



INSPECTIONS AND INVESTIGATIONS:

What to do When the Regulator Comes Knocking

Presented by Sean Parker

April 22, 2020 - ESAA Webinar Series

INSPECTIONS AND INVESTIGATIONS

Outline

- Inspections vs Investigations
- General Principles
- Planning Ahead
- When the Investigator Arrives
- Seizure of Documents/Information
- Questioning Witnesses
- After the Investigator Leaves
- Questions

General Principles

- Powers of inspection and investigation are broad in regulated industries
- Advanced preparation is essential
- Get legal counsel and experts engaged early
- Know the agency of the inspector/investigator and legislation operating under
- Document it

Inspections vs Investigations

Key legislation:

- *Environmental Protection and Enhancement Act (EPEA)* – Alberta
- *Water Act* – Alberta
- *Fisheries Act* – Canada
- *Migratory Birds Convention Act (MBCA)* – Canada
- *Canadian Environmental Protection Act, 1999 (CEPA)* – Canada

Inspections vs Investigations

- **Inspection** – to ensure or verify compliance with the legislation

- **Investigation** – to determine penal liability and collect evidence to support sanctions when a contravention is perceived

Inspections vs Investigations

- Inspection transitions to investigation when the *predominant purpose* is to gather evidence of a potential violation
- *R v Jarvis*, 2002 SCC 73 and *R v Ling*, 2002 SCC 74
- Lack of Alberta precedents

Inspections vs Investigations

Golden Rule:

- Regulators cannot use inspection powers (for assuring compliance) to compel information to collect evidence during an investigation (in support of penal consequences)
- In Alberta?
- *R v Nolet*, 2010 SCC 24

The Plain Sight Rule

- Inspector can search and seize where an offence is “immediately apparent”
- *R v Nolet*, 2010 SCC 24

Planning Ahead

- Risks minimized when:
 - Plan is in place
 - Employees know the plan and are prepared
 - Have a designated “Site Coordinator” responsible for all communications with the regulator
 - Understand what legal privilege is

Planning Ahead

- Employees should be made aware:
 - may be personally liable for possible offences (potential conflict)
 - no statement should be given until have legal advice
 - not required to sign “statements” drafted by Investigator
 - may be required to testify for either the company or the Crown

Planning Ahead

- Employees should know that it is a serious criminal offence to:
 - Obstruct an Investigator or a Peace Officer performing his or her duties; or
 - Destroy or alter evidence

When the Investigator Arrives

- Deal with the emergencies first
- Ensure emergency numbers have been called
- Obtain the name, title, address and official identification of the Investigator
- Confirm if a routine inspection or an investigation

When the Investigator Arrives

- Legislative authority?
- Proper equipment to enter the site?
- View and photocopy
judicial order or search
warrant
- Involve legal counsel

When the Investigator Arrives

- On-site co-ordinator should accompany the investigator at all times
- If possible, bring specifically requested materials to investigator
- Take note of investigator's actions and words

Seizure of Documents/Information

- May include books, documents, electronic records, materials (samples), etc.
- Must be relevant and not privileged (determined by legal counsel)
- Keep originals of documents whenever possible
- Request a receipt listing all items the Investigator takes

Questioning Witnesses

- Set the interview date
 - time to retain legal counsel
 - time to prepare witnesses (what to expect)
 - ensure relevant materials available
- If more than one government agency, request consolidated interviews
- Heed warnings that information may be used against the company or employees

Questioning Witnesses

- Purpose is to give factual information, not opinions
- Witness should never guess or speculate
- Have a lawyer present
- Make a recording

After the Investigator Leaves

- Site coordinator and legal counsel maintain contact with Investigator
- Meet with legal counsel to determine appropriate action
- Preserve evidence
- Document improvements

Possible Enforcement Actions

- Warning letter
- Administrative penalty
- Enforcement Order or Environmental Protection Order
- Prosecutions (corporate and personal)

Questions?



Sean Parker

Direct 780.482.9309
Toll Free 1.800.567.9200
Email sparker@mross.com