

Blakes Bulletin

Litigation – Regulatory

A Wolf in Sheep's Clothing: What to do When the Alberta Regulator Rings Twice

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INTRODUCTION

The regulator has arrived and they are asking to interview employees, inspect your operations and seize documents. Do you know how to respond?

Regulatory inspections and investigations are frequent occurrences in Alberta. From enforcement orders to the company and its employees being charged with an offence, the consequences of the regulator's attendance can be significant. This bulletin describes what your company should do when the regulator is at the door and provides constructive advice and recommendations on how your business should prepare for regulatory visits and respond to regulatory inquiries.

THE DUTY TO CO-OPERATE

Most regulatory statutes contain provisions that require you and your business to co-operate with regulatory inspections. For example, both the *Environmental Protection and Enhancement Act* (the EPEA) and the *Occupational Health and Safety Act* (the OHSA) provide inspectors with broad statutory powers to ensure compliance. The provisions of the EPEA enable inspectors to enter and inspect your premises, copy documents, make inquiries of any individual, and seize items during an inspection. Under the OHSA, regulatory officers also have the right to enter and inspect your worksite, copy documents, seize tools and equipment, and interview or obtain statements from individuals at the worksite. Non-compliance with an inspection may constitute an offence under both the EPEA and OHSA.

These powers, however, may only apply where the regulator is engaged in an "inspection". Where the regulator is engaged in an "investigation", the protections offered by the Canadian *Charter of Rights and Freedoms* come into play, and the regulator's powers to compel you to co-operate may be significantly curtailed. Accordingly, the distinction between an "inspection" and an "investigation" is key.

INSPECTIONS VS. INVESTIGATIONS

Where a regulator combines spot checking, verification, auditing, inspecting and full-scale investigation in a single inspector or department, it can be difficult to determine when a regulatory officer is conducting a routine compliance inspection or an investigation for the purpose of prosecution. An inspection is undertaken with the primary purpose of monitoring and ensuring regulatory compliance. The predominant purpose of an investigation is the determination of penal liability and confirmation of a regulatory violation. Simply because an incident has occurred that may constitute an offence does not necessarily mean an investigation has been commenced, and in many cases the actual investigation will not begin for some time after an incident.

It is important to note that inspections and investigations are not mutually exclusive activities, and may run concurrently with each other. Further, information collected during an inspection may be available for later use by investigators in a prosecution. However, once the predominant purpose of inquiries becomes the determination of penal liability, inspectors are generally barred from disclosing further information to investigators, or from using their statutory powers of inspection in furtherance of that investigation.

The Supreme Court of Canada has considered this issue and provided some factors as guidance in making the determination as to whether a regulator is acting as an inspector or an investigator. These include: the existence of sufficient grounds to lay charges; at what time a decision to proceed with a criminal investigation could be made; if the inspector transferred files or material to the investigators; if the inspector was acting as agent or collecting evidence for the investigator; and the nature of the information sought during the investigation. Each case will turn on its own particular set of facts, and no one single factor is in itself determinative, apart from a clear decision to pursue a criminal investigation.

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YOUR RIGHTS DURING AN "INSPECTION"

An inspection is undertaken with the primary purpose of monitoring and ensuring regulatory compliance. It is generally advisable to co-operate with inspectors, and failure to do so may constitute an offence under both the EPEA and the OHSA.

Right to Counsel

The right to counsel arises on arrest or detention, activities which are generally associated with investigations rather than inspections. Where an individual has been charged with an offence, the right to counsel will always arise. Regulatory officers have the ability to interview and take statements from individuals in the course of an inspection. There is generally no right to counsel in the course of such an interview. The courts have specifically upheld the jurisdiction of Alberta Workplace Health and Safety to exclude legal counsel from interviews conducted pursuant to section 19 of the OHSA and have also concluded that prohibiting witnesses from having legal counsel present is not contrary to the *Canadian Charter of Rights and Freedoms*.

However, the EPEA contains an express provision that legal counsel for the individual being questioned may not be excluded from interviews. As a note, while there may be a statutory provision with respect to the right to have counsel present under the EPEA, there is no requirement the interview be delayed so that counsel may attend. Even in situations where no right to counsel exists, it is generally advisable to request that the regulatory official allow counsel to be present. Regulatory officials have broad discretion with respect to procedure, and may allow such a request if so inclined.

YOUR RIGHTS DURING AN "INVESTIGATION"

Once the predominant purpose of an inquiry is the determination of penal liability and confirmation of a regulatory violation, the regulator's powers to compel co-operation may be significantly curtailed. Regulators are generally restricted from making use of their inspection and requirement powers, and must instead obtain search warrants.

Right to Remain Silent

The right to silence is triggered when the coercive power of the state is brought to bear against an individual. This right will always arise where an

individual has been arrested, charged or accused of an offence. If you are informed of your right to remain silent, you are being investigated, and should remain silent and contact counsel immediately. In situations where the right to silence does apply, it does not necessarily prohibit continued questioning, so long as that questioning does not negate the accused choice to speak, or is of a nature rendering any statements involuntary.

In the context of regulatory interviews, where the dominant purpose of an inquiry is to gather information regarding a workplace incident, and no real or imminent deprivation of the individual's liberty is present, the right to silence will not apply. Corporations themselves have no right to silence, and individuals may be compelled to give evidence against them. To the extent those answers will be used against the corporation, rather than the individual themselves, there is no right to silence. Under the OHSA, statements given by an individual may not be used in a subsequent action against them, except in a prosecution of the witness for making false statements or for providing false information to a Workplace Health and Safety officer.

Document Production

Where a warrant is served compelling the production of documents, a request should be made to allow counsel an opportunity to review the warrant and attend the premises to monitor the search. The regulator may or may not grant this request, and the law is clear that there is no requirement to delay the search so that counsel may attend.

Regulatory officers are entitled to exercise discretion as to what documents are seized, provided those documents are within the scope of the warrant. Where a document is outside the scope of a warrant, an objection should be raised. It is never advisable to consent to any search beyond the scope of the warrant. However, care must be taken not to obstruct the search as this will provide grounds for a possible charge. Investigators or inspectors are not required to allow photocopying of seized documents during the search, however, a request to photocopy documents should be made. If that request is denied, an opportunity is generally provided shortly after.

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TEN PRACTICAL TIPS

What follows is not an exhaustive list, but should serve as general guidance to companies that deal with regulators and regulatory visits.

1. **Appoint a representative.** Appoint a representative to be responsible in the event of a regulatory visit. The representatives should be aware of who your legal counsel is, and how to immediately contact them.
2. **Keep work stations tidy.** Ensure that all work stations are kept tidy and all documents and reports are routinely stored and put away when not in use.
3. **Determine the purpose of the visit.** Ask the official to describe the purpose of the visit, and try to get as much specific information as possible. Directly ask the official: Are we under investigation? What possible offence is being investigated? What suspected incident, what part of the facility or what materials are being searched? What is your authority for the investigation?
4. **Call legal counsel immediately.** When the officials appear, the representative should immediately call counsel. The regulatory agency should be asked to wait until counsel arrives before continuing with any search. Although officials are not required to wait, they often do so long as counsel can attend reasonably promptly. If you are advised of your right to remain silent, do so and contact counsel immediately.
5. **Obtain a copy of the search warrant and send a copy to legal counsel.** You should require the official to produce the search warrant and identification. Be sure to carefully record: the date of the Warrant or Order; the name of the Issuing Authority; the offence or suspected offence in respect of which the search is being carried out; and a description of the documents/samples or other items that are listed on the warrant as items which are subject to seizure.
6. **No consent.** Do not consent to any search being made beyond the scope of the warrant. If there is a dispute as to the scope of the warrant, indicate that you believe that the search is outside the scope of the warrant, you do not consent to it, that you believe it is unlawful, but that you will not obstruct the investigators from completing the search if they insist.
7. **Do not obstruct or mislead the searchers.** Everyone involved should be polite and cooperative. Answer only the questions asked and provide only the materials requested. Do not volunteer additional information. Document everything that was removed by the officer.
8. **Accompany the official.** A company representative should accompany the official. Keep careful records of everything that is said and done by the official, including demands made and methods used in conducting the visit. Take the official only where they specifically ask to go.
9. **Know how to respond to an interview request.** Request an interview be scheduled for a later date. Rescheduling can provide an invaluable opportunity for you and your legal counsel to become aware of the issues and prepare accordingly. Individuals who are interviewed should answer only questions that are within their personal knowledge, and not speculate.
10. **Assert claims over privileged documents.** Privilege constitutes an important restriction on which documents are properly available for seizure by authorities, and for use in any subsequent legal proceedings. Be familiar with what constitutes a legally privileged document, and keep these documents separate. If the investigator seizes documents claimed to be privileged, the investigator is obligated, without further examining or making copies, to place them and any copies that have been made in a package and to seal it.

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