

# WINNERS & LOSERS: Can Environmental Inspectors Use Search Warrants to Seize Evidence Relating to Due Diligence?



The environmental laws empower government inspectors to do many things, such as take samples, conduct tests and examine machinery. However, in some circumstances, inspectors must first obtain a search warrant to seize evidence. Typically, an inspector will use a search warrant to gather evidence that a company has violated the environmental laws. But can an inspector use a search warrant to seize relating to whether the company did—or didn't—exercise due diligence? Here are two cases in which courts had to decide whether search warrants issued under the *Criminal Code* were limited to evidence relevant to an element of an environmental offence or encompass evidence that may relate to potential defences, such as due diligence.

**[box]WARRANT FOR DUE DILIGENCE EVIDENCE INAPPROPRIATE[/box]**

## FACTS

Inspectors from Environment Canada took samples of effluent from a property that had been the site of a wood preserving business for about 50 years. They saw that the effluent flowed into a creek frequented by fish and then into a river.

Tests of the effluent revealed that it was deleterious to fish. The government applied for a search warrant for certain documents in the possession of the property owner. It argued that these documents were necessary to prove that the owner didn't exercise due diligence to prevent violations of the *Fisheries Act*. The court issued the search warrant. The owner challenged the warrant and asked for the return of the documents seized under it.

## DECISION

The BC Supreme Court "quashed" the warrant—that is, ruled that it was invalid—and ordered the return of all documents seized pursuant to it.

## EXPLANATION

The *Criminal Code* permits the issuance of search warrants to obtain proof of the commission of an offence. But the Crown's duty to prove the elements of an offence and the defendant's burden to prove it exercised due diligence are separate matters, said the court. Establishing whether or not a company exercised due diligence may entail a detailed inquiry into its affairs over a period of several years. And if such intrusions into the rights of privacy and property were authorized as to the potential defence of due diligence, the law should clearly state this as a ground for obtaining a search warrant, which it doesn't. Thus, the court concluded that a search warrant issued to seize evidence regarding a possible due diligence defence exceeded the law's authority.

*R. v. Re Domtar Inc.*, [1995] CanLII 1583 (BC SC), Oct. 11, 1995

[box]WARRANT FOR DUE DILIGENCE EVIDENCE APPROPRIATE[/box]

## FACTS

Due to a power outage, a chlor-alkali plant discharged a quantity of chlorine into nearby waters, killing a number of fish. The plant reported the discharge to fisheries authorities. During the subsequent investigation, a fisheries officer obtained search warrants for business records indicating that the plant "could have taken additional reasonable measures to prevent the release of a deleterious substance into water frequented by fish." He seized documents pursuant to the warrants. The plant was charged with violating the *Fisheries Act* and *Waste Management Act* and asked the court to quash the warrants. The trial court ruled that documents pertaining to the issue of due diligence didn't relate to the commission of this offence and quashed both warrants. The Court of Appeal upheld this ruling.

## DECISION

The Supreme Court of Canada ruled that a search warrant issued for evidence of due diligence was permissible.

## EXPLANATION

The Court said that the *Criminal Code* permitted search warrants for "evidence with respect to the commission of an offence." This phrase is broad, encompassing *all* materials that might shed light on the circumstances of an

event that appears to constitute an offence—including evidence relating to a possible due diligence defence. Thus, anything relevant or rationally connected to the incident under investigation, the parties involved and their potential culpability falls within the scope of a warrant, concluded the Court. In addition, the Court observed that evidence of factors such as a company's motive or failure to exercise due diligence are often relevant to determining whether the event that triggered the investigation in the first place is, in fact, an offence at all. The Court noted that this broad search warrant power doesn't authorize fishing expeditions or diminish the proper privacy interests of individuals or corporations.

*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, April 23, 1999