

ENFORCEMENT: INSPECTION AND INVESTIGATION

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Enforcement: Inspection and Investigation

The EPA has two main enforcement mechanisms: inspections and investigations. They are related but very different enforcement activities. The purpose of an inspection is to ensure compliance. The purpose of an investigation is to gather evidence of a crime.

Inspections are routine, but inspectors have broad powers under the Act. An investigation is much more usual, and the power of an investigator is much more limited.

Inspections and investigations are not just conceptually distinct activities, but are legally distinct³. Officials are required to answer if asked which type of enforcement activity they are engaged in. This is particularly important because an investigation will trigger various criminal law and *Charter* protections, such as the right to counsel and the right not to self-incriminate.

Inspectors may come, find non-compliance and leave. Then the next step will be an investigator coming to gather evidence about an offence to use before a tribunal or court.

Inspections and Investigations are carried out by different branches of the Ministry of the Environment. Investigators work in the Investigations and Enforcement Branch.

There is a third possibility of for when an officer may arrive. Officers may arrive in response to a spill or similar emergency. This is an exception circumstance where the officer would have broad powers. Other than as discussed above with respect to spills, the scenario is not discussed in this paper.

Powers on inspection

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3. See *R v. Inco Ltd.*, 2001 Can LII 8548 (ON CA), which addresses the affect of the *Charter* and the more limited powers available to a criminal investigator

The EPA gives compliance inspectors the right to do an inspection at any reasonable time and with any reasonable assistance⁴. These inspections must usually be based on reasonable belief that they are going to be inspecting something relevant to the EPA.

While inspectors are not authorized to use force to enter a facility, they have a legal right to enter. Refusing entry to an inspector will likely just mean they will return with a warrant and police to secure their entry. The person refusing entry may also be charged with obstruction⁵.

In the course of compliance verification, inspectors have broad powers. They may:

- (a) make necessary excavations;
- (b) require that any thing be operated, used or set in motion under conditions specified by the provincial officer;
- (c) take samples for analysis;
- (d) conduct tests or take measurements;
- (e) examine, record or copy any document or data, in any form, by any method;
- (f) record the condition of a place or the natural environment by means of photograph, video recording or other visual recording;
- (g) require the production of any document or data, in any form, required to be kept under this Act and of any other document or data, in any form, related to the purposes of the inspection;
- (h) remove from a place documents or data, in any form, produced under clause (g) for the purpose of making copies; and
- (i) make reasonable inquiries of any person, orally or in writing.

Even when an inspector is making inquiries of a person, the inspector cannot exclude the person's counsel from the questioning⁶. It is an offence to give an inspector false or misleading information⁷.

⁴ EPA, s.156(1)

Exceptional powers of a provincial officer

Under limited circumstances, an inspector's powers can become even broader. Without a warrant, an inspector can seize anything that is in plain view if the provincial officer reasonably believes that the thing will:

- afford evidence of an offence under the act
- that the thing was used in connection with an offence and the seizure is necessary to prevent the continuation of the offence, or
- the thing is likely to discharge a contaminant into the natural environment causing an adverse effect

Any provincial officer (which can include both inspectors and investigators) can exercise even more exceptional powers arise under "exigent circumstances". "Exigent circumstances" can arise at any time, including during an inspection or an investigation.

Exigent circumstances exist when:

- An officer believes that an offence has been committed
- There something that will provide evidence about the offence; and
- There is good reason not to take the time to get a warrant (e.g. evidence will be destroyed or the evidence is transient)

Under these exigent circumstances, the officer may search anywhere and seize anything that the officer reasonably believes is relevant to the offence.

If faced with an inspector who is seizing things or claiming the right to search anywhere, a party should inquire and make notes about the reason. If the officer claims they are acting under exigent circumstances, it is particularly important to get as much detail as possible about the

⁵ EPA, s.184(1) and s.186(1)

⁶ EPA, s.156(4)

⁷ EPA, s.184(2&3) and s.186(1)

circumstances they believe are exigent, and why a search warrant cannot be obtained. This may be important information later in determining if the officer was acting lawfully.

Recommendations regarding an inspection

When a provincial officer arrives at the premises, they should be asked for identification and the purpose of their visit. Management should then be called to work with the officer. Assuming the officer is performing an inspection, the scope of the inspection should be determined. Determine what the officer would like to look at.

A manager should escort the officer around the facility. The manager should take notes of everything the officer inspects or does. If the officer takes samples, documents or photographs, duplicate samples, documents or photographs should be taken. In particular with samples, the ideal sample is a portion or "split" of whatever the officer has sampled. Samples should be taken using appropriate and clean equipment.

An officer should be made aware of any areas containing privileged information, or of the privileged nature of any information they are seeking. In areas where there are sensitive documents or trade secrets, legal counsel should be involved to ensure the information is appropriately protected. A good example of an area containing privileged information would be the office of in-house counsel. Most of the contents of that office would be subject to solicitor-client privilege.

Officers should be refused access to any privileged information until they have a court order giving them the right to privileged information.

If an officer insists on inspecting or taking copies of privileged information, even after being advised of its privileged nature and refused access, steps should be taken to protect the information for a later judicial determination of the privileged nature of the document.

If the officer insists on having the information, or disputes its privileged status, you can provide copies (or originals if copying is not possible, or if the officer refuses to accept copies, in which case you should make and retain copies) in the following manner:

- 1) Advise the officer you will provide them with a copy of the information (if possible)
- 2) Place a copy of each piece of information (document, photograph, etc) in individual envelopes or other appropriate packaging. This is so each piece of information can be dealt with independently
- 3) Seal the envelope or package
- 4) Clearly label the envelope or package with the appropriate type of privilege
- 5) Make a list of each piece of privileged information that is provided to the officer
- 6) Provide the sealed envelope or package to the officer
- 7) Tell the officer that you are not waiving any privilege, and that they are not to review the information
- 8) Advise the officer that, as soon as possible, you will be seeking a judicial determination as to whether that officer has a right to that information that document
- 9) Tell the officer to keep the sealed package in a safe place until a court order deals with it

Powers on investigation

Investigations will often be commenced based on an inspector's report or based on an incident that demonstrates likely non-compliance.

An investigator does not have almost any of an inspector's statutory powers. Investigators are similar to police officers, and are equally reliant on search warrants. With a warrant, an investigator can legally do anything the warrant authorizes him to do. The officer may even use reasonable force if the warrant authorizes it.

Sometimes investigators do not have a search warrant but still ask to search premises. If a party gives consent, the investigator can then do any kind of searching they please. However, the party giving consent can withdraw it at any time. Once an officer has identified themselves as an investigator, there is little incentive to give consent. The investigator is investigating an offence, and has reasonable grounds to believe an offence has been committed. The party the investigator is investigating is likely suspected of an offence or may somehow be involved in the offence.

The investigator should be denied any cooperation until they come with a warrant. A clear “No” is the best way to answer an officer if they ask to look around. The “No” leaves no room for any kind of misunderstanding. Waiting for the officer to return with a warrant will give specific, judicially determined limits on what the investigator needs to do and where they can go.

Recommendations regarding investigation

If an investigator has come without a warrant they should be refused access to the facility until they have a search warrant. There is rarely any benefit to consenting to an investigator coming into the facility. Cooperating with an investigation when there is no legal obligation to do so carries significant risk. The Court, via a search warrant, should be allowed to decide the bounds of the search, and what information an investigator needs.

The investigator may return with a search warrant. Ask for a copy of the warrant. The warrant must:

- be signed by a judge or justice of the peace
- be executed by the person(s) named in it
- be executed during the times provided, and
- be executed before its expiry date

The officer must confine their search within the limits specified in the search warrant. You may not lawfully obstruct investigators while they are executing a warrant, but you do not need to go out of your way to assist them.

Ask for a list of everything seized and copies of all documents.

Unless the search warrant specifically gives the officer the right to privileged information, privilege should be asserted over sensitive documents. The steps listed above, under “Recommendations regarding an inspection”, should be followed under these search warrant circumstances as well. This information may later be subject to a judicial determination regarding whether the officer has a right to it.

Investigators who go outside the scope of their legal authority may find that the evidence they gather is inadmissible. The evidence may be excluded under s.24(2) of the *Charter*.

Written or oral questioning of employees

Questioning of employees can happen both during inspections and during investigations. Inspectors have the right to make oral or written inquiries of people during the course of their investigation. So long as the questions are relevant and do not seek privileged information, these inquiries will have to be answered truthfully, without being misleading. Failure to do so may result in a charge of obstruction⁸.

Investigators will also ask questions, as the police would in the course of any investigation.

An officer may provide a list of employees who they would like to interview and arrange scheduling to interview all of them at the facility. The list may be determined in the course of discussions between the officer and the organization.

⁸ EPA, s. 184

A company should prepare employees for questioning, particularly where elements of an offence have occurred.

Employees should answer questions directly and stop. They should not tell unrelated stories of what may have happened in the past. Employees should not guess when they don't know the answer. Do not volunteer information. Do not agree to sign notes of what the officer has recorded from the conversation.

Some companies make known their policy of providing employees who will be questioned with their own lawyer, at the expense of the company.

The interviewer may contact the employee outside of work, in which case the employer may have less control over the interview. For situations like this, it is even more important that employees know they could have their own lawyer paid for by the employer.

Attempt to get the officer's permission to record the interview. The employer may also wish to have corporate counsel present whether the employee has their own lawyer or not.