MacMillan (Ph.D. Candidate)

[phone numbers]
March 1, 1996

R.C.M.P. Headquarters
Appropriate Officers Representative Unit
1200 Vanier Parkway
Ottawa, Ontario
K1A 0R2

Dear Sirs/Mesdames:

Re: Graduate Research

I am a member on Leave Without Pay (Education). I am conducting research for a Ph.D. thesis at the University of British Columbia, Faculty of Law. My thesis supervisor is Dr. John Hogarth.

The general topic area of my thesis is police accountability and discipline, which will include an examination of compelled answers from employees.

In order to provide a qualitative and/or quantitative context for this topic, I would like to obtain information on certain aspects of the internal discipline process.

I am not interested in the personal details of any member/complainant, and I do not believe that any of the information I am seeking is sensitive and/or subject to privacy limitations. However, if I am wrong in this view, I am requesting this information for "research purposes," pursuant to s. 8(2)(j) of the Privacy Act.

Since I do not know what information can be retrieved from your records system, I thought it would be best to outline all the information I am looking for and then we can discuss any practical limitations that may limit access.
With the foregoing in mind, I would like to try and obtain the following information:

1. The total number of Appropriate Officer Representatives in your office.

2. The number and length of time(s) any positions were vacant.

3. The total number of:
   a. formal (and/or informal) requests for assistance,
   b. appropriate officers formally represented,
   c. hearings conducted,
   d. files,

handled by your office.

4. What types of files your office handles (i.e. only dismissal cases or all formal disciplinary cases).

5. What role, if any, your office has in relation to "ordered statements" in the Force.

6. Whether "ordered statements" have posed any concerns for your office or the Force generally (i.e. inability to effectively present a case).

7. Have ordered statements presented difficulties in presenting cases and/or advising your clients.

8. Have ordered statements been utilized to obtain evidence against members, despite the limitations on the use of such statements in a proceeding.

9. Any policy and/or procedural limitations on your office's mandate to represent appropriate officers.

10. Any other information you feel is relevant.

I have completed most of my research and I plan to start writing in mid-March. Any assistance you can give in this project would be greatly appreciated, and I am prepared to speak with you at your earliest convenience.
I look forward to hearing from you in the near future.

Yours Truly,

Craig S. MacMillan  (Ph.D. Candidate)

[phone numbers]