

KNOCK, KNOCK: RESPONDING TO SEARCH WARRANTS AND INSPECTIONS IN THE ENVIRONMENTAL LAW CONTEXT

Posted on February 22, 2015

Categories: [Insights](#), [Publications](#)

Canadian environmental legislation contains significant enforcement powers, including the ability of officials to conduct inspections and/or obtain and execute search warrants. Recent media reports indicate that search warrants have been executed against Imperial Metals and two of the engineering companies involved with the Mount Polley Mine (which experienced a dam failure and tailings spill on August 4, 2014).^[1] While such searches are not necessarily common, they are more frequent than some may realize. In fact, recent media reports indicate that the BC Conservation Officer Service has described them as "routine" parts of its investigations.^[2]

These developments are a helpful reminder to all parties that are subject to, for example, the BC *Environmental Management Act* and the federal *Fisheries Act* about the enforcement powers that exist and the potential for them to be used in the course of investigations. The powers are formidable, and include the following:

- Under the provincial *Environmental Management Act*, if there are reasonable grounds to believe that an offence has occurred or is occurring, a conservation officer can obtain a warrant authorizing the officer to enter and search buildings and personal property and seize anything that the officer believes is evidence of the offence.^[3] A conservation officer also has the ability to request that certain records be submitted for inspection and can be issued a warrant specifically authorizing the seizure of such records.^[4] A search and seizure can even be conducted without a warrant in certain "exigent" circumstances, where the delay necessary to obtain a warrant could result in the loss of evidence or danger to human safety.^[5]
- An conservation officer also has more general authority to conduct inspections under the *Environmental Management Act*. Specifically, officers can enter land or buildings to inspect any process, works or activity that produces or can produce waste, causes or can cause pollution, or is used to store or otherwise handle waste.^[6] An officer can also inspect vehicles if the officer has reasonable grounds to believe that a vehicle is being used to transport or handle waste.^[7]
- Under the federal *Fisheries Act*, a fishery officer has broad powers – for the purpose of ensuring compliance with the act, and without a warrant – to inspect buildings, vessels or vehicles if the officer

believes that any work, undertaking, fish or other "thing" to which the act applies is present. The officer may conduct tests, take samples and, more significantly, require the production of any records or other documents that the officer believes contains information relevant to the administration of the *Fisheries Act* or regulations. The *Fisheries Act* also specifically authorizes a fishery officer to take copies of documents during inspections. The owner of or person in charge of the place being inspected has a duty to assist the officer in carrying out the inspection.^[8]

The potential penalties under such legislation can be very significant. They can include fines of up to \$1,000,000 per offence under the *Environmental Management Act* and \$12,000,000 under the *Fisheries Act* (for second, subsequent offences). Sanctions can be sought not only in relation to the company but also its directors and officers in appropriate cases, including imprisonment of up to six months under the *Environmental Management Act* and three years under the *Fisheries Act*.⁹ The *Environmental Management Act* also provides for fines of up to \$3,000,000 and imprisonment of up to three years if a person intentionally causes damage to the environment or shows reckless disregard for the safety of others by causing a risk of death or harm.^[10]

There are a variety of other provincial and federal regimes that contain similar inspection and search powers to facilitate the enforcement of offences that may carry serious corporate and individual penalties.

Despite these potential consequences, many companies do not give them much attention based on the hope or expectation that no serious problems will ever arise. But, in an unpredictable world – especially one where environmental regulations play an ever increasing role – it would be a mistake, even for the most responsible companies, to assume they will never face such situations. Effective compliance policies and procedures can and should be established well before any problems ever come to pass. If an enforcement official were to appear to conduct an inspection or execute a warrant, the official's arrival is not the most opportune time to determine what rights the company does or does not have in this regard, and what the appropriate extent and limits of the official's powers may be.

In order to prepare for such circumstances, even if the likelihood of them arising is modest, a number of steps can be taken. These include developing an internal inspection and search response policy in consultation with legal counsel and providing appropriate training and protocols to company officials. These plans should include:

- knowing who to contact when enforcement officials arrive;
- knowing when and how steps can be taken to preserve privilege over documents;
- knowing what to do if it appears enforcement officials are acting beyond their authority under the legislation or warrant;
- knowing whether and how company officials are required to answer questions; and

- knowing what steps to take to ensure the company can later challenge enforcement actions or sampling and other measures taken by the official, if that is appropriate in the circumstances.

Such policies must also be developed with due regard for other internal business policies such as corporate responsibility and media engagement, and the interrelationship between them can be complex.

McMillan has developed a cross-country Search Response Team dedicated to assisting clients with these issues – both in terms of advance planning and in immediate situations when that knock on the door occurs. If you have any questions or need any advice in respect of these matters, we encourage you to contact one of our team members noted below.

by Robin Junger, Joan Young and Brittnee Russell

For more information please contact:

Vancouver: [Robin Junger](#), [Joan Young](#), Brittnee Russell

Calgary: [Andrew Stead](#), [Julia Loney](#)

Ottawa: David Debenham, [Michael Rankin](#)

Toronto: Henry Krupa, [Neil Campbell](#)

Montreal: Elisa Henry, [Guy Pinsonnault](#)

1 See media reports [here](#) and [here](#).

2 See media report [here](#).

3 Subsection 107(2).

4 Subsection 107(3) and (4).

5 Subsection 107(8) and (9).

6 Subsection 109(1).

7 Subsection 111(2).

8 Subsection 49(1) to (1.2).

9 Section 120 of the *Environmental Management Act* and subsection 40(1) of the *Fisheries Act*.

10 Section 126.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2015