



# Dealing with Regulatory Inspections and Investigations

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# Agenda



1. Inspections and investigations – why is there a difference?
2. Inspections & investigations
3. Interviews
4. Reporting Obligations
5. Search Warrants

# INSPECTIONS V. INVESTIGATIONS



- Regulatory statutes (Environmental, Workplace Safety etc.) are concerned with the protection of the public welfare
- Accomplished by:
  - inspections to ensure compliance with regulatory requirements
  - orders or directions to bring into compliance; and
  - investigation and prosecution of offences

# Inspection Powers

- Canadian courts have consistently upheld the wide powers of inspection provided to regulators, including the power to:
  - enter a workplace anytime during business hours without a warrant or court order
  - require the production of documents
  - speak with employees and management
  - observe the operation of machinery
  - take photographs
  - take samples

- The rationale for permitting these intrusive powers rests largely on the “Licensing Concept”
- Section 8 of the Charter of Rights and Freedoms protects businesses and people from unreasonable search and seizure, which translated, means that with a few limited exceptions, the government cannot enter onto private property without a warrant
- Relying on the Licensing Concept, the courts have relaxed the application of Section 8 to regulated businesses, permitting warrantless inspections

- The rationale: if a business is voluntarily operating within a regulated area, it cannot expect the same level of privacy Section 8 is intended to protect.
- **Public welfare/protection trumps privacy**
- This compares to *Criminal Code* and other penal investigations, to which, with a few limited exceptions, Section 8 is fully applied meaning that every entry onto private property must be authorized by a warrant

- With regulatory investigations, as compared to inspections, the courts have found that Charter rights should be maintained, in a way very close to *Criminal Code* investigations
- Test: If the predominant purpose of the regulator's enquiry is to collect evidence to support charges and a prosecution in the courts, then the regulator cannot rely on its powers of inspection

- Why?: Investigations engage the penal interest of regulated persons, in the sense that they can be compelled to attend court to answer allegations of wrongdoing and, if found guilty, can be punished by fines, probation and, in some cases jail.
- The penal interest is different than that engaged in inspections, where, theoretically the only purpose is to ensure overall compliance and not to collect evidence



# Why does it matter whether it is an inspection or investigation?

- Key differences affect the rights, obligations, powers and duties of inspectors, investigators, witnesses and legal counsel.
- These differences include:
  - Purpose of the process;
  - Triggers and notice associated with the process;
  - The powers of inspectors/investigators;
  - The need for and role of legal counsel; and
  - The implications for the facility, company and individuals participating in the process.

# What To Do When an Environmental Inspector/Investigator Calls?



# INSPECTIONS: Do's!



- Co-operate!
  - It is often an offence to hinder or obstruct an inspector; and often there is a positive duty to assist
  - See s.38(10) Fisheries Act: requires a person to provide reasonable assistance to an inspector
  - See Environmental Management Act: officers, directors, employees to provide documents, records and information relevant to the inspection to the inspector

# Inspections: Do's

- Have a spokesperson who is responsible for interfacing with the regulator (by way of telephone, letter and/or e-mail enquiries and face to face)
- Respectfully clarify the purpose of the visit – inspection not investigation
- Be efficient and proactive with the generation and storage of records required by regulator to show compliance
- Keep records centrally located and easily accessible for an inspection

# Inspection: Do's

- Accompany the inspector at all times
- Do not volunteer documents – supply only what is asked for
- List any documents that are copied
- Take a copy of any documents that are removed

# Inspections

- If you do not know the “inspector” who is calling you and the reason, confirm both
- If the inspector refuses to identify the reason for him/her attendance, seek legal advice immediately
- If the inspector indicates that he/she is attending for the purpose of investigating a potential breach, seek legal advice immediately

# Investigations

- More constitutional procedural safeguards are available to the regulated entity
- Section 8 – protection from unreasonable search and seizure – meaning that a search warrant is required to enter the workplace to seize documents
- Corporations do not enjoy the right to silence (Sections 7 and 11(c)), but their directors, officers and employees do

# Investigations

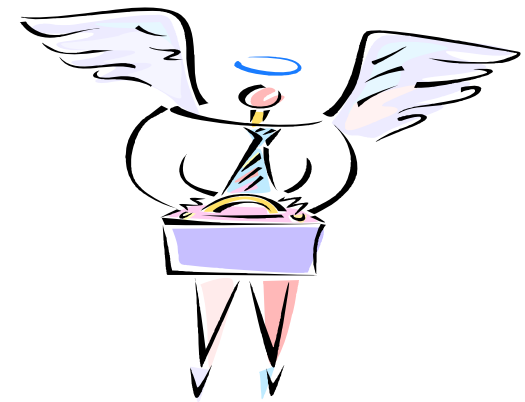
- Investigators cannot use inspection powers to compel employees to provide them with statements incriminating the company
- Investigators cannot use inspection power to compel employees to provide them with statements incriminating themselves. To be admissible, confessions must be voluntary, meaning they must be prefaced by a caution to the employee
- Directors, officers and employees have the right to obtain legal advice – independent from the company, if necessary - as to whether they should consent to be interviewed, and they have the right to have counsel, or anyone else present during the course of the interview



# Investigations

- Just as in the case of inspections, when a company is contacted by the regulator asking to enter the premises, obtain documents and/or speak to employees, it is imperative to determine the reason
- If the reason is to inspect – co-operate
- But if the reason is to investigate, refuse the request until the company has had the opportunity to seek legal advice

# Search Warrants



- If the regulator attends at the business with a search warrant:
  - - do not bar entry
  - - ask for a copy of the warrant & read it
  - - seek legal assistance immediately

# Interview “Do’s and Don’ts”

- Consider with counsel whether directors, officers and employees should be provided the opportunity to obtain legal advice and from who (counsel separate and independent of the company?)
- Arrange a time that is convenient for all
- Prepare those to be interviewed – what to expect etc
- Mechanics of the Interview Process

# Interview Do's and Don'ts

- Stick to the facts – what you know
- Do not guess
- Do not offer opinions or conclusions
- Limit answers to the information required to answer the questions
- If written, review the statement and make any changes that are necessary
- Obtain a copy of the statement

# MEETING STATUTORY REPORTING OBLIGATIONS

- Usually required when there has been an incident engaging public safety; for example, a discharge or spill causing pollution or an employee injury in the workplace
- Usually must be made quickly after the incident incorporating adjectives/adverbs such as “forthwith” or within a set time frame (24 hours)
- The regulated entity is required to have in place a system ensuring it complies with a reporting requirement

# Reporting

- Many companies have very specific written policies directing supervisors and managers as to when and to who reports must be made
- Most companies fall down – not on the reporting policy – but on the content of the information conveyed to the regulator
- Reports have to be conveyed on the assumption that, after the initial response by the regulator to address and assist in the abatement of the public safety issue, it is likely that there will be an investigation

# Reporting

- This is how many investigations originate
- Statutory reports can be admissible to support a prosecution; to “prove” that the wrongful act occurred
- Need to style reports so that they are neutral in language; few if no adjectives and adverbs; no conclusion to cause
- Golden rule: factual information sufficient to meet the reporting requirements, avoiding opinions, avoiding conclusions

## Dealing with Search Warrants

- A search warrant is an investigative tool in the form of a court order permitting entry into a business to search and seize evidence of a contravention
- Must be obtained on sworn evidence (an Information to Obtain) that the officer believes that there has been a contravention and the business location contains evidence of the contravention
- Court orders are powerful instruments. If a business is subjected to a search under warrant, there are very few options open to the company, and these options are more procedural than substantive



- Ask for a copy of the warrant at the time of entry
- Do not obstruct the search officers. Ask if they require assistance but do not interfere if they refuse
- Try to keep an inventory of when the search is carried out and what items are seized
- In the event the officer intends to seize what you consider to be privileged documents (communications to/from lawyers; information prepared for use by lawyers), advise the officer that you believe the information is privileged and ask if it can be placed in a sealed envelope in which the officer and you initial
- As soon as practicable, the inspector must bring the seized items before the issuing court and satisfy the court that the detention of the seized information is warranted

## Search and Seizure: Solicitor – Client Privilege

- A search warrant can't be issued for documents protected by solicitor-client privilege
- Privilege may be lost if disclosed to other parties
- If there is a dispute, put the documents in a sealed, signed envelope for determination by a court



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