Interagency cooperation

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Warning - Disclaimer

This is a rapidly developing area. There are VERY few direct precedents. The following is an exposition of basic principles that you may find to be useful in assessing the *Charter* issues involved in interagency cooperation.

1. Does agency have the power?

1. **Does the agency have the express or implied power to cooperate and share information and documents with other agencies?**

→ **This is relevant because administrative agencies have no inherent powers:**

e.g., *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 at para. 16

1. Does agency have the power?

- → **This is an issue of statutory interpretation: note the emphasis on statutory purpose and "context" in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paras. 26-27.**
- → **Potential breadth of implied/necessary powers: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 and *Global Securities Corp. v. British Columbia (Securities Commission),* [2002] 1 S.C.R. 494.**

2. *Charter* application

2. The *Charter* applies to state entities. Thus, each movement of information and documents to and from a state entity can potentially be subject to *Charter* protection.

Basic scenario

Holder of Information

↓ **(Documents and information ["materials"])**

"State Entity A"

↓ **("Documents and information" ["materials'])**

"State Entity B"

Holder to “A”

A. Movements from holder of materials (e.g. suspect) to “Entity A”.

Holder to “A”

- → Potential protection depending on ss. 7 and 8 jurisprudence.
- → First, are the documents and information being seized or are they just being received (someone on their own initiative sent an envelope)?

Holder to “A”

→ **Does “Entity A” have the express or implicit power to seize documents and information?**

Holder to “A”

→ **Assume “Entity A” is the police. Seizure by police by criminal investigatory purposes: usually a warrant is required**

(*Hunter v. Southam*, [1984] 2 S.C.R. 145)

Holder to "A"

→ **Assume "Entity A" is a regulatory authority (*e.g.*, securities commission). Seizure by regulatory authority may or may not attract *Charter* protection. Depends on the application of the test in *R. v. Jarvis*, [2002] 3 S.C.R. 757, esp. at paras. 93-94**.

From "A" to "B"
("A" Violated *Charter*)

B. Movements from "Entity A" to "Entity B".

→ Assume "Entity A" has violated the *Charter* in gathering the documents and information. "Entity A" transfers the documents and information to "Entity B".

From “A” to “B”
“A” Violated *Charter*

- → **Under s. 24(2), it is arguable that the documents and information will have been obtained by “Entity B” in a “manner that infringed or denied … rights” in the sense that the documents and information could not have been obtained without *Charter* breach**

From "A" to "B"
"A" Violated *Charter*

- → *R. v. Bartle*, [1994] 3 S.C.R. 173
- → Strict causal relationship between infringement of *Charter* and the obtaining of the evidence not required
- → Is it "not too remotely connected with the violation"? Is it "part of the chain of events"?
- → If so, the evidence is "obtained in a manner that infringed or denied" rights

From “A” to “B”
“A” Violated *Charter*

- → The circumstances of the transfer (and receipt by “Entity B”) may affect admissibility under s. 24(2)?
- → *e.g.*, good faith of “Entity B”

From “A” to “B”
“A” didn’t violate *Charter*

→ **Assume “Entity A” has NOT violated the *Charter* in gathering the documents and information. “Entity A” transfers the documents and information to “Entity B”.**

From "A" to "B"
"A" didn't violate *Charter*

→ **The taking of the documents and information by "Entity B" without the consent of the original holder of the material has to be assessed.**

From "A" to "B"
"A" didn't violate *Charter*

- → Circumstances of the transfer from the holder to "Entity A": was there waiver for all purposes and uses?
- → Assess reasonable expectations of privacy. Does holder have a reasonable expectation of privacy that the information would remain with "Entity A"? In other words, does seizure by "Entity B" offend the reasonable expectation of privacy of the holder?

From “A” to “B”
“A” didn’t violate *Charter*

- → ***R. v. Colarusso,*** **[1994] 1 S.C.R. 20**
- → ***Smith v. Canada (Attorney General)*****, [2000] F.C.J. No. 174 (C.A.), aff’d [2001] 3 S.C.R. 902**
- → **Conflicting lower court law on reasonable expectations of privacy in this context**

“A” tips off “B”

- → **“Entity A” has the holder’s documents, reads them, tips off “Entity B” and “Entity B” gets a warrant.**
- → **Not a problem, provided that the tip is sufficient (*R. v. Debot*, [1989] 2 S.C.R. 1140) and the warrant is otherwise valid**
- → ***Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708 (agency tips off police)**

3. Foreign agencies

3. **The *Charter* only applies to Canadian state entities**

→ **Foreign Entity “A” does seizure abroad and gratuitously transfers to Canadian Entity “B”: same as above (re A to B transfers) BUT Charter does not apply to “Foreign Entity A”.**

3. Foreign agencies

→ **Residuary protection for fair trial interest in Canada under s. 24(1): *R. v. White*, [1999] 2 S.C.R. 417 (see also *Harrer*, *Buric*, *Schrieber* and *Terry*)**

3. Foreign agencies

- **An investigator with a Canadian agency goes to the foreign country and gathers evidence contrary to the Charter for the purposes of the Canadian entity**
- **It is treated like domestic conduct: *R. v. Harrer*, [1995] 3 S.C.R. 562.**

3. Foreign agencies

- → **Canadian Entity "A" does seizure in Canada and gratuitously transfers to Foreign Entity "B": same as above (re A to B transfers) BUT *Charter* does not apply to Foreign Entity "B".**
- → **Query whether there is any practical relief in Canada against "Canadian Entity A" for a *Charter* infringement? (the material is being used in the foreign jurisdiction)**

4. Agencies as Agents

4. **Agency principles apply.**

→ **If "Entity B" uses "Entity A" as its agent to gather information for "Entity B's" purposes, A's action is ascribed to B.**

(*R. v. Harrer*, [1995] 3 S.C.R. 562)

5. Between Branches Within Agencies

5. **The situation WITHIN agencies. Movements of documents and information within state entities can potentially be subject to *Charter* protection.**

→ **"Entity A" has a regulatory branch and a criminal enforcement branch.**

5. Between Branches Within Agencies

- → **Regulatory branch can transfer information and documents it has validly received (*i.e.*, no *Jarvis* violation) to its criminal enforcement branch. (*Jarvis*, at para. 95)**
- → **BUT the criminal enforcement branch cannot use the regulatory branch to seize documents for criminal purposes. The regulatory branch would then be on the other side of *Jarvis.***

5. Between Branches Within Agencies

→ **Potential for fuzziness and uncertainty in the case of transfers within agencies? YES – but it is simply a matter of how the evidence stacks up against the *Jarvis* test.**