

# Charter Rights: Do They Apply to OHS Inspections?



By Jamie Jurczak, Taylor McCaffrey LLP

The *Canadian Charter of Rights and Freedoms* provides protection from government actions. So it would seem fair to say that in the workplace safety and health context, Charter rights would limit what an inspector (acting for the government) can do while attending a workplace where a safety incident has taken place. For example, one might assume that if the inspector wanted to question workers, the Charter would ensure that those workers don't have to answer without a lawyer being present. However, this may not be the case.

The courts in Canada have distinguished between two different roles played by a workplace safety and health inspector: inspector and investigator. Inspections involve monitoring compliance with OHS laws, while investigations involve gathering information and evidence when it's believed that such laws are being violated. This distinction is important because courts have determined that the Charter generally doesn't apply during an inspection, but may apply during an investigation.

## Why Are Inspections and Investigations Treated Differently?

The reason inspections and investigations are treated differently is that when individuals opt to participate in a regulated activity (such as running a business), they give up their individual rights in exchange for state protection. Individual rights, such as Charter rights, are therefore applied differently when we're looking at a regulated activity. Rather than criminalizing behaviour, regulatory laws, such as OHS laws, control and restrict

conduct that we as a society find beneficial, but, if left unchecked, could lead to unsafe conditions. Therefore, by differentiating between inspections and investigations, the law is attempting to balance society's need to ensure that the laws are being enforced and individuals' need to ensure their rights aren't breached.

In the inspection stage, the balance tilts in favour of society, as it allows an inspector to gather information using his statutory powers to compel information and interviews, without the need for a warrant or the ability of an interviewee to invoke Charter rights. In this way, inspectors can assess whether laws are being followed, furthering a legitimate end—the protection of society.

In the investigation stage, however, the balance is in favour of the individual, as it's at this time that the inspector has determined that the laws may not have been followed and so he's trying to decide whether penal consequences or liability ought to apply. Because of the potential consequences that could result once an inspector makes this determination, the courts have determined that Charter rights may apply, limiting what the inspector could otherwise do in terms of gathering evidence.

For example, when an incident occurs at a worksite, inspectors will attend the workplace to gather information and find out what happened. They may issue orders that require the employer to provide them with training documents or ask to speak with certain witnesses. Generally, OHS laws give inspectors powers to demand these things and require the employer to cooperate with these requests—without a warrant or witnesses being cautioned that they have the "right to remain silent." If every time an inspector made such demands, the employer or individual being interviewed could refuse by invoking their Charter rights, then there would never be any way to determine whether the laws were being followed and thus society may not be adequately protected.

Because the primary purpose of an inspection is to determine whether workplaces are in compliance with OHS laws, courts have held that it's not in society's best interests to allow the Charter to be used as a shield from providing information required under regulations. Only when the inspector has come to a conclusion that the behaviour might attract actual penal consequences (such as prosecution for an OHS violation) might Charter rights kick in. Then inspectors may need a warrant to obtain the training records and individuals being interviewed may need to be told they have a right to remain silent and not incriminate themselves.

## **Crossing the Line from Inspector to Investigator**

Because the distinction between inspection and investigation is so important, courts have attempted to define exactly at what point an inspector's conduct shifts from inspecting to investigating. Generally speaking, the rule is that when the relationship between the individual and the inspector becomes adversarial, then the line has been crossed into investigation territory and so Charter rights may now apply. The issue, of course, is how to define "adversarial" and pinpoint when the relationship has reached that stage, which is often very hard to determine.

Cases dealing specifically with workplace safety and health have stated that a relationship becomes adversarial when an inspector believes there's reasonable

and probable grounds that an offence is being committed. This definition of “adversarial” means that when an inspector arrives at a worksite to ensure that the legislation is being complied with, the Charter doesn’t apply at that very moment. But once that inspector has formed, based on what he or she sees during the inspection, a belief based on reasonable and probable grounds that an offence *has* occurred, the inspector has now shifted into investigatory mode. Thus, the Charter could kick in and provide some protection against conduct by the inspector that would otherwise infringe any rights.

Making this determination isn’t easy. It takes a careful examination of all of the surrounding circumstances and a number of different factors, which were set out in a Supreme Court of Canada case called *R. v. Jarvis*, [2002] 3 S.C.R. 757, Nov. 21, 2002:[box]

- a) Did the authorities have reasonable grounds to lay charges’ Does it appear from the record that a decision to proceed with a criminal investigation could have been made’
- b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation’
- c) Was there a transfer of files and materials to give the appearance that the matter had been transferred from an inspection to an investigation’
- d) Does it appear that the investigators intended to use the inspection in the collection of evidence’
- e) Is the evidence sought relevant to liability generally’ Or is the evidence relevant only to penal liability’
- f) Are there any other circumstances or factors that can lead the court to the conclusion that the compliance inspection had in reality become a criminal investigation’[/box]

No one factor will determine the issue. The courts will always look at *all* the factors and circumstances to make a decision as to whether the line has been crossed.

Because it can be so difficult to determine when an inspector has crossed into investigation territory, it’s recommended that a company get a lawyer involved early on when an inspector appears. Having a lawyer involved and keeping him or her informed as to what the inspector is doing is the best way to ensure that your Charter rights aren’t being infringed.

**Jamie Jurczak is a partner at Taylor McCaffrey LLP.** Jamie’s preferred area of practice is occupational health and safety. She’s experienced in defending employers charged under provincial and federal OHS legislation and is well versed in assisting clients in responding to serious workplace incidents, addressing administrative appeals of regulatory orders and performing regulatory compliance reviews and audits. She frequently speaks at conferences and seminars on various topics relating to OHS legal liability and due diligence. You can contact her at 204.988.0393 or [jjurczak@tmlawyers.com](mailto:jjurczak@tmlawyers.com).

**OHS Insider Resources**

For more information on inspections v. investigations, see this chart for the powers of inspectors under the OHS laws of each jurisdiction and this article for a comparison of two cases in which courts had to decide if a government action was an inspection or an investigation.