

Q&A NUMBER 2

The Canadian Ombudsperson for Responsible Enterprise and Particular Provisions of the Charter

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The Canadian *Charter of Rights and Freedoms* provides important protections to individuals and companies against infringements on their rights by all laws or government action, including the CORE. This note considers 3 *Charter* sections.

As noted in Q&A #1, the Government of Canada has wide leeway in creating an office that is compliant with the *Charter*. Per Ratushny¹, the *Charter* has very limited application to the powers of Commissioners under the *Inquiries Act*. This limited application provides protections to witnesses subject to subpoenas. It does not call into question the *existence* of the powers.

Q: What is section 7 of the *Charter*? Is section 7 relevant to investigations under the CORE?

A: Section 7 of the *Charter* provides:

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

Professor Ratushny summarizes the case law dealing with s. 7 and Commissioner powers as follows (emphasis mine):

Apart from the previous example [discussed below re: use immunity and derivative use immunity] **there is no authority to support the application of s. 7 to a commission of inquiry.** The threshold requirement is some infringement of a person's "life, liberty or security of the person". The exposure of a person to publicity at the hearings of an inquiry or to adverse findings in the final report may have dire consequences for a person's reputation. But this does not appear to pose a threat to "life, liberty or security of the person" that would trigger the protection of this section.... In any event, the common law principle of fairness would appear to address most concerns that would fall under section 7 of the Charter... The need for these constitutional provisions would arise only if a government sought to override the common law protection, for example through a commission's terms of reference.² (p. 268)

Commissions are not trials, and they do not have remedial powers to imprison or even fine subjects: commissioners do not determine liability, either civil or criminal. The same would be true of the CORE, and that fact could be spelled out in the enabling OIC. Thus, there are no life, liberty or security of the person interests at stake for participants: the reputational and economic interests at stake for a participant have not been found to enjoy the constitutional protections of s. 7 of the *Charter*.

¹ Ratushny, Ed, *The Conduct of Public Inquiries: law, policy and practice*, Irwin Law, 2009,

² Ibid

Our legal system has other common law rules of procedure that guard against unreasonable and unwarranted damage to reputation. But the courts have not recognized damage to reputation as a *Charter*-protected interest, without, for instance “serious state-imposed psychological stress”.³

Q: What is section 13 of the *Charter*? How does it relate to section 7 of the *Charter*? What is “derivative use immunity” and “use immunity”?

A: Section 13 provides:

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

This is a **protection** available to a witness who may be compelled to testify (through a subpoena or otherwise) to ensure that their compelled testimony cannot be used against them in future proceedings. It is an aspect of the right against self-incrimination. This is “**use immunity**”: evidence that is given involuntarily cannot be used to incriminate you.

In certain limited circumstances, in which the witness is subject to separate criminal proceedings, s.7 may protect the witness from being compelled to testify at all. Section 7 also provides “**derivative use immunity**” with respect to evidence that would not have been obtained but-for the compulsion (i.e. the evidence that is found as a result of the compelled testimony).

In both these cases, the *Charter* is a protection available to an individual who is compelled to testify, to ensure their testimony cannot be used to incriminate them – directly or indirectly.

Circumstances may arise in which a particular subpoena of the CORE, directed at an individual subject to criminal proceedings, could be challenged on the basis that the witness’ s. 7 rights would be violated if she were compelled to testify. Even if those limited circumstances arose, and there was a finding that the *Charter* required that an individual not be compelled to testify, it would affect only that subpoena, and not the powers of the Ombudsperson in general.

In a Supreme Court of Canada case⁴ involving a challenge to the investigative interviews provisions brought into the *Criminal Code* with the *Anti-Terrorism Act* after 9-11, the Court upheld a legislative scheme involving compelled testimony, where derivative and use immunities were not explicitly made available to witnesses in certain contexts.⁵ The Court interpreted the scheme as being consistent with the protections of sections 7 and 13 of the *Charter*.⁶ The Court did so by “reading in” to the statute that these immunities would be made available to witnesses in all contexts, essentially adding these immunities to the statute for the purposes of upholding it under the *Charter*.

³ see, e.g., *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44

⁴ *Application under s.83.28 of the Criminal Code (Re)*, 2004 SCC 42

⁵ Derivative use, and use immunity were not explicitly available in relation to deportation and extradition proceedings, nor in relation to the use of evidence by foreign authorities.

⁶ See, e.g. [Application under s. 83.28 of the Criminal Code \(Re\), \[2004\] 2 S.C.R. 248](#)

Q: What is section 8 of the *Charter*? Have the Courts ruled on the application of section 8 to Commissioner powers?

A: Section 8 of the *Charter* provides:

Everyone has the right to be secure against unreasonable search or seizure.

The powers of Commissioners have also been upheld in the face of challenges under s. 8 of the *Charter*.

The Supreme Court of Canada considered these issues in a case relating to the *Charter* validity of certain provisions of the Tax Code, which empowered an officer of the Canada Revenue Agency to use the powers of a Commissioner under the *Inquiries Act*.⁷ The question in the case was whether the holding of an inquiry and the issuing of a subpoena constituted an unreasonable seizure within the meaning of s. 8 of the *Charter*.

The applicant in that case sought a ruling that the provision itself violated the *Charter*, and therefore provided an opportunity for the Court to consider the *Charter* validity of the provisions themselves.

The Court found that there was **no basis for finding the provision invalid**: in other words, the provisions did not violate s. 8 of the *Charter*.

A summary of the case⁸ notes:

Theoretical and potential invalid uses or consequences of the use of s. 231.4 do not justify a declaration of total invalidity. The rights in s. 8 apply differently depending on the reasonable expectation of privacy in respect of the subject-matter and the nature of the intrusion on such privacy, and such factors go to the reasonability of any seizure. In comparison with a search, a *subpoena duces tecum* does not result in a major intrusion upon one's privacy. (p. 755)

⁷ *Del Zotto v. M.N.R.* [1999] 1 S.C.R. 3, the Supreme Court of Canada

⁸ Summary of the case in *The Law of Search & Seizure in Canada, LexisNexus, 10th edition, 2017*, by James Fontana and David Keeshan