

Q&A NUMBER 3

The Canadian Ombudsperson for Responsible Enterprise and Investigative Powers

October 31 2018

Q. Is it really worth having investigative powers?

A: A central purpose of an Ombudsperson is to conduct investigations. As Gregory Levine writes in his authoritative text, Ombudsman Legislation in Canada: An Annotation and Appraisal, Thompson-Reuters, 2012:

Investigation lies at the heart of the ombudsman project classically defined. Through it ombudsmen apprehend the facts of situations and achieve an understanding which helps them to resolve complaints through settlement or recommendation. (p. 69)

Levine is the former General Counsel of the Ombudsman Office in British Columbia: his text is singular in its review of Ombudsman offices in Canada. He explains the link between effective investigations and investigative powers:

To be an effective investigator, ombudsmen need powers respecting access to people and records. ... Ombudsman legislation across the country empowers the ombudsman to investigate effectively and efficiently. The investigative powers are not without restriction but they stand among the most powerful given any public official. (p. 69)

Moreover:

Ombudsman work depends on information, accurate and pertinent information. The power to obtain records and to hear people's understandings of events is critical to the ombudsman project. In turn, the power to compel the production of records and to compel testimony under oath is an important underpinning of ombudsman work. (p. 72)

For more on this, see also the CNCA's letter to Minister Champagne, dated November 2 2017, that articulated why investigatory powers, including the power to compel documents and summon witnesses, are the foundation of an effective ombudsperson office and are essential to a best-in-class model. (attached)

Q: Do other Ombudsman offices in Canada have investigative powers like the powers of Commissioners?

A: Levine explains that, for the reasons he cites above, these powers are commonplace in Ombudsman legislation.

Ombudsman in Canada are usually given the power to obtain information and to inquire into matters as necessary to understand them and to form an opinion on whether they give rise to legitimate grievance. (p. 70)

...

All of the Ombudsman statutes contain important specific powers related to information gathering. All provincial ombudsmen have subpoena and summons power or powers analogous to them and can compel testimony under oath. (p. 71)

Canada also has several federal offices that are analogous to the CORE, including federal officers and commissioners that are modeled on and share the essential characteristics of ombuds offices. Note that not all offices contain the word ombudsperson in their title. For example, the Supreme Court of Canada has recognized that the functions of the federal information and privacy commissioners are akin to those of an ombudsman and has interpreted their powers accordingly.¹

These offices have meaningful investigatory powers, including the powers to:

- search government and business offices and examine records found on the premises;
- order the production of documents; and
- summon witnesses and compel them to give evidence under oath.

Q: Why is it important to appoint the Ombudsperson as a Commissioner under the *Inquiries Act*? Don't Ombudspersons normally have their own legislation?

A: Empowering the CORE with the authority to compel witnesses to testify, or order the production of documents, requires legislative authority. Given that stand-alone legislation is not an option at this stage in the mandate, the CORE could instead be appointed as a Commissioner under the *Inquiries Act*.

The Indian Specific Claims Commission provides a model for an OIC under the *Inquiries Act* as an interim step: the Commission existed under an OIC for years before stand-alone legislation created the Specific Claims Tribunal.

Under s. 4 of the *Inquiries Act*, Commissioners have the powers:

- ... of summoning before them any witnesses, and of requiring them to
- (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and
 - (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

And under s. 5:

The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

For further on this, see November 9, 2017 Memo – OIC under *Inquiries Act*, attached.

¹ See, for example, *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 SCR 441 at para. 81.

Q: How can subjects of CORE investigations know that their rights will be protected?

A: The courts have been clear that commissions must abide by common law procedural fairness rules (the right to be heard by an independent and impartial decision-maker, among other rights particular to the context). Participants in commissions can rely on common law procedural fairness rules and on provisions of the *Charter*, in relation to derivative use immunity (see p. 1, Q&A # 2 – particular Charter provisions for an explanation of this term) to protect their interest in a fair process.