Can they make you talk?

Decades after the adoption of the Canadian Charter of Rights, and Freedoms, and after thousands of Miranda warnings on TV, most Canadians think they have a right to remain silent when the government comes after them.

To some extent, this is true–people pulled off the street by uniformed police almost never have a legal obligation to answer questions, with obvious exceptions when keeping silent would expose others to harm, such as the obligations to report spills and communicable diseases.

For routine matters, though, regulated businesses actually have very little privacy, or rights to silence, vis-à-vis their regulators. There are numerous reporting obligations for regulated communities, from income tax returns to the National Pollutant Release Inventory, with the census thrown in for good measure. Many statutes, such as the *Ontario Water Resources Act* and *Environmental Protection Act*, give inspectors the rights to enter private property, go through files, take samples, and ask questions, to confirm whether a regulated organization is complying with the law. However, the Charter establishes different rules once a regulator has reasonable and probable grounds to believe that a particular person or organization has committed an offence: see *Hunter v. Southam Inc.*, 1984 CanLII 33 (S.C.C.), [1984] 2 S.C.R. 145, and *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, 1994 CanLII 92 (S.C.C.), [1994] 2 S.C.R. 406. (An unsubstantiated complaint does not constitute "reasonable and probable grounds".) Once s/he has reasonable and probable grounds, a regulator needs prior judicial authorization to enter private property and to compel the production of evidence.

Do these rules, which govern the production of documents, also compel people to answer questions about possible offences?

For more than 20 years, there has been an uneasy tug of war about this between the Ministry of the Environment's desire to obtain evidence of environmental offences, and the reluctance of those facing the ministry's enforcement muscle to give them that evidence. The courts have upheld the rights of individuals and businesses to decline to answer such questions, except where there is a current emergency. That is, where the ministry requires information right now to deal with a spill or other environmental crisis that is underway, the businesses and individuals have had to comply. But where the ministry is simply seeking to force people to confess details of problems that have occurred in the past, people have had a right to remain silent.

In *R. v. Inco*[1], an Ministry of the Environment investigator entered Inco property, and asserted that he had statutory power to compel company employees to submit to questioning and produce documents and other materials. They complied, under protest, and the Ministry used the evidence thus extracted to prosecute the company. Inco moved to have the charges against it stayed as an abuse of process. The Ontario Court of Appeal ruled that the investigator could not use the statutory powers of an inspector, if, at the time, he had reasonable and probable grounds to believe that an offence had been committed.

The Court was interpreting the *Ontario Water Resources Act* as it was at the time of the investigation, in March 1994. By the time the case got to the Court of Appeal, in 2001, the Act had been amended. McMurtry C.J.O. commented on the amendments, in obiter:

> *[37] I am therefore of the view that under the legislative scheme as it existed at the time of this incident, the existence of reasonable and probable grounds would have limited the investigative techniques available to provincial officers. It appears that this view was held by the Legislature as amendments were passed. In order to strengthen the enforcement powers under environmental legislation[5], the OWRA and the EPA were both amended effective February 1, 1999. Among the amendments was the addition of the following provision, which is now found in s. 22.1 (2) of the OWRA and s. 163.1(2) of the EPA:*
>
> > *On application without notice, a justice may issue an order in writing authorizing a provincial officer, subject to this section, to use any device, investigative technique or procedure or to do any thing described in the order if the justice is satisfied by evidence under oath that there are reasonable grounds to believe that an offence against this Act has been or will be committed and that information concerning the offence will be obtained through the use of the device, technique or procedure or the doing of the thing.*
>
> *[38] An IEB officer who has reasonable and probable grounds to believe that an environmental offence has been committed can now apply for judicial authorization to conduct questioning sessions of the type that were authorized by the former s. 15(1)(n) of the OWRA [now s. 15(2)(i)] under the "investigative technique" umbrella.*

Until 2009, Ministry of the Environment investigators frequently used this quote to force people to submit to questioning, threatening them that they would be prosecuted for obstruction if they refused to answer. I often pointed out that McMurtry C.J.O. had only commented on the officer's power to "conduct questioning sessions", not on whether the person questioned had an obligation to answer. Most of those threatened, however, chose not to fight.

---

[1] 2001 CanLII 8548 (ON CA)

This issue was finally addressed in Branch v. Ontario (Environment), 2009 CanLII 104 (ON SCDC). Ministry of the Environment investigators obtained an ex parte court order against Michael Branch, manager of a facility which had had a serious fire. The order required him to attend before a Ministry investigator of the Investigations and Enforcement Branch, to submit to interrogation and to produce documents. Mr. Branch had already been asked to submit to questioning, and had declined.

Mr. Branch brought an application for judicial review of the court order. He challenged the authority of the Justice of the Peace to make such an order pursuant to s. 163.1(2) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "EPA"), and the constitutionality of any such authority.

Subsection 163.1(2) of the EPA states:

> *On application without notice, a justice may issue an order in writing authorizing a provincial officer, subject to this section, to use any device, investigative technique or procedure or to do any thing described in the order if the justice is satisfied by evidence under oath that there are reasonable grounds to believe that an offence against this Act has been or will be committed and that information concerning the offence will be obtained through the use of the device, technique or procedure or the doing of the thing.*

Swinton J. immediately noted the difference between having authority to put questions, and compelling people to answer them:

> *[12] The respondent submits that the questioning of persons falls within the words "investigative technique". While I agree that questioning potential witnesses is perhaps the most basic investigative technique, an investigator has that power without the need for an order from a justice of the peace. The question in this application for judicial review is whether a justice of the peace can compel answers to questions by witnesses in a provision which deals with the grant of authority to investigators to use an "investigative technique". That is not obvious from the words of the provision…*

Swinton J observed that Ontario has many regulatory statutes that compel answers to the questions of authorities:

> *[15]… It is noteworthy that the power to compel answers is set out explicitly in each statute, and the vast majority of them expressly allow the compelled witness to claim privilege. Most statutes also provide express protection against self-incrimination. …*
>
> *[18] In contrast, s. 163.1(2) of the EPA does not contain language explicitly compelling witnesses to speak to regulatory investigators, nor does it provide protection for privilege or protection against self-incrimination. The absence of such language in s. 163.1(2), given the large number of statutes dealing expressly*

with compulsion of witnesses, suggests that the Legislature did not intend to include powers of compulsion in s. 163.1(2)...

> *[25] There can be no doubt about the importance of effective legislation to protect the environment. However, that does not lead to the conclusion that the Legislature intended to provide IEB investigators with access to the power to compel answers from witnesses at the stage where investigators have reasonable grounds to believe that an offence has been committed.*

She noted the serious Charter concerns with compelling people to provide evidence to be used against them in court, although he did not ultimately feel it necessary to decide the issue on Charter grounds.

> *[27] ... While the power to compel witnesses to answer questions and to produce documents is an effective investigative tool, it is also intrusive and raises concerns about the principle against self-incrimination, one of the principles of fundamental justice in s. 7 of the Charter, as well as the common law right to silence.*

Swinton J. therefore quashed the order requiring Mr. Branch to attend for interrogation. In a similar decision, *R. v. Morrison*, [2006] O.J. No. 1889 (S.C.J.), in search warrants compelling the questioning of witnesses were quashed, on the basis that they were not authorized by the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 56. The trial judge held that the provision permitting the inspector to make inquiries of any person while executing a search warrant under the Act was limited to discrete questions arising during the execution of the warrant as required to render the execution effective.

However, the tug-of-war goes on. The Ministry of the Environment promptly returned to the Legislature for further amendments to its powers. Ironically, given its title, these amendments were bundled into the "Open for Business Act" and came into effect last year. The amendments added a new section to the *Environmental Protection Act* and the *Ontario Water Resources Act*:

> ***157.0.1*** *(1) For the purposes of determining compliance of a person with this Act or the regulations, a provincial officer may, at any reasonable time and with any reasonable assistance, require the person, or any person employed by or providing services to the person, to respond to reasonable inquiries.*
>
> *(2) For the purposes of subsection (1), a provincial officer may make inquiries by telephone or by any other means of communication.*

No one knows yet what this means. On the one hand, the new wording avoids the obvious ambiguity of section 163.1(2), the section interpreted in *Branch*. But this will only force the Divisional Court, next time, to grapple directly with the scope of the Charter protection against self-incrimination.

Since the normal powers of inspectors under, for example, Section 156 of the EPA, don't apply to investigators once they have reasonable and probable grounds to believe that an offence has been committed,, the same limit will presumably apply to the new section. But that Charter protection will be of little comfort to individuals, municipalities, and businesses if they can be forced to confess, in detail, by an inspector, who then hands the resulting statement over to an investigator for use in a prosecution, or for environmental penalties.

Other obvious questions about the new provision include:

- What inquiries are "reasonable"?
- How quickly must they be answered?
- How detailed must the answer be?
- Must the questions or answers be provided in writing?
- Are there any circumstances in which an investigator can use the new power?
- Can the provincial officer demand details of all potential defences to a future charge?
- Should the person state that the answers are not voluntary, and object to the potential use of these responses against them for enforcement purposes?
- Should the person state that the provincial officer is forcing them to answer the question before they have been able to complete their investigation, that the answers provided are provisional and may not be correct?
- Should the person include a claim for confidentiality for the purpose of subsequent freedom of information requests?

The one thing that is clear about the new power is that individuals, municipalities and businesses faced with a demand for information need to consult their lawyer before answering the questions. Once an answer has been given, it may never be possible to take it back.

Wednesday, June 15, 2011

Dianne Saxe