



## ENVIRONMENT IN THE COURTROOM

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## **Environmental Investigations: A Government Perspective**

PAUL McCULLOCH

Environmental regulatory regimes in Canada typically include offence provisions that can result in significant penalties such as fines, payments into funds, issuance of court orders, and even prison terms for individuals. The purpose of these penalties is to enforce compliance with the regulatory requirements through general deterrence.<sup>1</sup> Nevertheless, the enforcement agency still bears the burden of demonstrating that the perpetrator committed the impugned act. An effective investigation that collects the necessary evidence is therefore a key element of any enforcement action that leads to the imposition of a penalty. This chapter explains the difference between an investigation and an inspection in a regulatory context, describes the investigation process, and reflects upon recent cases that have addressed the inspection versus investigation divide.

### **Inspections and Investigations**

There are a variety of tools available to enforcement agencies to promote environmental protection. Education and outreach, voluntary compliance, standards and requirements imposed through regulations or permits/approvals/licences, warnings or notices of non-compliance, orders, administrative penalties, and finally prosecutions are all part of the agency's arsenal. Furthermore, the various tools are not mutually exclusive. An agency may either proceed in a stepwise fashion, starting with voluntary compliance and progressing to stricter means if the response is not satisfactory, or it may pursue two courses of action at the same time, such as issuing an order and also commencing an investigation.

An inspection is conducted to determine compliance with applicable regulatory requirements. It may lead to any one of the responses described above being used, or the suspension or revocation of a permit/approval/licence, in addition to referring a matter for investigation. The first contact between the regulated community and an enforcement agency often occurs through an inspection.

Environmental officers generally have a broad range of powers to carry out inspections that permit them to enter any place, including private property (except, in most cases, dwellings), without a warrant to make and record observations, take samples, gather information, make inquiries, and request and copy documents as long as doing any of these things is consistent with the purposes of the authorizing statute.<sup>2</sup> These powers have been upheld as not violating sections 7 and 8 of the *Charter* that protect against self-incrimination and unreasonable searches and seizure, for a number of reasons:

- There is a relatively low expectation of privacy for activities that are subject to state regulation<sup>3</sup>
- A less stringent standard can be applied because a regulatory regime does not carry the same moral reprimand and stigma that accompanies *Criminal Code* offences<sup>4</sup>
- Actors that voluntarily participate in the regulated activity must accept the corresponding terms and conditions.<sup>5</sup>

Inspections may be initiated for a number of different reasons, including:

- Routine inspections (announced or unannounced)
- Random stop programs
- Response to complaints
- Follow-up on self-reporting
- Specific incidents such as a spill or process upset
- Information provided by a whistleblower.

The common element is that the initial purpose is not to decide whether to lay charges. Rather, the inspector is initiating the inspection to determine whether the operation is out of compliance and, if so, to decide upon an appropriate course of action. While the officer may have a suspicion prior to arrival that he or she will find the facility to be out of compliance, this is not in itself sufficient

to convert an inspection into an investigation.<sup>6</sup> The officer will not be in a position to decide what course of action should be taken until completing at least the initial inspection. Furthermore, while an opposing relationship may exist between the officer and the facility owner or operator (simply referred to as the “facility” for the remainder of this paper), the relationship is not necessarily adversarial. In many cases, an officer may work constructively with the facility to provide guidance on how to come into compliance.

An investigation, on the other hand, has a much more focused purpose. The main if not sole purpose of an investigation is to gather evidence to determine whether enforcement action should be taken that will result in penal consequences, usually by laying charges. At this point, the relationship between the investigator and the facility has become adversarial.<sup>7</sup>

There is no simple line that clearly delineates between an inspection and investigation. The determination requires a contextual analysis taking into account a number of factors as described in the Supreme Court of Canada (SCC) decision *R. v. Jarvis*. In that case, the defendant was audited by Revenue Canada (as it then was) for income tax compliance purposes and was then later investigated for tax evasion. Audits and investigations were conducted by two separate branches within Revenue Canada. At issue was what information the investigation branch could use that was collected by the audit branch. The SCC listed the following factors, which have been paraphrased below:<sup>8</sup>

- Reasonable grounds
  - Did the authorities have reasonable grounds to lay charges?
  - Does it appear that a decision to proceed with an investigation that could lead to penal consequences could have been made?
- General conduct
  - Was the general conduct of the authorities such that it was consistent with the pursuit of penal consequences?
- Referral to investigator
  - Had the inspector transferred his or her files and materials to the investigator?
- Inspector acting as agent for investigator
  - Was the conduct of the inspector such that he or she was effectively acting as an agent for the investigator?

- Does it appear that the investigator intended to use the inspector as an agent in the collection of evidence?
- Relevance of information/evidence
  - Is the evidence sought relevant to liability generally?
  - Is the evidence relevant only to penal liability? (e.g. motive, intentions, due diligence)
- Other circumstances
  - Any other facts that could lead the trial judge to the conclusion that the inspection had in reality become an investigation?

In Ontario, similar to Revenue Canada, the Ministry of the Environment and Climate Change has created separate administrative branches for regional inspectors (called environmental officers) and investigators that report to separate directors. However, other enforcement agencies, such as the Ontario Ministry of Labour, do not use this administrative structure. In that situation, an enforcement officer must “wear two hats,” so to speak, and make the determination as to the point at which an inspection has turned into an investigation. The factors listed above will need to be reformulated in the case of an enforcement agency that does not split its enforcement officers between separate inspection and enforcement roles.

The distinction between an inspection and an investigation can be further complicated when there is a need for follow-up compliance inspections and/or continuing offences are occurring. In these situations, there can be a legitimate justification for enforcement officers to carry out further inspections even if there is an ongoing investigation. A common example is where an inspector conducts an inspection, determines that the operation is out of compliance, and issues an order to the facility that sets out steps that must be taken to come into compliance, but an investigation is also commenced to determine whether charges should be laid with respect to the initial non-compliance. Follow-up inspections may be undertaken to determine whether the order is being complied with. During these inspections, additional information may be gathered that is also relevant to the investigation. Where the enforcement officer was able to demonstrate that there was a valid purpose to the follow-up inspections to determine compliance with the orders, in at least one case, it was found that there was no *prima facie* evidence of a *Charter* breach.<sup>9</sup>

## **The Investigation Process**

At the point that an investigation is commenced, the investigator enters into a more adversarial relationship with the facility. For this reason, unlike in an inspection, the courts have determined that an investigator cannot rely upon the regulatory inspection powers to collect evidence. Rather, the investigation will be governed by more stringent requirements in determining whether any *Charter* rights were violated.<sup>10</sup>

Nevertheless, an investigation can still be effectively carried out, only using different techniques. Much of the evidence obtained during an investigation consists of information generated during the inspection stage. The inspector will provide the evidence along with a statement and his or her notes, which often form the foundation of an investigator's case. There is nothing prohibiting an investigator from making use of evidence obtained through the proper exercise of inspection functions.<sup>11</sup> An investigator can then pursue other sources of information as described below.

### **EVIDENCE FROM OTHERS THAN THE FACILITY WHO ARE WILLING TO VOLUNTARILY COOPERATE**

Basic investigative work includes interviewing and obtaining documentary evidence such as photographs from people other than the facility who will voluntarily provide such evidence, including:

- Victims or complainants
- Eyewitnesses
- Neighbours
- Employees
- Subcontractors
- Other agencies.

However, people are not always willing to cooperate. In particular, employees often do not wish to speak to an investigator out of loyalty to their employer or perhaps fear of reprisals despite the statutory protections that are provided.<sup>12</sup>

### **EVIDENCE GENERATED BY THE FACILITY PRIOR TO THE INVESTIGATION**

Environmental regulatory regimes generally require facilities to report key information to the regulator that may eventually be available to the investigator.

This information can provide important evidence for the investigator's case. Examples include:

- Applications for licences/approvals/permits, which often include supporting studies or engineering evaluations
- Reports such as environmental assessments, annual reports, or logbooks
- Monitoring data required to be kept by regulations or administrative instruments.

## **SURVEILLANCE**

When a suspected offence is ongoing, an investigator may engage in direct surveillance of the facility. Following trucks is a common example.

## **DETERMINING THE LEGAL ENTITY**

Where the facility is not an individual, an investigator must request business documents to determine the legal entity to charge. Searches for corporate profile reports, business name registrations, and partnership documents may be required depending upon the case. It is also helpful to obtain business records such as invoices to determine the specific legal entity that is responsible. This can be especially important when a number of related corporate entities such as parent and subsidiary companies are part of the operation. Where subcontractors are involved, it will be necessary to obtain contracts to establish the respective roles and responsibilities.

## **RETENTION OF EXPERTS**

Many of the more serious environmental offences involve discharges that cause or may cause an adverse effect. The investigator must demonstrate that the discharge in fact meets this requirement. This may require an expert opinion to be obtained.

The investigator must do so in a manner that does not contradict the expert's primary obligation to the court to provide impartial evidence. The investigator must clearly articulate the subject matter of the requested opinion, must detail what information was provided to the expert, and must be open to accepting the opinion of the expert whether it supports the laying of charges or not. Needless to say, the investigator cannot unduly influence the expert in any way. In many cases, the investigator will use government-employed scientists

and engineers whom the courts have determined can be qualified as expert witnesses.<sup>13</sup> However, an investigator may also retain outside experts if internal expertise is not available.

#### **VOLUNTARY STATEMENTS BY OR ON BEHALF OF THE ACCUSED**

Despite the fact that a facility or its employees are not required to provide any information to an investigator, they may voluntarily do so in any event. There are a number of reasons for this, including to:

- Convince the investigator that it did not commit the offence
- Provide evidence that the facility exercised due diligence
- Avoid being the subject of a search warrant
- Demonstrate cooperation with the investigation, which can be a mitigating factor at the penalty stage if convicted.

#### **SEARCH WARRANTS AND INSPECTION ORDERS**

Where an investigator cannot obtain necessary information through any of the techniques described above, or where the investigator may have reason to believe that evidence may possibly be tampered with or destroyed in the near future, the main alternative is to obtain a search warrant. The onus is on the investigator to demonstrate under oath to a justice that reasonable grounds exist justifying a search of a place for evidence as to the commission of an offence.

Some environmental statutes also provide authority for the court to issue an investigative procedure order empowering an investigator to go beyond simply conducting a search and also utilize other investigative techniques or procedures to obtain evidence. In Ontario, environmental investigators have used this authority to conduct site visits to make detailed observations of a facility accompanied by an expert to assist the expert in rendering an opinion. However, an inspection order cannot be used to compel a facility or its employees to answer questions without explicit statutory authority.<sup>14</sup>

In Ontario, once an environmental investigation is complete, and if it is determined that charges are warranted, the environmental investigator compiles the evidence into a Crown Brief. The brief also includes a statement by the investigator describing the steps taken in the investigation in order to provide the necessary context and substantiate basic investigative principles such as the voluntariness of statements and continuity of evidence. The brief is submitted to ministry's prosecution department, which is a seconded legal services branch within the Ministry of the Attorney General to obtain legal



advice on whether a reasonable prospect of conviction exists in accordance with the ministry's Charge Screening Practice Memorandum.

## **Recent Cases Interpreting Section 8 of the *Charter* and Inspections**

It is sometimes asserted by facilities that their section 8 *Charter* rights were violated on the basis that the evidence was obtained through an inspection that in fact had become an investigation. These arguments rely upon the *Jarvis* case, decided in 2002, for the proposition that a prosecution cannot use evidence obtained using inspection powers where the predominant purpose of the enforcement officer is to gather evidence for penal purposes. However, more recent decisions have indicated that the court will take a contextual approach in assessing the purpose or justification for carrying out the inspection.

In *R. v. Nolet*,<sup>15</sup> the SCC analyzed a search using a “continuing regulatory purpose” test. In that case, a police officer stopped a transport trailer for a valid regulatory purpose—to conduct an inspection pursuant to the provincial highways Act. The officer observed that the truck had an expired fuel sticker and lacked a valid provincial licence and that there were inconsistent entries in the driver's logbook. These infractions justified a further search of the truck's cabin, which led to the discovery of over \$100,000 in small bills, which in turn led to the discovery of a hidden compartment containing a significant quantity of marijuana. The court permitted the cash and marijuana to be entered as evidence by having regard to the manner in which the search progressed on a step-by-step basis and determining that the search was reasonable at each step. The fact that the police officer was also extremely interested in whether there might be contraband did not by itself render the search unconstitutional. The more important question was whether there was a legitimate regulatory purpose for proceeding to each stage of the search. In reaching its decision in *Nolet*, the SCC distinguished the *Jarvis* case as applying where there is a clear distinction between a “civil audit” on the one hand and an investigation that may result in penal remedies on the other. The police officer in *Nolet* was always in an adversarial position with the defendant, which is a wholly different situation.

Before even claiming a breach of section 8 of the *Charter*, the onus is on the defendant to first demonstrate that it had a right to privacy. The right to privacy was fairly clear in the *Jarvis* case, where personal banking records were obtained. For environmental offences, there are many situations where the facility has a very limited right to privacy. For example, lakes and rivers or

the surrounding air comprise a shared part of the natural environment. Even when samples are taken from the discharge point that may be on the facility's property, an argument can be made that there is a highly diminished privacy interest in the facility's use of the shared environment, especially a commercial or industrial facility. Therefore, even where an inspector may have made a determination that a matter may be referred for investigation, he or she may still be able to collect evidence from the natural environment without violating any *Charter* rights.

This proposition is supported by the case of *R. v. Mission Western Developments Ltd.* Department of Fisheries and Oceans officers conducted a warrantless inspection at a vacant commercial property that was intended for redevelopment. While there was a fence around the property, the gate was not locked. The inspectors entered through the gate and observed that alterations had been made along a fish-bearing creek that runs across the back of the property. The BC Court of Appeal, in denying leave to appeal, agreed with the appeal court justice that "owners of property subject to a high degree of regulation – such as property zoned for commercial development – cannot expect to sustain an expectation of privacy which forecloses the statutory powers of inspection of relevant regulatory authorities."<sup>16</sup>

These more recent decisions indicate that the determination as to whether a regulatory inspection violates section 8 of the *Charter* will be very fact-specific. At one end of the spectrum, an inspector carrying out a routine inspection with no prior expectation of what he or she may find has broad powers to carry out a warrantless inspection. At the other end, an investigator whose sole purpose is to decide whether or not to lay charges cannot generally use regulatory inspection powers or an inspector as an agent to obtain the necessary evidence. However, there will be a wide variety of situations in between that must be evaluated on a case-by-case basis. The courts do appear to be willing to give a fair amount of latitude to enforcement officers that are carrying out inspection functions in good faith. Conversely, any evidence of bad faith will be a significant factor against the Crown.

## NOTES

- 1 *R v Jarvis*, [2002] SCJ No 76, [2002] 3 SCR 757 at para 55 [*Jarvis*]; See also *R v Wholesale Travel Group Inc*, [1991] SCJ No 79.
- 2 For example, see s 156 of the Ontario *Environmental Protection Act*, RSO 1990, c E.19.
- 3 *Comité paritaire de l'industrie de la chemise v Potash*, [1994] SCJ No 7 at paras 8–13 and 60–67.
- 4 *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] SCJ No 23 at para 139; *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 60. For a more general discussion of the distinction between criminal and regulatory offences, see *Wholesale Travel Group Inc*, *supra* note 1.
- 5 *R v Fitzpatrick*, [1995] SCJ No 94.
- 6 *Jarvis*, *supra* note 1 at para 90.
- 7 *Ibid* at para 93.
- 8 *Ibid* at para 94.
- 9 *R v Demolition and Recycling*, [2009] OJ No 5318 at paras 23–40.
- 10 *Jarvis*, *supra* note 1 at para 96.
- 11 *Ibid*, at para 95.
- 12 See, e.g., ss 104 to 116 of the Ontario *Environmental Bill of Rights, 1993*, SO 1993, c 28, or s 174 of the Ontario *Environmental Protection Act*.
- 13 *R v Inco*, [2006] OJ No 1809; but see *Ontario (Ministry of Labour) v Advanced Construction Techniques Ltd*, [2015] OJ No 6130 for a case where a government engineer became too involved in the investigation to be qualified as an unbiased expert. For a more recent example in a criminal context, see *R v Livingston*, 2017 ONCJ 645.
- 14 *Branch v Ontario (Minister of the Environment)*, [2009] OJ No 45.
- 15 *R v Nolet*, 2010 SCC 24.
- 16 *R v Larsen*, 2012 BCCA 167 at para 28.