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Protecting Against Risk in an Era of Diligent Environmental Enforcement

REMTECH 2012 Pre-Conference Workshop

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PART 1 – THE REGULATOR

- Enforcement tools used by regulators
 - Inspections versus investigations
- What precipitates an inspection or investigation
- Authorities of an enforcement officer/fishery officer when inspecting or investigating
- Reasonable Grounds To Believe
- Assessment of Due Diligence
- Recommendation for enforcement action

FEDERAL ENVIRONMENTAL LEGISLATION

- *Canadian Environmental Protection Act, 1999* (CEPA 1999)
- *Fisheries Act* (Pollution Prevention Provisions)



DUTY TO ENFORCE

- CEPA 1999 Section 2(1) “In the administration of this Act, the Gov’t of Canada shall...
 - exercise its powers in a manner that protects the environment and human health
 - apply the precautionary principle
 - take preventive and remedial measures to protect & restore
- Compliance and Enforcement Policies for CEPA 1999 & FA
- Case Law – Importance of Environmental Protection
- Case Law – Liability for Failure to Enforce

“Laws without Enforcement are just good advice”

John Cliffe, Public Prosecutions Service of Canada

INSPECTIONS & INVESTIGATIONS

- Inspections:
 - Verify compliance with environmental legislation
 - On-site or off-site
 - Proactive or reactive
 - Announced or unannounced
- Investigations:
 - Gather and analyze evidence
 - Relevant to suspected violation
 - To support or refute offence

AUTHORITY TO INSPECT

- Authority to inspect comes from applicable environmental legislation
- Federal examples:
 - S. 218 CEPA 1999 - Enter and inspect any place for the purpose of verifying compliance with the Act and the regulations if the officer has reasonable grounds to believe that the place contains a regulated substance or a product containing a substance regulated by the Act
 - *Fisheries Act* s.38(1) (inspectors) and s.49(1) (fishery officers)

POWERS OF AN ENFORCEMENT OFFICER

- CEPA 1999 s. 218(10) In carrying out an inspection:
 - Examine any substance
 - Open any receptacle or package
 - Examine any document or electronic data
 - Take samples of anything relevant
 - Conduct any tests and take any measurements
 - Use or cause to be used any computer or copier
 - Reproduce any record and take any printout

WHAT SHOULD YOU DO?

- Duty to give all reasonable assistance (CEPA 1999 s. 227(a); FA s. 38(10) & 49(1.2)(a))
- Provide any information reasonably required (CEPA 1999 s. 227(b); FA s. 38(10) & 49(1.2)(b))
- Provide right of passage (CEPA 1999 226; FA s. 52)
- Do not provide false information (CEPA 1999 s. 228(a); FA s. 63(1))
- Do not obstruct (CEPA 1999 s. 228; FA s. 62)

Failure to comply is an offence

INVESTIGATIONS

- An investigation occurs when there are reasonable grounds to believe that an offence has occurred
 - *R. v. Jarvis* (2002 SCC) existence of reasonable grounds of offence does not *ipso facto* make an inquiry an investigation rather than an inspection, but an “inspector” can not act as an agent for an “investigator”
 - *R vs. Leahy* (2004 NS Prov. Court) notes this can be measured by information which would justify the issuance of a search warrant
- Primary issue: what does the officer believe he/she is doing – determining compliance or gathering evidence of offence

INVESTIGATIONS

- Collecting things: samples, documents
 - Search Warrant
 - Production Order
 - Exigent circumstances
 - Informed consent (must be rightful owner)
- Collecting Information: statements
 - Victims
 - Witnesses
 - Accused

INVESTIGATIONS

- Officers must always comply with the Charter of Rights and Freedoms
 - Provide caution when taking statements from potential accused
 - Provide Charter caution when arresting or detaining
 - Obtain evidence legally (as per previous slide)

WHAT SHOULD YOU DO?

- Co-operation is at your discretion
- Seek legal advice – if potential accused
- Do not provide false information
 - You do not have to provide any information other than what is required by law
- Do not obstruct
 - You can not prohibit others (including employees) from giving statements
- Do not assault – may include threats or touching officer

REASONABLE GROUNDS TO BELIEVE

- “A set of facts or circumstances, which would satisfy an ordinary, cautious and prudent person that there is a reason to believe and which goes beyond mere suspicion.”

DUE DILIGENCE DEFENCE

- During an investigation the officer will seek evidence to determine if there is a **due diligence defence** – it is in the best interests of the accused to provide it.
- CEPA 1999 s. 283 “No person shall be found guilty of an offence under this Act, other than an offence under section 273 if the offence is committed knowingly or under section 228 or 274, where the person establishes that the person exercised all due diligence to prevent its commission.”

DUE DILIGENCE DEFENCE

- Due diligence defence does not apply to violations of:
 - s.228 obstruction, false and misleading statements
 - s.273 false or misleading information, results or samples
 - s.274 intentionally or recklessly causes a disaster or risk of death or harm
- Due diligence defence is also available under FA s. 78.6



ENFORCEMENT ACTIONS

- Written Warnings
- Orders & Directions
 - Environmental Protection Control Order (EC)
 - Environmental Protection Order (AEW)
 - Enforcement Order (AEW)
 - Inspector's Direction (EC/DFO)
- Administrative (Monetary) Penalties
- Prosecution