

AN ATTEMPTED LINE BETWEEN INSPECTIONS AND INVESTIGATIONS?

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Recently the Ontario Court of Appeal analyzed the inspection powers of the Ontario Ministry of the Environment (MOE) to ascertain the point at which the ordinary course reliance on its inspection powers crosses a line whereby the exercise of those powers results in the instances of unreasonable search and seizure and, thereby, an abuse of process. The primary issue in *R v. Inco Ltd.* [2001] O.J. No. 2098 (C.A.) (*Inco*), summarized below, centers on the authority of the Investigations and Enforcement Branch (IEB) of the MOE to compel Inco employees to submit to questioning and to produce documents in connection with an inspection relating to an alleged pollution offence.

Prior to the *Inco* decision most environmental lawyers were of the view that there should be a distinction between the powers of abatement officers and those of investigation and enforcement officers. However, historically most lawyers have not advised their clients to refuse to cooperate when the investigation and enforcement officers relied on the statutory powers of provincial officers, because the statute contains a provision that provides for an obstruction charge in the event of a refusal to cooperate or furnish information (*Environmental Protection Act*, R.S.O., 1990, c.E. 19, s. 184(1) Obstruction).

The charges in *Inco* arose from the alleged discharge of untreated mine effluent from a nickel mine operated by Inco in Sudbury, Ontario. Inco determined that the discharge in question contained very high levels of nickel and iron. Inco employee reported the discharge to the MOE in March 1994. Abatement Officers attended the site on the same day that the report was made. They, in turn, advised an IEB Officer that there had been a discharge and that samples were being analyzed.

An IEB Officer contacted senior Inco employees, including Inco's in-house counsel, giving notice that he intended to interview any Inco employee who had knowledge of the incident. He also advised the employees that they were under a statutory obligation to submit to the interviews. Inco's in-house counsel identified the relevant personnel and arranged for interviews to be conducted on-site. The interviews were conducted in the presence of the in-house counsel. At the beginning of each interview, he stated his objection to the interview and indicated that his clients were cooperating to avoid potential charges of obstruction. The IEB Officer also requested documents and Inco's sampling analysis.

Inco was then charged with discharging an untreated mine effluent into the Grassy Creek located near the mine treatment area contrary to Section 30 of the *Ontario Water Resources Act* (OWRA). This section makes it an offence to cause or permit the discharge of any material of any kind into any waters or any place that may impair the quality of the water.

At trial, Inco brought a motion to stay the charges against it based on the doctrine of abuse of process. Inco contended that the IEB Officer had no statutory authority to compel its employees to submit to questioning and to produce documents and other materials. According to Inco, when the IEB Officer engaged in his investigation, he already had reasonable grounds to believe that an offence had been committed. Therefore, it was contended that the IEB Officer improperly used the inspection powers under Section 15 of the OWRA to build a case for prosecution. Inco asserted that the IEB Officer's inspection powers had expired as soon as he had reasonable and probably grounds to lay a charge. This motion was denied at the trial level. The trial judge based his decision on his finding that, if there was a possibility that any of the employees were going to be charged, the IEB Officer would have cautioned them.

Inco appealed this decision to the Ontario Court of Justice (Provincial Division) and a new trial was ordered. This court did not rule on the merits of Inco's abuse of process argument. Inco then appealed to the Ontario Court of Appeal on the abuse of process question, and the appeal was allowed.

Inco's argument before the Court of Appeal was that the investigation and enforcement officer did not have lawful authority to conduct the questioning and to demand and seize various documents from Inco, and that these activities violated Inco's right to remain secure against unreasonable search and seizure pursuant to Section 8 of the Canadian Charter of Rights and Freedoms. The MOE submitted to the Court of Appeal that the general inspection provisions of the OWRA authorized the IEB investigation without a search warrant. The Court of Appeal rejected this argument and determined that if there was enough evidence to support the existence of reasonable and probably grounds that an offence had been committed by Inco prior to the IEB Officer entering Inco's premises, then the IEB Officer ought to have obtained a search warrant. In the absence of obtaining judicial authorization, the IEB Officer's conduct constituted an unreasonable search and seizure, contrary to Section 8 of the Canadian Charter of Rights and Freedoms. However, there had been no lower court finding as to whether the IEB Officer had reasonable and probable grounds to believe that an offence under the OWRA had been committed before he conducted the interviews of the employees. Therefore a new trial was ordered to determine if the IEB Officer did in fact exceed his statutory authority. The Court of Appeal noted that, if it was found at a new trial that the IEB Officer had reasonable and probable grounds at the time he questioned the employees and thus lacked any statutory authority for his investigation, the presiding trial judge would be required to exercise discretion to determine whether a stay of the charge should be granted for abuse of process.

While this decision was making its way through the appeal process, the OWRA and the *Environmental Protection Act* were amended, effective February 1, 1999. Both acts now authorize Enforcement Officers to make an application *ex parte* to obtain a warrant if there are reasonable grounds to believe that an offence has been or will be committed and that information concerning the offence will likely be obtained.

The *Inco* decision will have significant implications beyond the investigation of offences under the OWRA. The rationale of this decision will apply to virtually all other regulatory quasi-criminal environmental and regulatory investigations. MOE investigators will now be required to obtain a warrant to proceed on investigations of suspected environmental offences once reasonable and probable grounds exist that an offence has been committed. This will likely mean that employee interviews may have to be curtailed temporarily at some point until such time as the property warrant has been obtained authorizing the further collection of evidence. If the MOE fails to obtain a warrant once reasonable and probable grounds are established, the MOE will run the risk that a stay of proceedings will be granted.

The IEB Officer still has broad powers and he can make an application to obtain a warrant *ex parte* if there are reasonable and probable grounds that an offence has been committed. Unfortunately for both the MOE Officers and anyone alleged to have committed an environmental offence, the reasonable and probable grounds test does not fully clarify the issue of when and how information is to be gathered. The question of whether an investigating Office actually possessed reasonable and probable grounds prior to conducting any interviews will be a determination to be made by those adjudicating the facts. Decisions by MOE Officers as to the point at which reasonable and probable grounds become evident in the course of an interview and after which a warrant must be obtained represents a difficult test of judgement. In the meantime, witnesses are obliged under statute to cooperate and not obstruct justice.

Clearly, the *Inco* decision demonstrates that the investigative powers of the MOE in regulatory offence cases have been significantly limited. However, the decision of when reasonable and probable grounds exist will make the determination of when to cooperate and when to insist on a warrant a very difficult one in each and every case.