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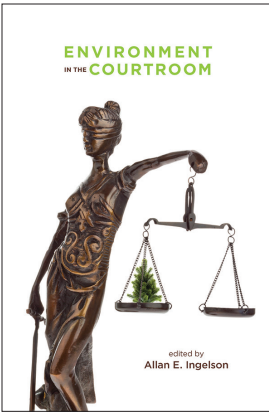
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## ENVIRONMENT IN THE COURTROOM

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## Anatomy of a Compliance Regime: Initiation of Action—A Regulator’s Perspective

FRED MAEFS\*

### Principal Legislation

In Ontario, the Ministry of the Environment and Climate Change (MOECC) mainly regulates compliance by the administration of five provincial statutes:

- *Environmental Protection Act (EPA)*<sup>1</sup>
- *Ontario Water Resources Act (OWRA)*<sup>2</sup>
- *Nutrient Management Act (NMA)*<sup>3</sup>
- *Pesticides Act (PA)*<sup>4</sup>
- *Safe Drinking Water Act (SDWA)*<sup>5</sup>

The MOECC appoints two different types of provincial officers to regulate compliance with these statutes: inspectors and investigators. The two types of provincial officers have two very different roles and as a result are granted very different powers.

According to the MOECC’s Compliance Policy Applying Abatement and Enforcement Tools:

#### *6. Violations: Identification and Response*

Violations of legislation or incidents with potential to adversely affect human health or the natural environment are identified by Ministry staff through a variety of channels:

\* *The views presented in this paper are my own and are not intended to represent the Province of Ontario, Ministry of the Attorney General, or the Ministry of the Environment and Climate Change.*

- Pollution incident reports (e.g., complaints from private individuals)
- Spill reports
- Notifications from the regulated community
- Response inspections
- Planned risk based inspections
- Mandatory inspections
- Adverse water quality incidents
- Report submissions
- Ministry audits and investigations
- Application to investigate under the Environmental Bill of Rights
- Information furnished by other agencies<sup>6</sup>

There are two primary courses of action that may be taken to address an incident that involves a violation. One is the abatement approach, where measures are taken to bring about and to maintain compliance or to prevent, reduce, or eliminate the risk of adverse impact to human health or the natural environment. The second is enforcement, which involves prosecuting the responsible person who has committed an offence. These two courses of action may proceed in parallel to respond to an incident. For instance, in response to a severe spill that results in adverse impacts to the natural environment, the ministry may issue a control document to ensure the responsible person is under a legal obligation to remediate the impacts, and the ministry may also commence an investigation to determine if the person should be prosecuted.

When an incident does not involve a violation but has the potential to adversely affect human health or the natural environment, abatement tools such as the request for an abatement plan or the issuance of a preventive measures order may be used to resolve the incident.<sup>7</sup>

## **Inspection vs. Investigation**

As noted in the decision in *R. v. Soviak*:

As a matter moves from an administrative regulatory/auditing function towards a criminal, quasi-criminal investigation, the rules of engagement change and the procedures for obtaining evidence are also subject to change.<sup>8</sup>

## INSPECTIONS

Provincial officers carrying out inspections have very wide-reaching powers. In exercising those powers, it is up to them to determine compliance with applicable environmental rules and regulations. It is not predominantly about collecting evidence. If non-compliance is found, the provincial officer, or inspector, may take various steps, such as issuing an administrative order to ensure compliance. The powers are so far-reaching that inspection powers are known as “super powers,” allowing the officer to carry out an inspection in the absence of consent or any judicial authorization. For example, the inspector may enter property, seize items, take samples, question employees, and make other inquiries.<sup>9</sup> In general, the powers of inspection are consistent with the inspector making a physical inspection, including making reasonable inquiries, orally or in writing. Depending on the nature of the subject matter of the inspection, specific protocols may apply, such as those under the *SDWA*.

In 2005, the Ontario Court of Appeal ruled that inspection powers did not include permitting the officer to make an inquiry by a telephone call.<sup>10</sup> The powers were amended in 2010 to permit telephone inquiries.<sup>11</sup> Environmental legislation also makes it an offence to hinder or obstruct a provincial officer in the performance of his or her duties, provide false or misleading information, or refuse to furnish any provincial officer with information required.<sup>12</sup>

The MOECC’s Compliance Policy sets out the steps to be taken in addressing a potential environmental violation.<sup>13</sup> At stage one, a determination must be made as to whether the incident is a violation, or has the potential for adverse health/environmental impacts. If the answer is yes, then the inquiry moves to stage two. At this stage the inspector considers all of the relevant information, including the potential health and environmental consequences arising from the incident, the compliance history of the facility or person involved, and specific considerations to be made with regard to this incident. The inspector will apply an “Informed Judgment Matrix” in an effort to determine what steps to take. This will be included with an assessment of case-specific considerations in assessing the severity of the incident. At stage three, the inspector will determine what compliance category to apply and select and implement the most appropriate abatement and/or enforcement tools. In stage four, the inspector will monitor the situation to determine whether or not compliance has been obtained and, if so, whether it was resolved in the timelines given by the officer. A determination will then have to be made as to whether further steps need to be taken or no further action is required. While considering what abatement responses may be required, the inspector will also consider whether or not a referral to the MOECC’s Investigations and

Enforcement Branch (IEB) will be warranted in order for an investigation to be carried out.

According to the policy, there are specific types of abatement and enforcement tools available.

### **Education and Outreach**

The inspector may consider meeting with the parties to analyze the consequences of the incident in question and work to prevent a reoccurrence through education and outreach.

### **Issue/Amend an Authorizing Document**

If the party in question has received prior authorization from the MOECC in the form of a document issued pursuant to environmental legislation, the inspector may consider whether that authorization needs to be amended or whether another type of authorization is required under the circumstances.

### **Notice of Violation**

The inspector or other appropriate employee of the MOECC may put the party on notice either in writing or verbally of a violation arising from the incident. This Notice of Violation is not considered an offence and is intended to address only minor violations.

### **Abatement Plan**

The inspector may either in writing or verbally advise the party in question that it is incumbent to develop an Abatement Plan within a specified time period to correct the violation or put preventative measures in place.

### **Control Documents (Orders)**

The inspector may issue a formal order setting out the obligations on a party to take corrective action or implement procedures. The order will include time-limits within which the items must be complied with. The party in question may request that it be reviewed by a director, which is usually the Director of the Regional Office. There is also a right of further review of the director's order by way of appeal of the decision to the Environmental Review Tribunal.

### **Environmental Penalty Order**

Both the *EPA* and the *OWRA* provide for the issuance of an Environmental Penalty Order in addressing specific types of violations at specified types of facilities.

### **Suspension/Revocation/Refusal of an Authorizing Document**

If it is determined that an authorizing document has been breached or that the issuance of an authorizing document should be refused, the director may suspend, revoke, or refuse an authorizing document. Such a decision may be appealed to the Environmental Review Tribunal.

### **Program Approval**

The party in question may develop an outline of abatement activities to be undertaken in addressing the matter at issue. The Program Approval will be subject to agreement with the plan by the ministry.

### **Enforcement**

**PART I OF THE *PROVINCIAL OFFENCES ACT*** If the potential offence is relatively minor, the inspector may issue an Offence Notice, also known as a Ticket or a Summons. The Offence Notice or Summons must be issued no later than 30 days after the date of the alleged offence. The maximum fine that may be imposed is \$500. The issuance of an Offence Notice or Ticket results in a prosecution in Provincial Offences Court. The party may choose to plead guilty and pay the designated fine, plead guilty with an explanation, or request a trial. A Part I Summons, on the other hand, establishes no set fine and requires both the party and the ministry to go to Provincial Offences Court for a trial.

**PART III OF THE *PROVINCIAL OFFENCES ACT*: THE ISSUANCE OF FORMAL CHARGES** Where the matter has been referred to the IEB, an investigation will be conducted. If it is determined that there are reasonable and probable grounds that an offence has been committed, the investigator may lay charges in the form of a Part III Information under the *Provincial Offences Act*. The laying of charges will result in a prosecution being conducted by Crown counsel on behalf of the MOECC before a Justice of the Peace in Provincial Offences Court.

### **Public Reporting**

The ministry will keep the public advised of environmental compliance activities to assure members of the local community that environmental laws are being complied with. Information for these activities may be accessed on the ministry's internet site at <http://www.ene.gov.on.ca>.

### **INVESTIGATIONS**

A provincial officer appointed as an investigator, on the other hand, will conduct a search for evidence of an offence. Parties under investigation have rights

pursuant to the *Canadian Charter of Rights and Freedoms*. The powers of an investigator are more limited. For example, the *EPA* merely states that “a provincial officer may investigate offences under this Act and may prosecute any person whom the provincial officer reasonably believes is guilty of an offence under this Act.”<sup>14</sup>

The purpose of an investigation is to determine if the possibility for penal liability exists. Predominantly an investigation is about gathering evidence to determine whether “reasonable and probable grounds” exist, and if so, laying charges under the appropriate environmental legislation. An investigator cannot use the super powers of an inspector and will require judicial pre-authorization such as a search warrant to enter premises or demand documents, unless consent is granted or exigent circumstances are present.

In general, any evidence obtained in an inspection prior to the onset of the investigation can be accessed by the investigator. After the onset of the investigation, only information that is exculpatory or obtained without the use of inspection super powers may be obtained.

### **Investigations and Enforcement Branch—Referral and Intake**

The MOECC’s Investigations and Enforcement Branch has a standard operating procedure in evaluating the significance of incidents referred by Abatement for investigations.

**PRE-REFERRAL** Provincial officers who have carried out an inspection and identified a potential violation may consider referring the matter for an investigation. The decision whether or not to refer a matter will be based on legislative requirements, and the process referred to earlier as set out in the *Compliance Policy Applying Abatement and Enforcement Tools*. The officer may also consider involving the IEB while an inspection is ongoing if immediate action is required.

**REFERRAL** A referral by Abatement to the IEB will include such information as the observations that have been recorded in the course of the inspection, an index of relevant documents or approvals, and the party’s compliance history over the past three years.

Once the information has been screened by a senior IEB Supervisor, the case will then be categorized in a range from Category A, very high priority and a high complexity, to Category E, which is non-prosecutorial investigations. The designation of the appropriate category will determine the priority of the investigation and the resources required.



## The Evolution of the Distinction between Inspections and Investigations

Courts have always tried to differentiate between “regulatory” offences and “criminal” offences. The high-water mark was established in the 1978 decision of the Supreme Court of Canada, *R. v. Sault Ste. Marie (City)*, which set out three categories of offences—two of which were simply “regulatory” in nature.<sup>15</sup>

The distinction began to become less clear as:

- Regulatory penalties increased;
- The number of regulated entities expanded; and
- Legislation imposed a greater impact on the rights of regulated entities.

### The Decision in *R. v. Inco Ltd.*

In *R. v. Inco Ltd.*, the Ontario Court of Appeal ruled that an inspection becomes an investigation when “an inspector under a regulatory regime possesses reasonable and probable grounds to believe that an offence has been committed.”<sup>16</sup> It may have been challenging to establish when an inspector, untrained as an investigator, would have determined the existence of “reasonable and probable grounds.”

### THE CURRENT STATE OF THE LAW: *R. V. JARVIS* AND *R. V. LING*

In the companion cases of *R. v. Jarvis*<sup>17</sup> and *R. v. Ling*,<sup>18</sup> the Supreme Court of Canada ruled that what is relevant is a determination of the “predominant purpose” for which the public official has entered onto property and/or made demands for information.

Both cases were based on inquiries by Canada Customs and Revenue Agency (CCRA). Just as with the inspectors and investigators of the MOECC, the CCRA has two distinct branches, the Audit Branch and the Special Investigations Unit. The cases arose out of initial inquiries by the Audit Branch into the activities of taxpayers. In the course of inquiries, auditors became increasingly aware that the taxpayers might have been involved in fraudulent activities. The question then became when an audit had turned into an investigation seeking evidence with penal ramifications. The Supreme Court of Canada stated that the determination as to whether or not the audit had “crossed the line into an investigation” would be a fact-based decision in each case.

In *Jarvis*, the court stated:

In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under secs. 231.1(1) and 231.2(1). In essence, officials “cross the Rubicon” when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of the inquiry.<sup>19</sup>

Seven factors for determining the predominant purpose of the inquiry were set out in *Jarvis* as follows:

- (1) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- (2) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (3) Had the auditor transferred his or her files and materials to the investigators?
- (4) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (5) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (6) Is the evidence sought relevant to liability generally? Or, as is the case with evidence as to the *mens rea*, is the evidence relevant only to penal liability?
- (7) Are there any other circumstances or factors which can lead the trial justice to the conclusion that the compliance audit had in reality become a criminal investigation?<sup>20</sup>

As pointed out in *Lowe*<sup>21</sup>:

It can be difficult to differentiate between when the inspection ends and the investigation begins, in fact, in some cases both can be carried out at the same time, as long as the purpose of the continuing inspection is for the predominant purpose of inquiring into or

determining the extent of compliance only and not for the purpose of gathering further evidence to prove the observed crime, then it is an inspection.

## DOES THE “PREDOMINANT PURPOSE” TEST APPLY TO PROVINCIAL REGULATORY INSTITUTIONS?

*Jarvis* and *Ling* arose under the federal *Income Tax Act*. However, the Supreme Court specifically noted that the seven factors referred to would have to be applied in the context of other provincial or federal departments, even if they have different organizational structures.

The court noted that there may well be other provincial or federal departments that have different organizational settings, which in turn may mean that the above-noted factors, as well as others, will have to be applied in those particular contexts.

Both the MOECC and CCRA have separate branches that carry out audit/inspection and investigation functions.

## Conclusion

In the event of potential non-compliance with environmental legislation, the MOECC has numerous responses available to consider in light of the specific circumstances. The focus is on determining the details of the incident, applying whatever immediate response is appropriate, and working with parties involved to remediate and prevent a reoccurrence and, if necessary, consider enforcement action. The wide-ranging powers available permit the MOECC to address any adverse event in an ongoing effort to protect the natural environment.

### NOTES

- 1 *Environmental Protection Act*, RSO 1990, c E.19.
- 2 *Ontario Water Resources Act*, RSO 1990, c O.40.
- 3 *Nutrient Management Act*, SO 2002, c 4.
- 4 *Pesticides Act*, RSO 1990, c P.11.
- 5 *Safe Drinking Water Act*, SO 2002, c 32.
- 6 Ontario Ministry of the Environment and Climate Change, *Compliance Policy Applying Abatement and Enforcement Tools*, May 2007, online: <<https://www.ontario.ca/page/compliance-policy-applying-abatement-and-enforcement-tools#section-5>>.
- 7 *Ibid* at s 6.
- 8 *R v Soviak*, [1997] OJ No 1215 (Prov Div) at para 134.
- 9 For example, see s 156 of the *EPA*.
- 10 *R v Crompton Co /CIE* (2005), 78 OR (3d) 135 (CA).
- 11 Section 157.01(2) of the *EPA*.
- 12 Section 184 of the *EPA*.
- 13 *Compliance Policy*, *supra* note 6 at s 8.
- 14 Section 5(5) of the *EPA*.

15 *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299 at para 60.

16 *R v Inco Ltd* (2001), 54 OR (3d) 495 (CA) at para 33.

17 *R v Jarvis*, [2002] 3 SCR 757 [*Jarvis*].

18 *R v Ling*, [2002] 3 SCR 814.

19 *Jarvis*, *supra* note 17 at para 88.

20 *Ibid* at para 94.

21 *R v Lowe*, [2007] NJ No 456, 280 Nfld & PEIR 331 (Prov Ct) at para 23.