

ENVIRONMENTAL LAW: MANAGING RISK

PAPER 3.1

“I Done What He Told Me To” – What to Do (And Not to Do) When the Regulator Calls

These materials were prepared by Toby Kruger and Clifford G. Proudfoot, both of Lawson Lundell LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, November 2011.

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“I DONE WHAT HE TOLD ME TO”—WHAT TO DO (AND NOT TO DO) WHEN THE REGULATOR CALLS

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I. Introduction

A property developer hires a Bobcat to clear brush adjacent to a stream on his property. A biologist with the Department of Fisheries and Oceans (“DFO”), who happens to walk by the site on her daily walk to work, notices the Bobcat. She calls her colleague, a Fisheries Officer, and the two of them attend the site later that day. Neither one sees a “no trespassing” sign posted on the property, and they enter the property through an open gate. The Fisheries Officer interviews the bobcat operator and orders him to stop work. The DFO employees proceed to search and take notes and pictures of the work near the stream. Some time later, using the evidence gathered at the site that day, a charge of harmful alteration of fish habitat contrary to the *Fisheries Act*, R.S.C. 1985, c.F-14, is laid against the property developer. Is the evidence gathered by the DFO Officer admissible in the prosecution?

A worker is crushed by a machine at a brick factory. He survives his injuries but never works again. An inspector from the Ministry of Labour attends at the factory and interviews several employees about the accident, both on the day of the accident and in the days that follow. The employees are not told by the inspector of their right to legal representation. Several of the employees later testify that they felt compelled to give the information, and in describing the inspector’s visit, one employee stated: “I done what he told me to.” The owner of the brick factory is subsequently charged with the offence of failing, as an employer, to take every precaution reasonable in the circumstances for the protection of a worker at a workplace. Has there been a breach of the employer’s *Charter* rights so serious that a stay of the prosecution is warranted?

What these cases have in common is that they examine the scope of a regulator's authority to inspect or investigate individuals and places in pursuit of a prosecution under a regulatory statute. The cases explore the legal consequences of an investigation (broadly, where a regulator is trying to gather evidence in support of a prosecution), and an inspection (broadly, where a regulator is seeking to monitor general compliance without the predominant purpose of collecting incriminating evidence). Of particular importance is s. 8 of the Canadian *Charter of Rights and Freedoms*: everyone has the right to be secure against unreasonable search or seizure. What determines unreasonable search and seizure in the regulatory context is informed by:

- (i) the scope of authority granted to the regulator by the relevant legislation, which in turn depends on whether the regulator is acting in an inspection or in an investigatory role; and
- (ii) the regulated person's reasonable expectation of privacy in the circumstances.

This paper examines the scope of a regulator's authority to conduct inspections and investigations across a number of common regulatory contexts. The paper begins by focusing on the basic framework courts use to determine the legality of an inspection or investigation. The paper then examines recent cases decided under the *Fisheries Act* and the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1 ("*OHSA*"),¹ and briefly comments on the application of *R v. Jarvis*, 2002 SCC 73, in cases decided subsequent to that decision. The paper concludes by summarizing how the principles developed in the case law might be applied in common regulatory contexts. An Appendix outlining the inspection and investigative powers contained in common regulatory contexts in BC is attached to this paper.

II. The Basic Framework

The basic proposition underlying the conduct of inspections and investigations in the regulatory context is that inspections and investigations must be grounded on a valid exercise of statutory power. Warrantless searches are presumptively unreasonable and contrary to s. 8 of the *Charter*. In the absence of a warrant, the Crown must establish on a balance of probabilities that the search was authorized by law, that the law itself is reasonable, and that the manner in which the search was carried out was reasonable.² If in a particular context the *Charter* has been infringed, evidence obtained through that *Charter* breach could be excluded from a prosecution pursuant to s. 24(2) of the *Charter*, or another remedy, such as a stay of prosecution, may be available under s. 24(1) of the *Charter*.

Regulatory inspections and searches must be limited to their intended purposes and cannot be turned into an unfounded general inquisition or unreasonable search.³ A regulatory inspection for compliance purposes does not constitute a warrant to search the premises or to interview employees for all purposes. The extent of a regulator's authority depends on an examination of every step of the regulator's actions to determine at what point, if at all, the regulator infringed the rights of the regulated person under s. 8 of the *Charter*. Regulatory inspections and investigations are not static events. Information, as it emerges, may entitle the regulator to attend a site for the purpose of ensuring regulatory compliance; or, as the case may be, return to the site with proper authorization to conduct an investigation.

1 The Ontario *OHSA* bears some similarity to the BC *Workers Compensation Act*, R.S.B.C. 1996, c.492, in respect of the powers given to inspectors to conduct workplace inspections. In the absence of judicial consideration of an inspector's powers under the BC *Workers Compensation Act*, a representative case under the Ontario *OHSA* is useful to demonstrate the extent of an inspector's powers in the common event of a workplace inspection or investigation. We caution however that, as is articulated throughout the paper, the extent of an inspector's powers in the regulatory context depend primarily on the grant of authority to conduct investigations or inspections contained in the governing legislation.

2 *R v. Nolet*, 2010 SCC 24 at para. 21.

3 *Ibid.* at para. 3.

Courts generally employ the following framework in considering the above principles to determine whether a regulatory inspection or search was unreasonable:

1. Did the regulator possess the statutory power to conduct the inspection or investigation?
2. If the inspection or investigation was initially authorized, and thus not constitutionally flawed from the outset, did the regulator's continued actions constitute a breach of s. 8 of the *Charter*?

Concerning the first question, restricting the focus of the legality of a search on the *Charter* may distract attention from the important preliminary question of whether the inspector possessed the power to conduct an inspection or investigation in the first place.⁴ If not, then the search is *prima facie* unreasonable.

If the regulator does possess the power to conduct the inspection or investigation, fundamental to establishing the *Charter* right to be protected from unreasonable search or seizure is the presence of a personal privacy right. Absent a personal privacy right, an individual does not have any right to be protected from search and seizure.⁵

A. Did the Regulator Possess the Power to Conduct the Inspection or Investigation in the First Place?

A recent illustration of the framework courts use to determine the validity of an inspection or investigation in relation to the *Fisheries Act* occurred in *R v. King*, 2009 PECA 9, in which an individual was charged with the possession of undersized lobsters in contravention of the Atlantic Fishery Regulations, 1985, SOR/86-21. The lobsters were found and seized by officers on regular patrol in a warehouse on the property of Transport Canada, which the accused was occupying as an employee.

The Court began its analysis by identifying the statutory authority of a Fisheries Officer under the *Fisheries Act*. Pursuant to s. 49(1), for the purpose of ensuring compliance with the Act and the Regulations, a Fisheries Officer may enter any place to conduct an inspection where he or she believes there is any work or undertaking or any fish to which the Act or Regulations may apply, save and except a dwelling in which case the consent of the owner or a warrant is required. Pursuant to s. 49.1(1), fisheries officers may conduct searches where the officer believes on reasonable grounds that there has been a contravention of the Act, but only on the authority of a warrant. Being satisfied that the officers' initial entry into the warehouse was done pursuant to a valid exercise of statutory power, the Court proceeded to the second step of the framework: the *Charter* analysis.

An important component of *King* and several other cases decided under the *Fisheries Act* is that the inspection and investigation powers granted under s. 49 and 49.1 of the *Fisheries Act* respectively are largely the same; the difference between the two sections is the context under which the power arises. In *King*, the power to enter the warehouse and inspect its premises were found to be valid exercises of power under s. 49, permitting the court to proceed to a full *Charter* analysis. By contrast, in *R v. Inco*,⁶ a case concerning an abuse of administrative powers by an inspection officer under the Ontario *Water Resources Act*, R.S.O. 1990, c.O 40 ("OWRA"), an inspector's entry into a company's premises and the subsequent interview of its employees was found to exceed the inspector's statutory authority in the first place, making the interviews *prima facie* unreasonable.

4 *Ibid.* at para. 24.

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

6 2001 CanLII 8548 (Ont. C.A.), leave to appeal to SCC refused, [2001] SCCA No 436.

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In *Inco*, an Investigation and Enforcement Officer (“IEB Officer”) of the Ministry of Environment (“MOE”) attended an Inco facility after abatement officers had informed him that there had been a discharge from the mine treatment area into a nearby creek and that the water samples from the creek were being analyzed by the MOE. The IEB Officer contacted senior Inco employees, including its in-house counsel, to advise that he intended to interview any Inco employee who had knowledge of the incident. He also advised the employees—falsely, as it turns out—that they were under a statutory obligation to submit to the interviews. The IEB Officer attended at Inco and interviewed the employees in the presence of counsel, who stated his objection to the interviews and indicated that his clients were cooperating to avoid potential charges of obstruction. Counsel also voiced his objection without success to the taping of the interviews by the IEB Officer. After the questioning sessions, the IEB Officer requested that Inco personnel provide various documents concerning the discharges, including Inco’s sampling analysis of the discharges and Inco’s operational procedures on shutdowns.

Inco was subsequently charged with discharging untreated mine effluent contrary to the *OWRA*. Inco appealed on the basis that the IEB Officer had no statutory authority to compel Inco employees to submit to questioning and to produce documents and other materials. According to Inco, when the IEB Officer engaged in this investigation, he already had reasonable grounds to believe that an offence had been committed, and improperly used the inspection power under s. 15 of the *OWRA* to build a case for prosecution. Section 15 of the *OWRA*, at the time, permitted IEB Officers to make “inspections” without a warrant or court order for the administration of the *OWRA* or associated regulations.

The Court held that the question of whether the IEB Officer had statutory authority for his actions turned on whether he possessed reasonable and probable grounds to believe that an offence had been committed when he engaged in the interviews and search. The Court cited *La Forest J in Comité Paritaire de l’industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, for the proposition that the scope of the constitutional guarantee afforded by s. 8 of the *Charter* varies depending on whether an inspection or search pursuant to an investigation is involved:

An inspection is characterized by a visit to determine whether there is compliance with a given statute. The basic intent is not to uncover a breach of the Act: the purpose is rather to protect the public. On the other hand, if the inspector enters the establishment because he has reasonable grounds to believe that there has been a breach of the Act, this is no longer an inspection but a search, as the intent is then essentially to see if those reasonable grounds are justified and to seize anything which may serve as proof of the offence.

Following *Comité Paritaire* and applying the legislative scheme, the Court in *Inco* held that where the IEB Officer had reasonable grounds to believe that an offence had been committed, absent exigent circumstances, he must obtain a warrant.

The IEB Officer’s testimony in *Inco* on whether he possessed reasonable and probable grounds to believe that an offence had been committed before he interviewed Inco’s employees was equivocal. He initially testified that he had reasonable grounds to believe there had been a breach of the *OWRA* prior to conducting the interviews, however, on cross-examination by the Crown, he recanted that evidence and said that he did not have grounds to lay the charges until after he had completed the interviews of Inco employees. Neither of the lower courts made a finding as to whether the IEB Officer had reasonable grounds to believe that an offence under the *OWRA* had been committed *before* he conducted interviews of Inco’s employees. Accordingly, the case was sent back to trial. The lower court was instructed to make a finding on whether reasonable and probable grounds existed prior to the IEB Officer’s interviews of Inco’s employees. If there was enough evidence to support the existence of reasonable and probable grounds before the IEB Officer entered Inco’s premises, then the inspection provision in s. 15 of the *OWRA* could not be relied on and the IEB Officer ought to have obtained judicial authorization to enter Inco’s premises.⁷

⁷ *Inco* eventually ended up before Renaud J. of the Ontario Court of Justice in 2008, where the Crown was unable to prove its case and Inco was acquitted of the charges. As such, it was unnecessary to consider the

What *Inco* and *King* demonstrate is that the statutory context in which an investigation takes place is of fundamental importance. Particular attention must be paid to the changing nature of regulatory inspection powers. In *King*, the inspectors visited the warehouse once, for a purpose authorized by law, in which visit they obtained the necessary evidence to support the prosecution. In *Inco*, the IEB Officer made repeat visits to the site as part of a continuing investigation, and while the initial visit may have been authorized by law, the subsequent visits were not. Examining the statutory grant of power to inspect each time a regulator visits a site must always be the first step in determining whether or not an investigation was reasonable. Lawyers should be very aware of the statutory context in which their clients who are regulated entities operate, as what may be permissible in one statutory context may be impermissible in another.⁸

B. Were the Regulator’s Continued Actions a Breach of Section 8 of the Charter?

Returning to *King*, once satisfied that the Fisheries Officer was acting pursuant to a valid grant of statutory power, the Court did not dwell on whether the officer’s attendance at the site that day changed from inspection pursuant to s. 49 of the *Fisheries Act* to an investigation pursuant to s. 49.1. The Court stated that whether the power changed to one exercised pursuant to s. 49 or s. 49.1 was beside the point—in either situation, the issue in an application to exclude evidence under the *Charter* depends on whether there has been a breach of the fisher’s rights under *Charter*.⁹ As long as there is a continuing regulatory purpose on which to ground the exercise of the regulatory power in any particular visit, the issue is whether the officer’s search infringed the accused’s *Charter* rights, beginning with an examination of the accused’s reasonable expectations of privacy.¹⁰ The question before the court thus became as follows: was the accused’s right to be protected from an unreasonable search and seizure violated when the officers entered the warehouse and seized the lobster allegedly caught in violation of the Atlantic Fishery Regulations?

McQuaid J.A. for the P.E.I. Court of Appeal determined that if there was no reasonable expectation of privacy on the part of the accused in respect of the place in which the search took place, then no violation of the s. 8 *Charter* right could occur. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. The factors to be considered in assessing these circumstances may include, but are not restricted to, the following¹¹:

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;

Charter argument, but in *obiter* the Court stated that the inspector had reasonable and probable grounds to lay a charge before interviewing the employees. Notwithstanding the resulting violation of the defendant’s s. 8 *Charter* rights, the Court stated that this was not the “clearest case” where a stay of proceedings under s. 24(2) of the *Charter* would have been warranted. See *R v. Inco Ltd.*, 2008 ONCJ 332.

- 8 A list of statutory powers of investigation and inspection under common regulatory statutes applicable in BC is found in the Appendix to this paper.
- 9 Presumably in making these comments the Court found that the initial purpose of the visit was supportable. The DFO inspectors discovered the lobsters pursuant to a routine inspection, and the question of whether the DFO officers initially intended to perform an inspection or an investigation was never squarely before the court.
- 10 *Nolet*, *supra*, n. 2 at para. 41.
- 11 *R v. Edwards*, [1996] 1 S.C.R. 128 at para. 45.

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- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

In addition, an important component of the contextual analysis of the circumstances of each case is whether the legislation from which the powers of the officers are derived is regulatory or criminal.¹² Courts have stated that there is a much reduced expectation of privacy when inspection powers are exercised upon an individual participating in a highly regulated endeavor, such as fisheries. In a regulated environment, an individual's privacy interests often give way more readily than in a criminal or quasi-criminal environment.¹³ The greater the reasonable expectation of privacy, the greater the possibility the officer's actions could be considered an unreasonable search. The onus of proof for whether a reasonable expectation of privacy exists lies on the *Charter* claimant.¹⁴

Applying these factors, the Court of Appeal in *King* found that the accused did not have a reasonable expectation of privacy in the premises upon which the lobsters were found. The accused did not own the warehouse, and he had non-exclusive possession of it only because of his position of employment. At the time of the alleged offence, the property was accessible to the public. The accused had no subjective expectation of privacy, as he took the position that the lobsters were not his, thereby leaving the court to infer that others had access for the purpose of leaving their lobsters on the property. As such, there was no violation of the accused's s. 8 right to be protected from an unreasonable search and seizure.

To summarize, in applying the basic framework for whether a search pursuant to a regulatory statute was contrary to s. 8 of the *Charter*, courts will first look at whether the regulator had the power to conduct the search or inspection in the first place. If not, as in *Inco*, the search is presumptively unreasonable. If yes, the court will look at whether the accused had a reasonable expectation of privacy. If there is no reasonable expectation of privacy, there can be no breach of s. 8 of the *Charter*, as was the case in *King*.

III. Occupational Health and Safety: R. v. Canada Brick Ltd.

The example of the injured brick-worker given in the introduction is based on the facts of *R. v. Canada Brick Ltd.*, 2005 CanLII 24925 (Ont. S.C.). The company, which was acquitted at trial on the due diligence defence, argued on the Crown's appeal that its s. 8 *Charter* rights were breached because the Ministry of Labour inspector exceeded the inspection powers granted to him under s. 54 of the *OHSA* by continuing to use the inspection powers granted under the *OHSA* to gather evidence to support a prosecution, after the point in time at which he had reasonable grounds to believe the *OHSA* had been violated.

Section 54(1) of the *OHSA* provides that an inspector may, for the purpose of carrying out his or her duties under that Act, exercise without a warrant a variety of powers including: entry to a workplace without notice; require production of documents; conduct tests; make seizures; and make inquiries of persons in the workplace.

The Court analyzed the legality of the inspection pursuant to the framework established in *Inco*. The Court found that the inspector's initial attendance at the factory on the date of accident was a valid

12 While it is submitted that this distinction is arbitrary, it is nevertheless one that has developed in the jurisprudence. For a critical view of this distinction, see Christopher Sherrin, "Distinguishing Charter Rights in Criminal and Regulatory Investigations: What's the Purpose of Analyzing Purpose?" (2010) 48 *Alta L Rev* 93.

13 *King* at para. 40.

14 *Nolet, supra*, n. 2 at para. 30.

response to a notification to the Ministry of Labour concerning a workplace accident and was an inspection authorized by law. The inspector, in furtherance of his regulatory mandate to monitor safe workplaces, was obliged to determine the circumstances of the reported industrial accident in order to ascertain whether it was the result of non-compliance with the *OHS Act* or associated regulations, and if so, to take necessary and timely steps to protect workers. To this end, on his initial attendance at the site the inspector properly exercised a panoply of warrantless powers conferred by s. 54 of *OHS Act* in an effort to learn how the accident occurred, whether it was the product of a preventable hazard, and what remedial action, if any, was required.

During the course of the day, however, and after the inspector had left and returned to the site, it became apparent to the inspector that a previous order had been issued by the Ministry of Labour to the same employer several months earlier, in relation to a workplace hazard constituting a danger or hazard to the health and safety of workers around the same machine that was involved in the most recent accident. The previous order required the factory to implement a permanent solution to the workplace hazard, which it plainly had not done. At that point, the court ruled, the inspector objectively had reasonable grounds to believe that the employer had contravened the Act, and any further gathering of evidence by the inspector was a warrantless search no longer authorized by law.¹⁵ In the words of the Supreme Court of Canada in *Jarvis*, the inspector had at that point “crossed the Rubicon” from an inspection to an investigation. The inspector’s predominant objective thereafter was the investigative gathering of evidence respecting the liability for a regulatory infraction, whether or not he would ultimately see himself as having grounds to charge the company.

Importantly, the Court held that a deliberate deferral of consideration by the inspector as to whether he had reasonable and probable grounds or whether such grounds objectively existed did not alter the transparently clear dominant intent of the inspector in the weeks following the accident. As such, what circumstances constitute reasonable and probable grounds is to be judged on an objective basis.

Accordingly, the Court held that the inspector’s prolonged employ of his administrative powers to gather evidence as to whether an offence had been committed was presumptively unreasonable and contrary to s. 8 of the *Charter*.¹⁶ With this determination, the court was not required to proceed with an inquiry as to whether the accused’s privacy rights had been infringed.

A. Recent Developments under the Fisheries Act

I. R v. Mission Western Developments Ltd.

The example of the Bobcat operator in the introduction to this paper is taken from *R v. Mission Western Developments Ltd.*, 2011 BCSC 1378. The defence in that case challenged the evidence that the Crown intended to introduce through the DFO officer and biologist on the basis that the evidence was gathered through an illegal investigation, in violation of s. 8 of the *Charter*. Applying the framework

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- 15 In his testimony at trial, the inspector repeatedly acknowledged that he had conducted an “investigation” using the coercive powers granted under the Act for more than 20 days after the accident. He conducted interviews, documents were produced, and information and records in which respondent had a reasonable expectation of privacy were obtained. This became a warrantless search no longer authorized by law.
- 16 The Court’s finding that the employer’s s. 8 *Charter* right was breached turned out to be a pyrrhic victory, as the company was nonetheless convicted of the charge because the Court found that no remedy for the breach was available under s. 24 of the *Charter*. The Court found that the inspector believed he was legally justified in investigating through the use of warrantless powers and was not deliberately treating his search warrant authority with contempt. Moreover, the Court found that the inspector was acting at a point in time well in advance of the clarification of the law in *Jarvis*. As a result, the integrity of the administration of justice was not unduly threatened, the government’s actions would not shock the conscience of the community, and no remedy under s. 24 was warranted.

set out above, the Court had to first satisfy itself that the DFO officer and biologist had the legislative power to attend the property for an inspection in the first place.

The Court reviewed the evidence to determine whether the DFO employees had the authority under the *Fisheries Act* to enter upon the premises. Despite defence counsel's best efforts on cross-examination of the DFO employees to establish otherwise, the Court found that the employees' attendance at the site was not done pursuant to a preconceived intent to prosecute, such that s. 49.1 of the *Fisheries Act* would be engaged. Rather, the Court found that their attendance at the site was typical of an inspection of fish habitat under s. 49 of the *Fisheries Act*, which section does not require a warrant prior to entry.

Turning to the *Charter* issue, the Court found that s. 8 was not engaged because the defendant had a very diminished reasonable expectation of privacy in the property relating to the DFO inspection. Factors that led the Court to this conclusion were:

- while the company maintained a fence around most of the property and tried to restrict unauthorized use of the property by posting "No Trespassing" signs, the evidence was that the DFO employees did not see the signs and entered the property through an open gate;
- the property was intended for commercial development, a highly regulated use which cannot be expected to sustain a reasonable expectation of privacy over the statutory powers of inspection given to regulatory authorities.

Accordingly, the evidence was deemed to be admissible and the case was sent back to Provincial Court for retrial.¹⁷

2. R v. Sutherland

Another recent case in which the extent of a DFO officer's inspection powers was considered is *R v. Sutherland*, 2010 ONSC 2240, aff'd 2011 ONCA 239. In that case, in response to a complaint that work had been undertaken on a fish-bearing stream, a DFO officer and a fisheries biologist attended the site on Mr. Sutherland's property. When they arrived at the site, they noticed a large amount of fill material that had been placed over the entrance of the creek. They remained on the scene for about an hour and took photographs and measurements of the scene. The DFO officer made subsequent inquiries and later visited the site several times to inform Mr. Sutherland that if he removed the offending material, he would not be charged. Mr. Sutherland did not remove the material and was charged and convicted under ss. 35(1) and 40(1)(a) of the *Fisheries Act* for depositing rocks and other fill material into a fish-bearing stream on his property. He appealed that decision on the basis of a breach of his s. 8 *Charter* rights.

Under the first branch of the analysis above, the court confirmed that s. 49 of the *Fisheries Act* allows a Fisheries Officer to enter onto property for the purpose of inspecting it to ensure compliance with the Act (i.e., ensuring that offences against the Act are not being committed), whereas s. 49.1 provides the authority for the officer to enter and search the property where that officer has reasonable and probable grounds to believe that an offence has been committed under the Act. Under s. 49.1, the DFO officer must have a warrant. Relying on earlier authorities,¹⁸ the Court found that, once reasonable and probable grounds exist to support a belief that an offence has been committed, any further entry onto the property constitutes a search or investigation and must therefore be conducted with a warrant under s. 49.1 of the Act. The transition from an "inspection" designed to "ensure compliance" to an "investigation" was quoted as follows:

¹⁷ At the time of writing this paper, no appeal had been filed.

¹⁸ Namely, *R. v. Zuber*, 2004 CanLII 2549 (Ont. S.C.) and *R. v. Douglas*, [2000] B.C.J. No. 2701 (Prov. Ct.).

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Section 49.1 makes it clear that once a fishery officer has ‘reasonable grounds’ to believe that work or undertaking is being carried on in contravention of the Act or regulations, the officer must apply for and obtain a warrant from a justice of the peace, before he or she can enter and search the place where the work or undertaking is located.

Accordingly, the Court held that the DFO officer’s initial visit to the site following the complaint was done pursuant to s. 49 of the *Fisheries Act* as part of his overall mandate to ensure compliance by the public with the Act. Upon visiting the site, the officer concluded that reasonable grounds existed for believing that an offence had been committed. After that determination, any further entry onto Mr. Sutherland’s property would have constituted a search or an investigation, requiring a search warrant under s. 49.1 of the *Fisheries Act*. Mr. Sutherland was held to have been properly convicted based on admissible evidence derived from the initial site visit. If there were any *Charter* breaches, those breaches occurred after the initial visit and the evidence obtained in relation to those breaches was properly disregarded.

IV. A Comment on R v. Jarvis

In *Jarvis*, a taxpayer was charged with tax evasion under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp). In defending a prosecution for tax evasion, a taxpayer objected to the admission of information and documents obtained by the Canada Revenue Agency in the course of a civil audit that he was led to believe might lead to a reassessment. Under the *Income Tax Act*, the taxpayer’s cooperation at the reassessment stage was compulsory. The question arose as to whether the taxpayer’s records provided to the Canada Revenue Agency under the guise of an audit could be used in the prosecution. The Court agreed with the taxpayer that “there must be some measure of separation between the audit and [penal] investigative functions” and held that officials “cross the Rubicon” when the “predominant purpose of a particular inquiry is the determination of penal liability.” As noted by Binnie J. in *Nolet*, in other words, “when the inquiry in question engages the adversarial relationship between the taxpayer and the state,” the taxpayer is entitled to a level of *Charter* protection that is appropriate to the penal context.

When it was first released, *Jarvis* was seen as establishing great hope for defence lawyers in regulatory prosecutions (notwithstanding that the Crown succeeded in that case). It was perhaps thought that the moment at which the predominant purpose of an inspection turned into an investigation, the full spectrum of an accused’s *Charter* rights would be engaged. While this may be true, *Jarvis* has not, to our knowledge, been used to turn what may have initially been a valid exercise of a statutory inspection power into an unreasonable investigation *during the course of the same visit*. In other words, *Jarvis* has been interpreted to mean that if an inspector enters a place of inspection without reasonable and probable grounds that a contravention of the Act has occurred, the inspector’s original purpose will sustain the legality of the visit, as in *King* and *Mission*. In our view, should the right facts arise, there is an opportunity to argue that *Jarvis* should apply the moment the inspector “crosses the Rubicon,” regardless of whether that occurs during the initial visit or upon a subsequent visit. It is submitted that the time at which the “predominant purpose” of an inspection can be said to shift from an inspection to an investigation should not be limited to the intervals between an inspector’s physical presence at the site.

What *Jarvis* has done is to firmly establish that the scope of a particular *Charter* right or freedom in the regulatory context will vary according to the circumstances. *Jarvis* is useful in that it provides a set of factors that can be used to identify whether an inspector’s visit is in the nature of an inspection or an investigation.¹⁹ That determination, however, is only useful when analyzed against the words of the

¹⁹ In *Canada Brick* at para. 163, *Jarvis* was described as a “very clear enunciation of a ‘predominant purpose’ test respecting the separation line between the exercise of administrative power and investigatory function.”

inspection power granted by the Act. *Jarvis* itself states that the analysis begins with the words of the Act.²⁰ In that vein, *Jarvis* has proven useful in determining the constitutionality of an investigation where the words of the Act do not clearly delineate between inspection and investigation powers. As stated in *Jarvis*, where the applicable Act requires a prior authorization to investigate where the commission of an offence is suspected, it creates a strong inference that separate statutory inspection powers are unavailable to further a prosecutorial investigation. The *Fisheries Act*, for example, contains separate sections delineating the inspector's powers when there are and when there are not reasonable grounds to believe that a contravention of the Act has occurred, with the former requiring the inspector to obtain a warrant. The BC *Workers Compensation Act*, by contrast, is not as clear, and as a result there may be a greater scope for an officer acting pursuant to that Act to abuse the powers of inspection to further an investigation in the absence of warrant. As a result, *Jarvis* may be of more assistance to an accused charged under the *Workers Compensation Act* than to an accused charged under the *Fisheries Act*, as the constitutionality of an inspector's powers under the former statute may be more difficult to ascertain.

V. Conclusion

As is clear from all of the cases reviewed in this paper, the constitutionality of an inspection or investigation depends on the statutory grant of power to the inspector or investigator. It is only once the boundaries of this power are established (or not), that an inquiry into the accused's privacy rights under s. 8 of the *Charter* begins. Where reasonable and probable grounds that an offence has occurred exist, the applicable statute should be examined to determine whether the inspector or investigator requires a warrant to proceed. If an accused is charged, where appropriate, prudent defence counsel will argue both that the inspector or investigator overstepped his or her statutory mandate, and that the accused's privacy rights under s. 8 of the *Charter* have been infringed.

Given the importance of the statutory context, both defence counsel and prosecution should be intimately familiar with the statutory context in which their clients operate. If the inspector or investigator visits, clearly establish the purpose of every visit, each time, on an objective basis, and do not take the investigator at face value. Different considerations arise if the inspector is there on a routine inspection, for example, or if the investigator is there following up on an earlier incident. Where, on an objective test, the investigator has reasonable and probable grounds to believe an offence has been committed, it may be that a warrant is required. It is up to defence counsel to protect their clients in this regard—don't ever let a client say they done what the regulator told them to!

²⁰ *Jarvis* at para. 77.

VI. Appendix A—Inspection and Investigative Powers Contained in Common Regulatory Contexts in BC

This appendix highlights the inspection and investigative powers contained in the following common regulatory statutes in BC:

- *Workers Compensation Act*, R.S.B.C. 1996, c.492
- *Species at Risk Act*, S.C. 2002, c.29
- *Migratory Birds Convention Act*, 1994, S.C. 1994, c.22
- *Environmental Management Act*, S.B.C. 2003, c.53
- *Fisheries Act*, R.S.C. 1985, c.F-14
- *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp)

A. Workers Compensation Act, R.S.B.C. 1996, c. 492

Application of Division

178 This Division, as it applies in relation to inspections, also applies to investigations and inquiries.

Authority to conduct inspections

179(1) An officer of the Board may enter a place, including a vehicle, vessel or mobile equipment, and conduct an inspection for the purpose of

- (a) preventing work related accidents, injuries or illnesses,
- (b) ascertaining the cause and particulars of a work related accident, injury or illness or of an incident that had the potential to cause a work related accident, injury or illness,
- (c) investigating a complaint concerning health, safety or occupational environment matters at a workplace, or
- (d) determining whether there is compliance with this Part, the regulations or an order.

(2) An inspection may be conducted

- (a) at a reasonable hour of the day or night, or
- (b) at any other time if the officer has reasonable grounds for believing that a situation exists that is or may be hazardous to workers.

(3) An officer may do one or more of the following for the purposes of an inspection under this Division:

- (a) bring along any equipment or materials required for the inspection and be accompanied and assisted by a person who has special, expert or professional knowledge of a matter relevant to the inspection;
- (b) inspect works, materials, products, tools, equipment, machines, devices or other things at the place;
- (c) take samples and conduct tests of materials, products, tools, equipment, machines, devices or other things being produced, used or found at the place, including tests in which a sample is destroyed;
- (d) require that a workplace or part of a workplace not be disturbed for a reasonable period of time;
- (e) require that a tool, equipment, machine, device or other thing or process be operated or set in motion or that a system or procedure be carried out;
- (f) inspect records that may be relevant and, on giving a receipt for a record, temporarily remove the record to make copies or extracts;
- (g) require a person to produce within a reasonable time records in the person's possession or control that may be relevant;

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- (h) question persons with respect to matters that may be relevant, require persons to attend to answer questions and require questions to be answered on oath or affirmation;
- (i) take photographs or recordings of the workplace and activities taking place in the workplace;
- (j) attend a relevant training program of an employer;
- (k) exercise other powers that may be necessary or incidental to the carrying out of the officer's functions and duties under this Part or the regulations.

(4) The authority to conduct an inspection under this Division is not limited by any other provision of this Part or the regulations giving specific authority in relation to the inspection.

(5) If an officer of the Board requests this, a peace officer may assist the officer in carrying out his or her functions and duties under this Part or the regulations.

Restrictions on access to private residences

181(1) If a workplace, in addition to being a workplace, is occupied as a private residence, the authority under section 179 may be used to enter the place only if

- (a) the occupier consents,
- (b) the Board has given the occupier at least 24 hours' written notice of the inspection,
- (c) the entry is made under the authority of a warrant under this Act or the Offence Act, or
- (d) the Board has reasonable grounds for believing that the work activities or the workplace conditions are such that there is a significant risk that a worker might be killed or seriously injured or suffer a serious illness.

(2) The authority under section 179 must not be used to enter a place that is occupied as a private residence, but is not a workplace, except with the consent of the occupier or under the authority of a warrant under this Act or the Offence Act.

Representation on inspection

182(1) Subject to this section, if an officer makes a physical inspection of a workplace under section 179,

- (a) the employer or a representative of the employer, and
- (b) a worker representative or, if there is no worker representative or the worker representative is not reasonably available, a reasonably available worker selected by the officer as a representative,

are entitled to accompany the officer on the inspection.

(2) A worker is to be considered not reasonably available for the purposes of subsection (1) if the employer objects to that person's participation in the inspection on the basis that it would unduly impede production, but the employer may only object to one person on this ground.

(3) Despite subsection (1), an officer may conduct a physical inspection of a workplace in the absence of a person referred to in that subsection if the circumstances are such that it is necessary to proceed with the inspection without the person.

(4) The time spent by a worker accompanying an officer under this section is deemed to be time worked for the employer, and the employer must pay the worker for that time.

(5) Nothing in this section requires the Board or an officer to give advance notice of an inspection.

(6) If an inspection involves the attendance of an officer at a workplace for a period longer than one day, the rights under this section may be abridged by direction of the officer.

Person being questioned is entitled to have another person present

184(1) A person who is questioned by an officer on an inspection is entitled to be accompanied during the questioning by one other person of his or her choice who is reasonably available.

(2) As a limit on the person's choice under subsection (1), the officer may exclude a person who the officer has questioned or intends to question in relation to the matter.

(3) Subject to subsections (1) and (2), a person may be questioned by the officer either separate and apart from anyone else or in the presence of any other person permitted to be present by the officer.

Limited authority to seize evidence without warrant

185(1) An officer may seize something without a warrant if

- (a) the thing has been produced to the officer or is in plain view, and
- (b) the officer has reasonable grounds for believing that this Part, the regulations or an order has been contravened and that the thing would afford evidence of the contravention.

(2) The officer must inform the person from whom a thing is seized under subsection (1) as to the reason for the seizure and must give the person a receipt for the thing.

(3) The officer may remove a thing seized under subsection (1) or may detain it in the place in which it was seized.

(4) As soon as reasonably practicable after something is seized under subsection (1), the officer must bring the thing, or a report of it, before a justice to be dealt with in accordance with the Offence Act as if it were seized pursuant to a warrant under that Act.

Assistance on inspection

186(1) A person must provide all reasonable means in that person's power to facilitate an inspection under this Part.

(2) A person must not

- (a) hinder, obstruct, molest or interfere with, or attempt to hinder, obstruct, molest or interfere with, an officer in the exercise of a power or the performance of a function or duty under this Part or the regulations,
- (b) knowingly provide an officer with false information, or neglect or refuse to provide information required by an officer in the exercise of the officer's powers or performance of the officer's functions or duties under this Part or the regulations, or
- (c) interfere with any monitoring equipment or device in a workplace placed or ordered to be placed there by the Board.

B. Species at Risk Act, S.C. 2002, c.29**Inspections**

86(1) For the purpose of ensuring compliance with any provision of this Act, the regulations or an emergency order, an enforcement officer may, subject to subsection (3), at any reasonable time enter and inspect any place in which the enforcement officer believes, on reasonable grounds, there is any thing to which the provision applies or any document relating to its administration, and the enforcement officer may

- (a) open or cause to be opened any container that the enforcement officer believes, on reasonable grounds, contains that thing or document;
- (b) inspect the thing and take samples free of charge;
- (c) require any person to produce the document for inspection or copying, in whole or in part; and

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- (d) seize any thing by means of or in relation to which the enforcement officer believes, on reasonable grounds, the provision has been contravened or that the enforcement officer believes, on reasonable grounds, will provide evidence of a contravention.

Conveyance

(2) For the purposes of carrying out the inspection, the enforcement officer may stop a conveyance or direct that it be moved to a place where the inspection can be carried out.

Dwelling-place

(3) The enforcement officer may not enter a dwelling-place except with the consent of the occupant or person in charge of the dwelling-place or under the authority of a warrant.

Authority to issue warrant for inspection of dwelling-place

(4) On an ex parte application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant, subject to any conditions specified in it, authorizing an enforcement officer to enter a dwelling-place, if the justice is satisfied by information on oath that

- (a) the conditions for entry described in subsection (1) exist in relation to the dwelling-place;
- (b) entry to the dwelling-place is necessary for the purposes of the administration of this Act, the regulations or an emergency order; and
- (c) entry to the dwelling-place has been refused or there are reasonable grounds for believing that entry will be refused.

Authority to issue warrant for inspection of non-dwellings

(5) On an ex parte application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant, subject to any conditions specified in it, authorizing an enforcement officer to enter a place other than a dwelling-place, if the justice is satisfied by information on oath that

- (a) the conditions for entry described in subsection (1) exist in relation to that place;
- (b) entry to that place is necessary for the purposes of the administration of this Act, the regulations or an emergency order;
- (c) entry to that place has been refused, the enforcement officer is not able to enter without the use of force or the place was abandoned; and
- (d) subject to subsection (6), all reasonable attempts were made to notify the owner, operator or person in charge of the place.

Waiving notice

(6) The justice may waive the requirement to give notice referred to in subsection (5) if the justice is satisfied that attempts to give the notice would be unsuccessful because the owner, operator or person in charge is absent from the jurisdiction of the justice or that it is not in the public interest to give the notice.

Use of force

(7) In executing a warrant issued under subsection (4) or (5), an enforcement officer may not use force unless the use of force has been specifically authorized in the warrant.

Operation of computer system and copying equipment

(8) In carrying out an inspection of a place under this section, an enforcement officer may

- (a) use or cause to be used any computer system at the place to examine any data contained in or available to the computer system;
- (b) reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output;
- (c) take a printout or other output for examination or copying; and
- (d) use or cause to be used any copying equipment at the place to make copies of the record.

Duty of person in possession or control

(9) Every person who is in possession or control of a place being inspected under this section must permit the enforcement officer to do anything referred to in subsection (8).

Right of passage

90 An enforcement officer may, while carrying out powers, duties or functions under this Act, enter on and pass through or over private property without being liable for trespass or without the owner of the property having the right to object to that use of the property.

Assistance

91 The owner or the person in charge of a place entered by an enforcement officer under section 86, and every person found in the place, must

- (a) give the enforcement officer all reasonable assistance to enable the enforcement officer to carry out duties and functions under this Act; and
- (b) provide the enforcement officer with any information in relation to the administration of this Act, the regulations or an emergency order that the enforcement officer may reasonably require.

Obstruction

92 While an enforcement officer is exercising powers or carrying out duties or functions under this Act, no person shall

- (a) knowingly make any false or misleading statement, either orally or in writing, to the enforcement officer; or
- (b) otherwise obstruct or hinder the enforcement officer.

Investigations**Application for investigation**

93(1) A person who is a resident of Canada and at least 18 years of age may apply to the competent minister for an investigation of whether an alleged offence has been committed or whether anything directed towards its commission has been done.

Statement to accompany application

(2) The application must be in a form approved by the competent minister and must include a solemn affirmation or declaration containing

- (a) the name and address of the applicant;
- (b) a statement that the applicant is at least 18 years old and a resident of Canada;
- (c) a statement of the nature of the alleged offence and the name of each person alleged to be involved;
- (d) a summary of the evidence supporting the allegations;
- (e) the name and address of each person who might be able to give evidence about the alleged offence, together with a summary of the evidence that the person might give, to the extent that information is available to the applicant;
- (f) a description of any document or other material that the applicant believes should be considered in the investigation and, if possible, a copy of the document; and
- (g) details of any previous contact between the applicant and the competent minister about the alleged offence.

Investigation

94(1) The competent minister must acknowledge receipt of the application within 20 days after receiving it and, subject to subsections (2) and (3), investigate all matters that he or she considers necessary to determine the facts relating to the alleged offence.

Frivolous or vexatious applications

(2) No investigation is required if the competent minister decides that the application is frivolous or vexatious.

Notice of decision

(3) If the competent minister decides not to conduct an investigation, he or she must, within 60 days after the application for investigation is received, give notice of the decision, with reasons, to the applicant.

When notice need not be given

(4) The competent minister need not give the notice if an investigation in relation to the alleged offence is ongoing apart from the application.

C. Migratory Birds Convention Act, 1994, S.C. 1994, c.22**Inspections**

7(1) For the purpose of verifying compliance with this Act and the regulations, a game officer may, subject to subsection (3), at any reasonable time, enter and inspect any place, including a vessel, in which they believe, on reasonable grounds, there is any thing to which this Act or the regulations apply or any document, record or data relating to the administration of this Act or the regulations, and the game officer may

- (a) open or cause to be opened any container that the game officer believes, on reasonable grounds, contains any such thing or document;
- (b) inspect the thing and take samples free of charge;
- (c) require any person to produce the document for inspection or copying, in whole or in part;
 - (c.1) use or cause to be used any computer system or data processing system at the place to examine any data contained in or available to the system;
 - (c.2) reproduce or cause to be reproduced any record from the data in the form of a printout or other intelligible output;
 - (c.3) take a printout or other output for inspection or copying;
 - (c.4) use or cause to be used any copying equipment at the place to make copies of the record or document; and
- (d) seize any thing by means of or in relation to which the game officer believes, on reasonable grounds, this Act or the regulations have been contravened or that the game officer believes, on reasonable grounds, will provide evidence of a contravention.

Duty of person in charge or control

(1.1) Every person who is in charge or control of a place that is inspected under this section shall permit a game officer and every person acting under their direction and control to do anything referred to in paragraphs (1)(c.1) to (c.4).

Entry of vessels

(1.2) Subject to subsection (3), for the purpose of verifying compliance with this Act and the regulations, a game officer who believes on reasonable grounds that a vessel has on board any thing to which this Act or the regulations apply or any document, record or data relating to the administration of this Act or the regulations may, in Canadian waters or the exclusive economic zone of Canada, board the vessel at any reasonable time and travel on it.

Accommodation

(1.3) A game officer and every person acting under their direction and control who travels on a vessel shall be carried free of charge, and the master shall provide them with suitable accommodation and food free of charge.

Stopping and detaining conveyances

(2) A game officer may, at any reasonable time, direct that a conveyance be stopped— or be moved, by the route and in the manner that the officer may specify, to a place specified by the officer where an inspection can be carried out—and the officer may, for a reasonable time, detain a conveyance.

Dwelling-place

(3) The game officer may not enter a dwelling-place except with the consent of the person in charge or control of the dwelling-place or under the authority of a warrant.

Inspection warrant — dwelling place

(4) On ex parte application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant authorizing a game officer to enter a dwelling-place, subject to any conditions specified in the warrant, if the justice is satisfied by information on oath that

- (a) the conditions for entry described in subsection (1) exist in relation to the dwelling-place;
- (b) entry to the dwelling-place is necessary for the administration of this Act or the regulations;
- (c) entry to the dwelling-place has been refused or there are reasonable grounds to believe that entry will be refused; and
- (d) all reasonable attempts have been made to notify the owner or person in charge or control of the dwelling-place.

Inspection warrant — non-dwellings

(5) On ex parte application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant authorizing a game officer to enter a place other than a dwelling-place, subject to any conditions specified in the warrant, if the justice is satisfied by information on oath that

- (a) the conditions for entry described in subsection (1) exist in relation to the place;
- (b) entry to the place is necessary for the administration of this Act or the regulations;
- (c) entry to the place has been refused, there are reasonable grounds to believe that entry will be refused, the game officer is not able to enter without the use of force or the place is abandoned; and
- (d) all reasonable attempts have been made to notify the owner, operator or person in charge or control of the place.

Waiving notice

(6) The justice may waive the requirement to give notice under paragraph (4)(d) or (5)(d) if the justice is satisfied that attempts to give the notice would be unsuccessful because the owner, operator or person in charge or control is absent from the justice's jurisdiction, or that it is not in the public interest to give the notice.

Person under direction and control

(7) A person who is acting under a game officer's direction and control may accompany a game officer who is inspecting a place under this section, may enter the place and may exercise any of the powers referred to in paragraphs (1)(b) to (c.4).

Use of force

(8) A game officer may not use force in executing a warrant under this section unless the warrant specifically authorizes the use of force.

Exclusive economic zone

(9) Every power that may be exercised in Canada under this section may be exercised in the exclusive economic zone of Canada.

Consent

(10) The consent of the Minister is required for the exercise of any power under this section in the exclusive economic zone of Canada in relation to a foreign vessel. However, for greater certainty, the consent of the Attorney General of Canada is not required.

Search and seizure without warrant

8. For the purpose of ensuring compliance with this Act and the regulations, a game officer may exercise the powers of search and seizure provided in section 487 of the *Criminal Code* without a search warrant if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be feasible to obtain it.

Assistance

8.3 An owner, operator or person in charge or control of a place entered by a game officer under this Act, and every person found in the place, shall

- (a) give the game officer and every person under their direction and control all reasonable assistance to enable the game officer to carry out their duties and functions under this Act; and
- (b) provide the game officer and every person under their direction and control with any information relating to the administration of this Act and the regulations that the game officer may reasonably require.

D. Environmental Management Act, S.B.C. 2003, c.53**Enforcement powers of the Conservation Officer Service**

107(1) A member of the Conservation Officer Service may

- (a) exercise the powers and perform the duties of
 - (i) an officer under this Act, and
 - (ii) a prescribed official under a prescribed enactment, and
- (b) enforce the prohibitions or requirements of prescribed enactments.

(2) On information on oath that there are reasonable grounds to believe that an offence under an enactment referred to in section 106(5)(b) has occurred or is occurring, a justice, on being satisfied that an entry and a search are likely to provide evidence of such an offence, may issue a warrant authorizing a conservation officer

- (a) to enter and search the real or personal property specified in the warrant,
- (b) to seize and remove anything that the conservation officer has reasonable grounds for believing is evidence of an offence, and
- (c) to take other actions as the justice considers appropriate in the circumstances and authorizes in the warrant.

(3) A person required by an enactment in respect of which a conservation officer has enforcement authority to keep records must submit the records to a conservation officer for inspection on request.

(4) If a person refuses to submit records for inspection as required under this section, a justice, on being satisfied that an inspection of the records is necessary for the administration of the enactment that requires them to be kept, may issue a warrant authorizing a conservation officer to enter property specified in the warrant and to seize the records.

(5) A conservation officer who enters on property in accordance with a warrant issued under subsection (2) or (4) may take with him or her persons and equipment that may be necessary for the purpose of the entry.

(6) and (7) [Repealed 2006-15-6.]

(8) Despite subsection (2), a member of the Conservation Officer Service may

- (a) search real or personal property, including premises or a part of premises occupied solely as a private residence, and

- (b) seize and remove anything that the member has reasonable or probable grounds for believing may provide evidence of the commission of an offence under an enactment referred to in section 106(5)(b),

without a warrant, if the conditions for obtaining a warrant exist but because of exigent circumstances it is not practicable to obtain the warrant.

(9) For the purposes of subsection (8), “exigent circumstances” means circumstances in which the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.

Conservation officers entering land

108 Despite any other enactment, a conservation officer performing duties under an enactment may

- (a) enter any land, whether enclosed or not,
- (b) enter any structure, including, if the conservation officer has a warrant authorizing the entry, a structure or a part of a structure used solely as a private residence,

but, at the request of the owner or occupier of the land or structure, the conservation officer must provide proof of identity.

Inspections

109(1) For the purposes of ensuring compliance with this Act and the regulations, an officer may enter land or premises, except premises or a part of premises occupied solely as a private residence, at any reasonable time and inspect any process, works or activity that

- (a) produces or is capable of producing waste,
- (b) causes or is capable of causing pollution, or
- (c) is used for the storage, handling, treatment, destruction or disposal of waste.

(2) An officer may exercise powers under this section in respect of premises used as a private residence only

- (a) with the consent of the occupant, or
- (b) under the authority of a warrant under subsection (3) or another enactment.

(3) If satisfied by evidence on oath that access to premises or a part of premises, used solely as a private residence, is necessary for the purposes of this Act, a justice may issue a warrant authorizing a person named in the warrant to enter the premises and conduct an inspection.

(4) An officer who enters on land or premises under subsection (1), with consent under subsection (2) or under a warrant under subsection (3), may do any of the following:

- (a) inspect, analyze, measure, sample or test land, and any article, substance or waste located on or in the land, and premises to ascertain
 - (i) whether pollution is present,
 - (ii) the quantity of waste produced, treated, stored, handled, transported or discharged, or
 - (iii) the characteristics of waste produced, treated, stored, handled, transported or discharged;
- (b) take away samples of land, articles, substances or waste;
- (c) examine and take away copies of records relating to
 - (i) the production, treatment, storage, handling, transportation and discharge of waste, and
 - (ii) the characteristics of the waste produced, treated, stored, handled, transported or discharged;

- (d) require that anything related to the production, treatment, storage, handling, transportation or discharge of waste be operated, used or set in motion under conditions specified by the officer;
 - (e) use a computer system at the place that is being inspected to examine data, contained in or available to the computer system, related to the production, treatment, storage, handling, transportation or discharge of waste;
 - (f) record or copy by any method any information related to the production, treatment, storage, handling, transportation or discharge of waste;
 - (g) use any machine, structure, material or equipment in the place that is being inspected as is necessary to carry out the inspection;
 - (h) use copying equipment located at the place that is being inspected to make copies to take away;
 - (i) take photographs or make audio or video records.
- (5) An officer who enters land or premises in accordance with this section
- (a) may take with him or her the persons and equipment that may be necessary for the purposes of the inspection, and
 - (b) on request, must provide proof of identity to a person present on the land or premises entered.
- (6) A person who is or was a director, receiver, receiver manager, officer, employee, banker, auditor or agent of a person who is the subject of an inspection under this section must, on request of the inspecting officer,
- (a) produce, without charge or unreasonable delay, for examination by the inspecting officer
 - (i) any approval, licence, order, permit or waste management plan related to waste produced, treated, stored, handled, transported or discharged on or from the land or premises, and
 - (ii) any other record that touches on any matter relating to the production, treatment, storage, handling, transport or discharge of waste on or from the land or premises, and
 - (b) provide the inspecting officer with information relevant to the purposes of the inspection.

E. Fisheries Act, R.S.C. 1985, c.F-14

Inspection

49(1) Subject to subsection (2), for the purpose of ensuring compliance with this Act and the regulations, a fishery officer or fishery guardian may enter and inspect any place, including any premises, vessel or vehicle, in which the officer or guardian believes on reasonable grounds there is any work or undertaking or any fish or other thing in respect of which this Act or the regulations apply and may

- (a) open any container that the officer or guardian believes on reasonable grounds contains any fish or other thing in respect of which this Act or the regulations apply;
- (b) examine any fish or other thing that the officer or guardian finds and take samples of it;
- (c) conduct any tests or analyses and take any measurements; and
- (d) require any person to produce for examination or copying any records, books of account or other documents that the officer or guardian believes on reasonable grounds contain information that is relevant to the administration of this Act or the regulations.

Operation of data processing systems and copying equipment

(1.1) In carrying out an inspection of a place under subsection (1), a fishery officer or fishery guardian may,

- (a) use or cause to be used any data processing system at the place to examine any data contained in or available to the data processing system;
- (b) reproduce any record or cause it to be reproduced from the data in the form of a print-out or other intelligible output and remove the print-out or other output for examination or copying; and
- (c) use or cause to be used any copying equipment at the place to make copies of any record, book of account or other document.

Duty to assist

(1.2) The owner or person in charge of a place that is inspected by a fishery officer or fishery guardian under subsection (1) and every person found in the place shall

- (a) give the officer or guardian all reasonable assistance to enable the officer or guardian to carry out the inspection and exercise any power conferred by this section; and
- (b) provide the officer or guardian with any information relevant to the administration of this Act or the regulations that the officer or guardian may reasonably require.

Disposition of samples

(1.3) A fishery officer or fishery guardian who takes a sample under paragraph (1)(b) may dispose of it in any manner that the officer or guardian considers appropriate.

Warrant required to enter dwelling-house

(2) Where any place, premises, vessel or vehicle referred to in subsection (1) is a dwelling-house, a fishery officer or fishery guardian may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant issued under subsection (3).

Authority to issue warrant

(3) Where on ex parte application a justice of the peace is satisfied by information on oath

- (a) that the conditions for entry described in subsection (1) exist in relation to a dwelling-house,
- (b) that entry to the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and
- (c) that entry to the dwelling-house has been refused or that there are reasonable grounds for believing that entry thereto will be refused,

the justice of the peace may issue a warrant under his hand authorizing the fishery officer or fishery guardian named therein to enter that dwelling-house subject to such conditions as may be specified in the warrant.

Search

49.1(1) A fishery officer with a warrant issued under subsection (2) may enter and search any place, including any premises, vessel or vehicle, in which the officer believes on reasonable grounds there is

- (a) any work or undertaking that is being or has been carried on in contravention of this Act or the regulations;
- (b) any fish or other thing by means of or in relation to which this Act or the regulations have been contravened; or
- (c) any fish or other thing that will afford evidence in respect of a contravention of this Act or the regulations.

Authority to issue warrant

(2) Where on ex parte application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any place referred to in subsection (1) any fish or other thing referred to in subsection (1), the justice may issue a warrant authorizing the fishery officer named in the warrant to enter and search the place for the thing subject to any conditions that may be specified in the warrant.

Where warrant not necessary

(3) Notwithstanding subsection (1), a fishery officer may exercise the power of search referred to in that subsection without a warrant issued under subsection (2) if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

Exigent circumstances

(4) For the purposes of subsection (3), exigent circumstances include circumstances in which the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.

Powers during search

(5) In carrying out a search of a place under this section, a fishery officer may exercise any power mentioned in subsection 49(1), (1.1) or (1.3).

F. Fisheries Act, R.S.C. 1985, c.F-14**Inspections**

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

- (a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and
- (b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

- (c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and
- (d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

Prior authorization

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

Application

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that

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- (a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),
- (b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and
- (c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

- (d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and
- (e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 231.1; 1994, c. 21, s. 107.

Requirement to provide documents or information

231.2(1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
- (b) any document.

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

Judicial authorization

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) where the judge is satisfied by information on oath that

- (a) the person or group is ascertainable; and
- (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.
- (c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

Service of authorization

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

Review of authorization

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the

service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

Powers on review

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 231.2; 1996, c. 21, s. 58; 2000, c. 30, s. 176; 2007, c. 35, s. 63.

Search warrant

231.3(1) A judge may, on ex parte application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Evidence in support of application

(2) An application under subsection 231.3(1) shall be supported by information on oath establishing the facts on which the application is based.

Evidence

(3) A judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that

- (a) an offence under this Act was committed;
- (b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and
- (c) the building, receptacle or place specified in the application is likely to contain such a document or thing.

Contents of warrant

(4) A warrant issued under subsection 231.3(1) shall refer to the offence for which it is issued, identify the building, receptacle or place to be searched and the person alleged to have committed the offence and it shall be reasonably specific as to any document or thing to be searched for and seized.

Seizure of document

(5) Any person who executes a warrant under subsection 231.3(1) may seize, in addition to the document or thing referred to in that subsection, any other document or thing that the person believes on reasonable grounds affords evidence of the commission of an offence under this Act and shall as soon as practicable bring the document or thing before, or make a report in respect thereof to, the judge who issued the warrant or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Retention of things seized

(6) Subject to subsection 231.3(7), where any document or thing seized under subsection 231.3(1) or 231.3(5) is brought before a judge or a report in respect thereof is made to a judge, the judge shall, unless the Minister waives retention, order that it be retained by the Minister, who shall take reasonable care to ensure that it is preserved until the conclusion of any investigation into the offence in relation to which the document or thing was seized or until it is required to be produced for the purposes of a criminal proceeding.

Return of things seized

(7) Where any document or thing seized under subsection 231.3(1) or 231.3(5) is brought before a judge or a report in respect thereof is made to a judge, the judge may, of the judge's own motion or on summary application by a person with an interest in the document or thing on three clear days notice of application to the Deputy Attorney General of Canada, order that the document or thing be returned to the person from whom it was seized or the person who is otherwise legally entitled thereto if the judge is satisfied that the document or thing

- (a) will not be required for an investigation or a criminal proceeding; or
- (b) was not seized in accordance with the warrant or this section.

Access and copies

(8) The person from whom any document or thing is seized pursuant to this section is entitled, at all reasonable times and subject to such reasonable conditions as may be imposed by the Minister, to inspect the document or thing and to obtain one copy of the document at the expense of the Minister.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 231.3; 1994, c. 21. s. 108.

