WINNERS & LOSERS: When Is Evidence of an Environmental Offence the Result of an Illegal Search?

Under the *Charter of Rights and Freedoms,* Canadians are protected from unreasonable search and seizure. As a result, the government can't use any documents, water samples, pieces of equipment or other evidence in an environmental prosecution unless it was seized legally. So there's often an issue in these cases as to whether evidence of an environmental offence was the result of an illegal search and thus should be inadmissible. Here are two contrasting cases in which courts had to decide whether searches by environmental officials were legal.

SEARCH WAS ILLEGAL

FACTS

A man owned a vacant residential lot that abutted a lake. The lake bed in front of the property contained several large tree stumps. A neighbour notified Parks Canada that the property owner was removing and altering these stumps. A Parks inspector went to the property to inspect it for possible violations of the *Fisheries Act*. He took pictures, issued a stop work order to the owner and determined that a violation had been committed. So he referred the case to the DFO. Without a search warrant, a DFO inspector and biologist went to the site and took pictures. They returned about a month later to see exactly how many stumps had been altered and fully assess the impact on the fish habitat. They then flew over the site in a helicopter and took more pictures. The property owner was convicted of a *Fisheries Act* violation and appealed.

DECISION

The Ontario Superior Court ruled that the seizure of the evidence was illegal and overturned the conviction.

EXPLANATION

The appeals court found that the Parks inspector's initial search was part of a legitimate inspection to ensure compliance with the *Fisheries Act* and, thus, was

legal. He determined that the property owner *had* committed an environmental offence and told the DFO as much. The DFO inspector and biologist then went to the property'without a search warrant'to gather evidence of this violation as part of an investigation for which they needed a warrant. Because there was nothing preventing them from getting a search warrant, there's a presumption that their search was unreasonable. In addition, there were no 'exigent circumstances' in this case that would justify a warrantless search under the law, added the court. Therefore, the evidence that the DFO employees seized during these illegal searches was inadmissible.

R. v. Zuber, [2004] CanLII 2549 (ON SC), July 9, 2004

SEARCH WAS LEGAL

FACTS

A DFO biologist drove by a commercial construction site that abutted a creek every day on her way to work. During one such trip, she noticed that vegetation near the creek seemed less dense. When she got to work, she told a DFO inspector what she'd seen and they went to the site to conduct an inspection. They entered the site through an open gate and walked to the creek where they saw that trees had been cut and stacked and brush had been removed. They took notes and photographs and spoke to a worker operating a Bobcat, who said he'd been hired to clear the area. The company that owned the site and its director were charged with two violations of the *Fisheries Act*. But at trial, the court found that the evidence from the biologist and inspector were the result of an illegal search and couldn't been used. As a result, the defendants were acquitted. The Crown appealed.

DECISION

The BC Supreme Court ruled that the search and seizure of the evidence was legal.

EXPLANATION

The appeals court said the issue was whether the DFO employees' entry into the site and their actions there violated the defendants' protection from an illegal search. Although the site was private property and was fenced in, the gate was open when the DFO employees entered it and there weren't any visible 'No Trespassing' signs. Thus, the defendants had a minimal expectation of privacy in the site, said the court. In addition, the DFO employees were empowered under the law to conduct inspections of fish habitats, such as this creek. And that there was no evidence to suggest that their actions were inconsistent with such inspections or merely a ruse to get evidence for a prosecution. Thus, the appeals court ordered a new trial at which their evidence could be admitted.

R. v. Mission Western Developments Ltd., [2011] BCSC 1378 (CanLII), Oct. 14, 2011 (leave to appeal this decision dismissed on April 25, 2012).