

Inspection and Investigation By the ministère de l'Environnement: It's Up to You...

By Yvan Biron and Nadia Cattaneo

Are we seeing a shift in policy at the ministère de l'Environnement? Possibly—since the new government came into office, this department has increased both the number of proceedings against business and the amount of the fines it is looking to collect. How should companies react to this apparent tightening of control?

The Main Pillars of Environmental Compliance

Understanding the nature of environmental control that representatives of the *ministère de l'Environnement* may exercise is the first step and the best way to prepare yourself for it. Officers who investigate will verify one or more of the following:

- Does the company hold all required authorizations?
- Does the company comply with contaminant management and emission standards?
- Does the company properly manage spills when they occur?
- Does the company comply with administrative requirements imposed by law such as filing of assessments and reports?

Inspections and Investigations

An **inspection** or, as it is commonly called, a routine visit, consists of entering premises to check whether the law and regulations are being complied with. Every authorized government officer may, at any reasonable time, enter a property, a house, a vehicle or a boat to collect samples, install measuring apparatuses, perform analyses, review records or inspect the premises. This is an inspection under the *Environment Quality Act* (the "Act").

During such a visit, no one may hinder the inspector in the performance of his duties, mislead him, refuse or fail to obey any order he may give under the Act (for instance, with respect to the posting and/or maintenance of notices).

By contrast, the purpose of an **investigation** is to collect evidence that will be used to prove a suspected violation of the Act, where the *ministère* has reasonable grounds to believe that an offence has been committed. In such a case, the *ministère's* officer is required to obtain the prior authorization of a judge to enter your company premises, install measuring apparatuses, perform analyses or review records. Note, however, that an investigator may perform his duties without obtaining prior authorization in an emergency, that is where the situation: (1) may result in danger to human health or safety; (2) may cause harm to the environment or property; (3) may result in the loss, disappearance or destruction of evidence necessary for the investigation.

Inspections and Investigations: How They Work

Is a routine visit or an investigation coming up? Here are some recommendations to help you deal with it:

- Ask the government employee to identify himself/herself;
- Begin by asking what the purpose of the officer's visit is. Find out whether his/her visit is part of an inspection or an investigation. In the case of an investigation, make note of the context, time and place of the event under investigation;

- Find out whether the officer has a mandate to investigate or a search warrant. If he/she does, carefully check what it covers;
- Ask the officer to identify himself/herself and show you confirmation of his/her capacity or, in the case of an investigation, authorization from a judge;
- Contact forthwith the people in charge in the company and consult with an attorney if necessary;
- Appoint a competent person who is well aware of the situation. This person should accompany the government officer at all times, be aware of everything he/she does and make note, whenever possible, of what is said;
- Obtain a copy of all materials he/she collects, including any sample, and file a copy of any document that was asked for;
- Once the inspection or investigation is over, draw up a report: what happened, what documents were given, where the meeting took place;
- If you have any doubt about the relevance of a question or the examination of any documents, tell the officer that you have to check before complying with his/her request. Do so politely to avoid your answer being interpreted by the inspector as a hindrance to his/her work;
- In the case of an investigation, refuse to answer any question that is not related to the specific facts or matters set out in the mandate, since your obligation to cooperate is limited to the specific elements set out therein;
- Refuse to submit to formal questioning without first consulting an attorney;
- You should also refuse to sign any written statement.



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Grounds for Objecting to an Inspection or Investigation

A company or individual may refuse to submit to an inspection or investigation where:

- the officer does not have certification or such certification is not signed by the Minister or Deputy Minister of the Environment;
- the officer exceeds his authority, for instance, if he comes at an unreasonable time or wishes to perform an inspection to collect evidence in respect of a specific event when he does not have a mandate to investigate or a search warrant.

Prevention: Your Best Protection in the Event of Legal Proceedings

You should be aware that almost all environmental offences of a penal nature constitute “strict liability” offences. This means that the prosecutor only has to prove that the company committed the offence it is charged with, without having to submit any evidence establishing that the action was intentional.

In these circumstances, a defendant company hoping to be acquitted must show that it took all known and available means to avoid committing the offence. The type of company and nature of its activities as well as the risks it poses to the environment will be analysed. The required degree of diligence or care depends on the danger that the activities of the company pose to the environment.

Some Elements of a Due Diligence Defence

The following are examples of elements that may constitute due diligence:

- The company holds and complies with all required authorizations;
- The company has set up an environmental policy and internal procedures;
- The company has appointed a team of responsible and competent managers who adequately supervise activities;
- A continuing education program exists within the company to enable employees to deal with ongoing operations as well as emergency situations;
- The company adequately uses the equipment and technology required to comply with government standards;
- The company has implemented a regular equipment inspection and maintenance program;
- The company has set up an internal and external communications program that includes regular discussions with government authorities in charge of environmental issues;
- The company consults with external experts as needed.

Environmental Liability: Times Have Changed

Monitoring is more important than ever in environmental regulation matters. You guessed it, gone are the days when a company could win sympathy from the authorities by complaining that its last renovations were expensive.... that it wasn't aware of certain aspects of its environmental liability... or that it didn't realize what impact its activities would have!

Now that you are aware of these environmental compliance and inspection issues, ask well-informed advisors to help you with them. Doing so could avoid unnecessary legal proceedings or greatly improve the quality of your defence if such proceedings cannot be avoided.

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