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File 92803

**VIA EMAIL**

**PRIVILEGED & CONFIDENTIAL**

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(1934 - 2006)

Dear Doctors:

**Re: Ontario Medical Association ("OMA") – Charter Issues**

You have asked me for my opinion on two issues that have been raised in correspondence by the OMA in connection with the OMA's *Charter* challenge:

1. Is the projected timeframe for the filing of materials and hearing of the challenge usual for *Charter* litigation?
2. Does the OMA's position that its affidavits (already served upon the government lawyers) will be kept secret until shortly before the hearing reflect usual practice?

I am co-author of *Constitutional Litigation in Canada* (Thomson-Carswell, looseleaf), and an Adjunct Professor at Osgoode Hall Law School, where I have taught constitutional litigation for 19 years. My practice includes a substantial amount of *Charter* litigation, and I have been recognized as having expertise in this field by Lexpert and Best Lawyers in Canada, among others. I have appeared in 25 cases in the Supreme Court of Canada, most of which were *Charter* or constitutional cases. I also practice in the area of labour law.

**1. *Is the projected timeframe for the filing of materials and hearing of the challenge usual for Charter litigation?***

The OMA states in correspondence that its *Charter* application was commenced in October, 2015, six affidavits were served on the Attorney General of Ontario (i.e., the government lawyers) in April, 2016, and one affidavit remains to be served. The OMA projects a hearing date in 2018.

In my experience, this timeframe, and particularly the suggested time between the serving of the affidavits and the projected hearing date, is unusually long. I understand that the OMA intends to serve one further affidavit to address recent events. If this affidavit has not yet been completed, it should not take long. The OMA should then be in a position to work out a schedule with the government for the remaining steps, and could request the appointment of a case management judge if necessary. Currently court dates for applications of this kind can be obtained with about 5-6 months' notice. The government lawyers may request more time than this, but I see no reason why the hearing could not take place by mid-2017 at the latest.

There may be unusual circumstances that I am not aware of, but normally I would expect a *Charter* application of this kind to be heard within approximately 18-20 months of the date it was commenced.<sup>1</sup>

**2. Does the OMA's position on keeping its affidavits secret until shortly before the hearing reflect usual practice?**

Practice may vary on whether affidavits that have been served on the government lawyers are filed with the court at time of service, or later. Once filed, they form part of the public record, and can be accessed as part of the court file under the "open court principle" unless there are exceptional circumstances that justify an order that the court file be sealed. Such orders are very rarely granted in public interest litigation such as this case.

However, I have never encountered a situation where a representative organization that has already served affidavits on the government lawyers (i.e. the opposing party) claims that it cannot or should not make them public because they will be "dissected". This suggests that the OMA is more concerned with keeping its evidence secret from its own members, whom it purports to represent, than from the opposing party in court. I find this suggestion to be extraordinary, especially in light of the fact that the evidence will be part of the public record at some stage.

I note the OMA's advice that its lawyers were involved in two of the three cases in the Supreme Court of Canada's 2015 trilogy on collective bargaining, and in the recent case of *Canadian Union of Postal Workers v. A.G. Canada*. In these cases, the OMA's lawyers acted for interveners on the side of the government, and as such were not responsible for advancing the cases of those whose *Charter* rights were found to have been breached.

I trust this answers your questions. Please do not hesitate to contact me if you have any further questions.

Yours very truly,

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**



Andrew Lokan

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<sup>1</sup> For example, I represented the federal government's 2700 lawyers in their *Charter* challenge to federal wage restraint legislation. In that case, the application was commenced in June, 2010 and the hearing was in April, 2011 (10 months later). Likewise, I represented CUPE in its *Charter* challenge to the *Putting Students First Act*. In that case, a very complex matter involving five unions, the application was commenced in October, 2012 and the hearing was scheduled for June, 2014 (20 months later). The hearing was subsequently adjourned by agreement of the parties to December 2015, to wait for relevant cases to be decided by the Supreme Court of Canada. This is an example of unusual circumstances that can lead to a longer delay.