

INSPECTIONS vs. INVESTIGATIONS: DID THEY NEED A WARRANT AND WHAT HAPPENS IF THEY DID?

OHS Insider

Presented by: Jeremy Warning

»» May 10, 2017

Presentation Overview

1. Canadian Charter of Rights and Freedoms: Section 8
2. Inspections vs. Investigations: Application of Section 8 to Regulatory Statutes
3. Practical Steps to Assist in Enforcing Rights
4. Remedy for Unconstitutionally Obtained Evidence
5. Can Evidence Be Excluded That Was Not Obtained Illegally?

CANADIAN CHARTER OF RIGHTS AND FREEDOMS: SECTION 8

The Charter: Section 8

The Guarantee

- Section 8 of the *Charter* has been in force since 1982 and provides that:

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

- Everyone means both individuals and corporations
- Right is only as against the government and its agents

The Charter: Section 8

Expectation of Privacy

- Section 8 only protects matters in which there is an expectation of privacy
 - Informational
 - Location
 - Personal

The Charter: Section 8

Expectation of Privacy

- Applicant must have an expectation of privacy in the material in order to have “standing” to assert section 8 right
- Can’t assert someone else’s rights
- *R. v. Edwards*, [1996] 1 S.C.R. 128
 - Edwards could not assert expectation of privacy in girlfriend’s apartment

The Charter: Section 8

Expectation of Privacy

- Employers in regulated fields have a diminished expectation of privacy
- Regulatory legislation permitting inspections of private workplaces is constitutional
- Different standard than for criminal matters

Inspections vs. Investigations: Application of Section 8 to Regulatory Statutes

Inspections vs. Investigations

Is There a Difference?

- All OHS legislation in Canada provides broad powers of inspections for health and safety officers
- Can enter into and onto private property without a search warrant
- Officers can exercise these powers in both proactive and reactive circumstances
- Some jurisdictions call reactive visits “investigations” but maintain that they are, at least initially, audits for compliance or “inspections”

Inspections vs. Investigations

Is There a Difference?

- Clouding things further is fact that officers may wear two hats:
 1. **Compliance** – auditor for adherence to legislated requirements
 2. **Enforcement** – investigator gathering evidence to use in a prosecution

Inspections vs. Investigations

Is There a Difference?

- Courts have set a test to determine when Section 8 rights are engaged
- Is it **reasonable and probable grounds**?
 - *R. v. Inco Ltd.*, [2001] O.J. No. 2098 (C.A.)
- What about the **predominant purpose**?
 - *R. v. Jarvis*, [2002] S.C.J. No. 76
 - *R. v. Ling*, [2002] 3 S.C.R. 814

Inspections vs. Investigations

Is There a Difference?

- For Section 8 purposes, the difference between an inspection and investigation is the purpose of the officer's activities
- What is the **predominant purpose**?
- No contravention of Section 8 if the predominant purpose is auditing or inspecting for regulatory compliance
- Section 8 rights engaged when predominant purpose becomes gathering of evidence for prosecution / determination of penal liability

Inspections vs. Investigations

Is There a Difference?

- The challenge is how to tell
- The things officers do are useful for compliance and prosecution
- Supreme Court of Canada said must look at all factors in making the predominant purpose determination
- No closed list of factors – “no clear formula”
- Reasonable and probable grounds is *one of* the factors in predominant purpose determination

Inspections vs. Investigations

Determining Predominant Purpose

- Reasonable and probable grounds = credibly based probability
 - Objective standard
- Same standard as is used to obtain a search warrant
- More than mere suspicion, hypothesis or “fishing expeditions” but less than proof beyond a reasonable doubt or a *prima facie* case

Inspections vs. Investigations

Determining Predominant Purpose

In “most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered”.

R. v. Jarvis

Inspections vs. Investigations

Determining Predominant Purpose

- Factors to analyze:
 - Officer's knowledge of elements of offence
 - How statutory powers are exercised by officer
 - Nature of the information gathered by the officer
 - Compliance with investigatory procedures
 - Other case-specific factors
- As officer's activities progressing, some of these factors may point to a predominant purpose of prosecution

Inspections vs. Investigations

Determining Predominant Purpose

- Factor that doesn't appear to be relevant:
 - Issuing of an order – including a stop work order
- Clear indicators:
 - Execution of a search warrant
 - Cautioning of witnesses
 - Want workers to tell employer if cautioned
 - Worker should stop speaking with MOL

PRACTICAL STEPS TO ASSIST IN ENFORCING RIGHTS

Practical Steps for Right Enforcement

Augmenting Factual Record

- Enforcing Section 8 rights, likely only to happen after charge(s) laid – when prosecution may actually seek to use the evidence collected
- Factual record of officer's intent, generally, comes solely from the officer
- Taking steps to augment record may assist in identifying purpose of officer's activities

Practical Steps for Right Enforcement

Augmenting Factual Record

- Asking the officer whether inspecting or investigating
- Ask to take notes during interviews / witness statements
- Ask to have representatives present during testing or examinations of items or equipment
- Where relevant, ask if expert will be preparing report and if can obtain a copy of the report or learn of expert's conclusion(s) / opinion(s)
- Document responses

Practical Steps for Right Enforcement

Roadmap of a *Charter* Application

- Defendant must prove the *Charter* breach
- Defendant must bring application to enforce *Charter* rights
- Application must be brought on notice (minimum notice periods may apply)
- Requires evidence from defendant
 - Affidavit
 - In court testimony

Practical Steps for Right Enforcement

Roadmap of a *Charter* Application

- Response from Crown
- Witnesses may be cross-examined on testimony or Affidavits
- Submissions by defendant and Crown
- Decision by court will address two issues:
 1. Section 8 contravention (If occurred and when started)
 2. Remedy (only considered if contravention found)

REMEDY FOR UNCONSTITUTIONALLY OBTAINED EVIDENCE

Remedy: Section 8 Breach

To Exclude or Not to Exclude

- Remedy for Section 8 breach is *possible* exclusion of evidence
- Exclusion is not automatic
- Illegally obtained evidence can be admissible at trial

24(2) Where, [...], a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Remedy: Section 8 Breach

To Exclude or Not to Exclude

- Supreme Court of Canada has developed three part test for admissibility of evidence:
 1. Seriousness of *Charter*-infringing conduct;
 2. Impact of breach on *Charter*-protected interests; and
 3. Society's interest in adjudication on the merits

R. v. Grant, [2009] 1 S.C.R. 353.

Remedy: Section 8 Breach

To Exclude or Not to Exclude

- First two parts of *Grant* test pull towards exclusion of evidence
- Third element pulls towards admission
- If first two elements favour exclusion, rarely, if ever, will third element displace them
- If the first two elements divide, third element of test more likely to justify admission of evidence

Remedy: Section 8 Breach

To Exclude or Not to Exclude – Factor #1 – Seriousness of the Breach

- Assessment of the severity of the *Charter* breach
- Will consider circumstances such as:
 - Reason for infringement (negligence, wilful blindness, intentional)
 - Number of breaches
 - Time period of breaches

Remedy: Section 8 Breach

To Exclude or Not to Exclude – Factor #2 – Impact on *Charter* Protected Interests

- How much did the breach actually undermine the interests protected?
- Was it fleeting or technical or profoundly intrusive?
- Will consider location of breach and/or specific evidence gathered and expectation of privacy in same
- Will admission mean Section 8 has little practical value?

Remedy: Section 8 Breach

To Exclude or Not to Exclude – Factor #3 – Society's Interest in Adjudication of Merits

- Whether the truth seeking function of trial process would be better served by admission or exclusion of the evidence
- Court must consider the possible negative impact on the administration of justice by admission
- Also must consider negative impact on administration of justice by exclusion

Remedy: Section 8 Breach

Types of Evidence That Could Be Excluded

- Observations of officers
- Photographs
- Measurements
- Expert reports
- Documents
 - Remember could be due diligence documents
- Statements and utterances of witnesses
- In court testimony about same?

CAN EVIDENCE BE EXCLUDED THAT WAS NOT OBTAINED ILLEGALLY?

Excluding Legally Obtained Evidence

Is it Possible?

- Yes
- May be able to exclude if admission of the evidence would be unfair to the trial process
- *R. v. Harrer*, [1995] S.C.J. No. 81.

Excluding Legally Obtained Evidence

Practical Uses

- Legally compelled information / evidence:
 - Accident notices
 - Expert reports
 - Testing results
- All of the above may have been lawfully compelled for regulatory purposes
- Provides additional basis for exclusion beyond arguing *Charter* breach

Questions?



Jeremy Warning

Partner

T 647-777-8284

C 647-407-5732

F 416-862-8247

jwarning@mathewsdinsdale.com

North America: Canada - Mexico - United States

Central & South America: Argentina - Brazil - Chile - Colombia - Panama - Peru - Venezuela

Western Europe: Austria - Belgium - Cyprus - Denmark - Finland - France - Germany - Greece - Ireland - Italy
Luxembourg - Netherlands - Norway - Portugal - Spain - Sweden - Switzerland - United Kingdom

Eastern Europe: Belarus - Czech Republic - Estonia - Hungary - Latvia - Lithuania - Poland - Romania - Russia - Slovakia - Turkey - Ukraine

Middle East & Asia Pacific: China - India - Israel - Japan - Korea, Republic of - New Zealand - Singapore - United Arab Emirates

mathewsdinsdale.com | iuslaboris.com