

**Q&A Number 1**

**The Canadian Ombudsperson for Responsible Enterprise, the Canadian *Charter of Rights and Freedoms*, and the Powers of Commissioners under the *Inquiries Act***

October 31, 2018

**Background:**

The Canadian Ombudsperson for Responsible Enterprise (CORE) requires robust investigative powers to fulfill his/her mandate. Appointing the CORE as a Commissioner under the *Inquiries Act* would give the Ombudsperson many of the tools she/he needs to investigate allegations of harm, and to reach a well-founded conclusion.

This Q&A provides some background on the relationship between the *Charter of Rights and Freedoms* and the proposed CORE powers under the *Inquiries Act*. It provides an overview of the operation of the *Charter* in respect of government actions and laws; and discusses the current state of the law on Commissioner powers and the *Charter*.<sup>1</sup>

The bottom line? The jurisprudence of the Supreme Court of Canada makes clear that the government has wide leeway in designing the office of the CORE to comply with the *Charter*.

There are many other offices and commissions that have the powers we expect will be provided to the CORE. As outlined below, when faced with *Charter* challenges to Commissioner powers, or their use in investigations, the courts have upheld these powers in a variety of settings. Thus, the courts have already used the *Charter* to scrutinize the powers of Commissioners, and found that there is nothing inherent in these powers that gives rise to problems under the *Charter*.

The *Charter* has very limited application to the powers of Commissioners under the *Inquiries Act*. It is available to protect against evidence gathered through compelled testimony being used against a witness in future proceedings. These protections can be bolstered through language in the OIC clarifying that evidence obtained through Ombudsperson investigations cannot be used in other proceedings.

**Q: What does it mean to challenge a law or state action under the *Charter of Rights and Freedoms*?**

A: The *Charter of Rights and Freedoms* is part of Canada's Constitution. It is the supreme law of Canada: all other laws (including Orders In Council), and all state action, must comply with the *Charter*. Governments have an obligation to ensure that their laws, and action authorized by those laws, comply with the *Charter*; and a person who believes that their *Charter* rights are affected by a law or a state action can seek a remedy before the courts. They can argue a) that the law itself violates the *Charter*; OR b) that the action of a government official violated the *Charter*.

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<sup>1</sup> For an examination of constitutional questions relating to federal / provincial division of power issues in this context, please see the November 9, 2017 memo OIC under the *Inquiries Act*, attached.

**Q: How does the Court decide if a law or action violates the *Charter*?**

A: In order to establish a violation of the *Charter*, a court must be satisfied that the affected interests are protected by a particular provision of the *Charter*.

Further, a court must be satisfied that any rights violation is not justified under s. 1 of the *Charter*: all rights under the *Charter* are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In short, this means that the law or state action disproportionately impacts on the rights of the individual, relative to the legitimate interests of the state in the law or its administration.

**Q: How does the court remedy a violation of the *Charter*?**

A: If the court finds that a rights violation has occurred, and it was not justified under s. 1, it may either a) provide a remedy to the affected individual whose rights were violated, leaving the law itself intact,<sup>2</sup> OR b) strike down all or part of the law itself.<sup>3</sup>

In the case of a *Charter* violation not justified under s. 1, Supreme Court jurisprudence dictates that the appropriate remedy is one that interferes as little as is necessary with the government’s legislative objectives.<sup>4</sup>

If the court finds a *Charter* violation in the *use* of legislated powers it will provide a remedy for that use. The court will only strike out the legislation authorizing the powers if the legislation is not “capable of being administered in a manner that respects *Charter* rights.”<sup>5</sup> Moreover, “Parliament is entitled to proceed on the basis that its enactments “will be applied constitutionally” by the public service.”<sup>6</sup>

***The bottom line?*** If there is a *Charter* problem with the *use* of a power, but it is *not* inherent in the existence of the power itself, then the appropriate remedy is to address the use of the power, not to strike out the law. Remedies in that case may include, for example, invalidating an order or a subpoena made by a commissioner. In that case, the law itself (and the powers of the government official herself) would remain intact. Only the particular order in question would be struck out, and the official would have guidance going forward for the constraints on her powers.

**Q: Have the powers of a Commissioner under the *Inquiries Act* ever been challenged under the *Charter*?**

A: Governments have used the *Inquiries Act* to appoint Commissioners to create numerous public inquiries. Commissioners, in turn, have drawn on their powers to compel witnesses to testify and order the production of documents from business corporations, large organizations, private individuals, and government officials. In addition to the public inquiry setting, various government officials have the

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<sup>2</sup> Also called a “s. 24(1) remedy”

<sup>3</sup> Also called a “s. 52 remedy”

<sup>4</sup> See, e.g. *Schachter v. Canada*, [1992] S.C.J. No. 68

<sup>5</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, para 44

<sup>6</sup> *Little Sisters*, para 71

powers of Commissioners under the *Inquiries Act* to carry out investigations in their respective realms. For instance, officials of the Canada Revenue Agency have the power of Commissioners to carry out investigations relating to the administration of the *Income Tax Act*.

There have been *Charter* challenges to certain Commissioner powers and their use in particular investigations. The outcome of these challenges has been that the courts have upheld these powers in a variety of settings. So the courts – including the Supreme Court of Canada - have indeed used the *Charter* to scrutinize the powers of Commissioners, and found that there is nothing inherent in these powers that gives rise to problems under the *Charter*.

As discussed in the separate memo on particular provisions of the *Charter*, sections 7 and 8 of the *Charter* have very limited application to Commissions authorized under the *Inquiries Act*. Section 13 protects witnesses who are compelled to testify in Commissions to ensure that their compelled testimony cannot be used against them in future proceedings; and in limited cases, s. 7 may protect people from having to testify at all.

Professor Ed Ratushny summarizes this jurisprudence in his leading text, *The Conduct of Public Inquiries: law, policy and practice*, Irwin Law, 2009, as follows (emphasis mine):

The *Canadian Charter of Rights and Freedoms* applies to both federal and provincial Commissions of Inquiry. **However, the circumstances in which that application could arise are very limited.** (page 267)

**Q: Could someone bring a Charter challenge to the CORE before it even started working?**

A: As a general rule, courts are reluctant to scrutinize newly enacted laws or regulations for *Charter* compliance.<sup>7</sup> An assessment of *Charter* compliance requires “a proper factual context”. As Justice Robert Sharpe and Professor Kent Roach explain in their text, *The Charter of Rights and Freedoms*, Irwin Law, 4<sup>th</sup> edition, 2009:

...*Charter* issues will almost always arise in a fact-specific context and be decided in the course of a concrete dispute between two parties. The primary task of the court is to decide the case before it, not to pronounce at large upon the constitution or its meaning. (p. 112)

It is rare that courts decide that a law is “on its face” (i.e. on the basis of a concept alone) unconstitutional, without a specific allegation in a specific application of the law.

In the case of the CORE, the courts have already ruled in various contexts on the *Charter* issues that could arise, and they have upheld the powers and their application. We know that there is nothing inherent in the powers of a Commissioner under the *Inquiries Act* that gives rise to *Charter* problems.

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<sup>7</sup> See, e.g. Almrei, McKay, Same Sex Marriage Reference

**Q: What would happen if someone brought a Charter challenge to the CORE during an investigation?**

A: If someone were to challenge the *Charter* validity of a particular order for disclosure, or a subpoena, issued by the CORE, the court would consider:

- the language of the OIC;
- the terms of reference;
- the procedure followed by the Ombudsperson;
- and her intentions and purposes in making the order, among other factors.

As discussed in this Q&A, and in the Q&A on particular *Charter* provisions, the circumstances under which an order or subpoena of a Commissioner would run afoul of the *Charter* are very limited. In those limited circumstances, if a Court were to find a *Charter* violation, the remedy would match the violation. So, if an order to produce documents was found to violate the *Charter*, the order would be set aside. The Ombudsperson would have to conduct that particular investigation without that particular order.

The alternative remedy - striking the entire Commission on the basis of *Charter* invalidity - would be unprecedented and a sharp departure from the jurisprudence described in the Q&A on particular *Charter* provisions, and the jurisprudence described above. There is no legal basis for a conclusion that the CORE would be vulnerable to *Charter* challenge.

**Q: Is there anything the government can do to mitigate any risk of a Charter challenge?**

A: Risks of a *Charter* violation can be avoided (or at least forcefully mitigated) through:

- i. careful drafting of the OIC and the terms of reference to balance access to information and investigative tools on the one hand, with confidentiality, procedural protections, and jurisdictional limits on the other.
- ii. for the Ombudsperson herself, conducting the investigations in accordance with the law as established through the relevant *Charter* and administrative law jurisprudence.

On the basis of the court cases noted above, the government has the benefit of clear guidance for the crafting of an OIC that complies with the requirements of the *Charter*; and the Ombudsperson has the benefit of case law to guide her procedures and actions in accordance with the *Charter*.