

# **HIP POCKET GUIDE TO SEARCHES AND INSPECTIONS OF VESSELS IN CANADA**

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## **Introduction**

Vessels operating in Canadian coastal waters are subject to being inspected and searched by government authorities acting under the authority of a wide variety of legislation. The obligations of both the government authorities conducting the searches and the vessel operators being searched will depend, to a large degree, upon whether the authorities are conducting an inspection for the purpose of ensuring compliance or a search for the purpose investigating a contravention. Since most of the reported legal cases on searches have arisen in the context of the *Fisheries Act*, this article will begin by reviewing the law in the context of *Fisheries Act* searches.

## **Compliance Inspections**

Under section 49 of the *Fisheries Act*<sup>1</sup>, so long as a fishery officer or guardian reasonably believes there is any work, undertaking, fish or other thing to which the *Fisheries Act* or *Regulations* apply, he or she may enter and inspect any place including fishing vessels and premises. These are referred to in this article as compliance inspections<sup>2</sup>. The *Act* sets out a broad range of powers available to persons conducting compliance inspections and imposes a positive duty upon the persons being inspected to assist and provide copies of documents.

The only significant limit on the compliance inspection powers contained in s. 49 is subsection (2), which requires a warrant before entering a dwelling house. Whether or not living accommodation on a fishing vessel would be considered a dwelling house is not entirely clear, as there are not many reported cases on the issue. However in the case of *R. v. Kinghorne*,<sup>3</sup> involving the search of crew quarters on a fishing vessel, a New Brunswick summary conviction appeal court held that “[a]lthough crewmembers used a portion of the vessel to sleep and eat while at sea, ‘there was no permanency of any manner and such was ancillary to the principal use of the vessel and would not convert the entire vessel into a dwelling house’” (para. 31). If this case is followed in other jurisdictions, it will likely be difficult to challenge the search of crew quarters on fishing and other similar commercial vessels solely on the basis that no search warrant was obtained. This will be particularly difficult if, as is often the case, the master of the vessel has a desk in his cabin where he keeps the ship’s papers.

Constitutional challenges to the validity of compliance inspections under s. 49 have been upheld in numerous cases primarily on the basis that:

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<sup>1</sup> *Fisheries Act*, R.S.C. 1985, c. F-21.

<sup>2</sup> These are also sometimes referred to as administrative searches. See for example the quote from *R. v. McKinlay Transport Ltd.* 1990 CANLII 137 (SCC) in *R. v. Kinghorne*, 2003 NBQB 341 (para. 19).

<sup>3</sup> *R. v. Kinghorne*, 2003 NBQB 341. See also *R. v. Nolet*, 2010 SCC 24 where the court recognized only a limited expectation of privacy in the sleeping cab of a commercial truck because “the cab of a tractor-trailer rig is not only a place of rest but a place of work, and the whole of the cab is therefore vulnerable to frequent random checks in relation to highway transport matters.” (para 30-1, 43-44).

HIP POCKET GUIDE TO SEARCHES AND INSPECTIONS  
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*Individuals and companies involved in the fishing industry have a reduced expectation of privacy, which they have voluntarily assumed by being part of the fishery. The nature of the industry and the legislation requires that inspections be carried out to ensure compliance with the Act and regulations. Without powers of inspection, the fisheries officers would be unable to enforce the legislation.*<sup>4</sup>

Even though persons could be considered detained for the purposes of an inspection, recent case has suggested that this type of detention does not often engage the same types of Charter rights as it would in a criminal investigation.<sup>5</sup>

Compliance inspections with respect to the deposit of deleterious substances are governed by s. 38.

### **Contravention Searches**

Section 49.1 of the *Fisheries Act* provides that a fisheries officer must obtain a warrant from a justice of the peace in order to enter and search a vessel or other place if he or she believes on reasonable grounds that the vessel or place contains:

*a) any work or undertaking that is being or has been carried in contravention of this Act or the regulations;*

*b) any fish or other thing by means of or in relation to which this Act or the regulations have been contravened; or*

*c) any fish or other thing that will afford evidence in respect of a contravention of this Act or the regulations.*

In this paper, these will be referred to as “contravention searches”.

The only exception to the requirement for a warrant for contravention searches in s. 49.1 is in exigent circumstances where the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.

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<sup>4</sup> *R. v. Sandover-Sly*, (1999) CanLII 15129 (BCSC); See also: *R. v. Lowe*, 2007 CanLII 69298 (para. 50); *R. v. Diep*, 2005 ABCA 54[warrantless search of fish farm facility]; *R. v. Leahy*, 2004 NSPC 62 [warrantless search of premises of third party]; *R. v. Kinghorne*, supra note 3 (para. 22-25)[warrantless search of scallop vessel after returning to home port]; *R. v. Wilcox*, 2001 NSCA 45; *R. v. Kinnear* (1997), 151 Nfld & P.E.I. 83 (C.A.) [warrantless search of a lobster vessel]; *R. v. Cranford*, [1999] N.J. NO. 200 (para. 19-23); see also *R. v. Rice*, 2009 BCCA 569, a recent case involving similar legislation under the B.C. *Wildlife Act* and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154.

<sup>5</sup> See *R. v. Rice*, supra note 4 at para. 72 where it refers to *R. v. Suberu*, 2009 SCC 33; but see *R. v. Kooktook*, 2004 NUCJ 7 where the court found that the use of inspection powers to obtain a statement from an aboriginal with respect to the conduct of a constitutionally protected fishery violated his rights under s. 7 of the *Charter*.

HIP POCKET GUIDE TO SEARCHES AND INSPECTIONS  
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by Brad M. Caldwell

It is noteworthy that when contravention searches are being performed under s. 49.1, the *Act* does not impose any positive duty upon persons being searched to assist or provide information. Although the law relating to obstruction would require some cooperation during the search<sup>6</sup>, numerous court cases have held that during a s. 49.1 contravention search, the full range of Charter rights are triggered such as the right to remain silent (s. 7), the right to be secure against unreasonable search and seizure (s. 8), and the right to be promptly informed of the right to counsel and the right to retain counsel (s. 10).<sup>7</sup>

**Boundary Between Compliance Inspections and Contravention Searches – The Predominate Purpose Test**

Unfortunately, it is not always easy to determine when a compliance inspection ends and a contravention search begins.<sup>8</sup> In *R. v. Jarvis*<sup>9</sup>, a 2002 case involving investigations under the *Income Tax Act*, the Supreme Court of Canada looked at the question of how to draw a line between the audit compliance type provisions of the *Income Tax Act* where few, if any, Charter rights are available and the criminal investigative type provisions where a full range of Charter rights are available. After a careful review of a number of conflicting authorities, the court concluded that: “where the **predominate purpose of the inquiry in question is the determination of penal liability** . . . officials must relinquish the authority to use inspection . . . powers . . .” [emphasis added].<sup>10</sup> The Court went on to note that:

*[T]he mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to “force the regulatory hand” by removing the possibility of seeking the lesser administrative penalties on every occasion in*

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<sup>6</sup> See for eg. *R. v. Rhyno* 2002 NSPC 8 [leaving crab vessel tied to dock & refusing to provide identification]; *R. v. Robie*, 2001 BCSC 1572 [interference with inspection of property re environmental impact]; *R. v. Cranford*, [1999] N.J. No. 200 (para 47-8) [closing a cooler while a fisheries guardian was trying to inspect it]; *R. v. Ralph*, 2006 NLCA 15 [failing to give provincial fish inspectors access to fish in fishhold].

<sup>7</sup> *R. v. Lowe*, *supra* note 4 (para. 25-34) [protest hand line cod fishery]; *R. v. Sandover-Sly*, *supra* note 4 [roadside inspection under Fisheries Act]; *R. v. Douglas*, [2002] B.C.J. no. 3134 [Roadside inspection under *Wildlife Act*]

<sup>8</sup> For example, some older, primarily pre 2002 cases, have held that line between the improper use of compliance inspections is reached at the point when reasonable and probable grounds exist that would allow the authorities to obtain a search warrant, namely when credibly based probability replaces suspicion. For a general discussion of these different lines of cases see *R. v. Wilcox*, 2001 NSCA 45 (para 99-101). See also: *R. v. Kinghorne*, *supra* note 3 (para 25-29) citing earlier authorities such as *R. v. Wilcox*, *R. v. Kent*, (1991), 109 N.S.R. (2d) 355 and *R. v. Kinnear*, *supra* note 4.

<sup>9</sup> *R. v. Jarvis*, 2002 SCC 73.

<sup>10</sup> *R. v. Jarvis*, *supra* note 9 at para. 88.

HIP POCKET GUIDE TO SEARCHES AND INSPECTIONS  
OF VESSELS IN CANADA  
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*which reasonable grounds existed of more culpable conduct.* (para. 89) [emphasis added].

The court also rejected the test of mere suspicion and then set out a list of seven factors to for courts to consider when determining whether it is dealing with a compliance type inspection or an investigative search.

In 2004 this predominate purpose test was applied in a case involving a warrantless search of a fish farm facility by the Alberta Court of Appeal in the case of *R. v. Diep*<sup>11</sup>. It was also applied to a *Fisheries Act* case in 2007 by the Alberta Provincial Court in the case of *R. v. Lowes*<sup>12</sup> and was cited with approval in 2010 by the B.C. Court of Appeal in *R. v. Rice*, a case involving an investigation under the *Wildlife Act*.<sup>13</sup> Although it has not yet been applied in all jurisdictions, it appears to be the current applicable test.

### **Inspections and Searches under the *Canada Shipping Act, 2001***

The rules and procedures for Contravention searches under the *Canada Shipping Act, 2001* (“*CSA, 2001*”) are set out in section 211 and are very similar to the provisions of the *Fisheries Act*. A marine safety inspector, classification society or other designated person, can perform inspections. Inspectors are provided with specific authority to stop and detain vessels for the purpose of inspections and a broad range of powers are provided to them, which impose positive duties upon the persons being inspected to assist and provided copies of documents. Living quarters may only be entered with the consent of the occupants “or for the purpose of establishing the vessel complies with a relevant provision”. Presumably by relevant provision, what is meant is a provision relevant to the living quarters such as safety within the living quarters?

For inspectors to conduct searches for evidence regarding contraventions of the *CSA, 2001*, they must first obtain a search warrant from a Justice of the Peace under the provisions of s. 487 of the *Criminal Code*. The *Criminal Code* search requirements are subject to certain modifications set out in subsections 1-3 of *CSA, 2001* section 220, namely: (1) no warrant is required for searches in exigent circumstances; (2) no search of a living quarters is allowed without a warrant unless there is consent and (3) authorities searching pursuant to a *Criminal Code* warrant are also to have all powers of an inspector under s. 211(4) of the *CSA, 2001*.

### **Inspections and Searches under the Migratory Birds Convention Act**

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<sup>11</sup> *R. v. Diep*, *supra* note 4.

<sup>12</sup> *R. v. Lowes*, *supra* note 4 at para 23-28 note: In this case, however, the test was incorrectly stated at para 25 because it overlooked para 89 of *Jarvis* where the SCC said the mere existence of reasonable grounds may be insufficient to support a conclusion that the predominate purpose of the investigation is the determination of penal liability.

<sup>13</sup> *R. v. Rice*, *supra* note 4 at paragraphs 41-9 and 68.

HIP POCKET GUIDE TO SEARCHES AND INSPECTIONS  
OF VESSELS IN CANADA  
by Brad M. Caldwell

The rules and procedures for contravention searches under *Migratory Birds Convention Act* are set out in section 7 and are also very similar to the provisions of the *Fisheries Act*.<sup>14</sup> Inspection powers are provided to game officers and include the power to inspect vessels and other things. This includes the power to board vessels in the exclusive economic zone of Canada. Section 7 (3) specifically prohibits entry into a “dwelling house” without a warrant, but unfortunately does not define the term.<sup>15</sup>

Similar to the *CSA, 2001*, contravention searches under the *Migratory Birds Convention Act* must be authorized by a search warrant issued under s. 487 of the *Criminal Code*. The s. 487 search powers are modified by s. 8, which provides for an exception where exigent circumstances.

**Inspections and Searches under the *Canadian Environmental Protection Act*.**

This is very modern legislation, which creates a complete code that governs inspections and searches without recourse to the *Criminal Code*. Compliance inspections are governed by s. 218, which provides a very detailed list of inspection powers available to enforcement officers and imposes positive duties upon persons being inspected. It has provisions prohibiting entering a “private dwelling-place” or any part of a place that is designed to be used and is being used as a permanent or temporary private dwelling-place” except with consent or warrant. Subsection 9 has specific provisions allowing for the boarding of ships. Under certain conditions referred to in subsection 15 and 16, inspections of ships can take place in Canada’s exclusive economic zone.

Contravention searches are governed by s. 220, which provides a complete code for searches to be conducted under the authority of a search warrant, except where allowed in exigent circumstances.

**Consequences of an Illegal search**

From the vessel operator’s perspective, given both the risk of being charged with obstruction of justice and the difficulty in determining whether a government investigator is conducting a compliance inspection or an investigative search, the safest course of conduct is to co-operate. The unfortunate result is that the only remedy available to an illegal search is an application under s. 24(2) of the *Charter* to exclude the discovered evidence from admission at any subsequent prosecution that arises.

Section 24(2) of the *Charter* provides that when evidence has been obtained in a manner that infringes a person’s charter rights, the evidence shall be excluded if “it is established

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<sup>14</sup> For cases regarding inspections under the *Migratory Bird Convention Act* see: *R. v. Fleming*, (2003) 104 C.R.R. (2d) 75 [reduced expectation of privacy on stage located on dock] and *Ontario (Ministry of Natural Resources v. Lidtkie*, (2007) C.E.L.R. (3d) 316.

<sup>15</sup> Since the *Act* provides for issuance of a warrant for inspection of a dwelling by a Justice of the Peace as defined by s. 2 of the *Criminal Code*, in the absence of any other definition the definition of dwelling house in s. 2 of the *Criminal Code* would likely be applied.

HIP POCKET GUIDE TO SEARCHES AND INSPECTIONS  
OF VESSELS IN CANADA  
by Brad M. Caldwell

that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.” While such applications are occasionally successful,<sup>16</sup> in the context of regulatory prosecutions in the past, it has often been difficult to establish that the admission of the evidence would bring the administration of justice into disrepute.<sup>17</sup> In 2009, the Supreme Court of Canada reformulated the test for exclusion of evidence under s. 24(2) in the case of *R. v. Grant*.<sup>18</sup> Although not a fishing case, *R. v. Grant* is similar to the fishing case of *R. v. Fitzpatrick*<sup>19</sup> with respect to its emphasis on the expectation of privacy as a matter to be considered under the s. 24(2) analysis. In particular, at stage two of the newly formulated test, the expectation of privacy is one of the factors to be considered in assessing the impact of the impugned state conduct on the interest protected by the infringed charter right.<sup>20</sup> Because of the reduced expectation of privacy on fishing and other commercial vessels, it is likely that under the test as reformulated in *R. v. Grant*, the courts will continue to be reluctant to exclude evidence obtained as a result of illegal searches of these vessels. Accordingly, even if one can establish a Charter breach in connection with a search of a commercial vessel, it will likely be difficult to have such evidence excluded.

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<sup>16</sup> See for example *R. v. Stengler* 2003 SKPC 119 [roadside motor vehicle inspections where the reduced expectation of privacy argument did not apply].

<sup>17</sup> See for example *R. v. Sandover-Sly*, *supra* note 4 at para 91-101.

<sup>18</sup> *R. v. Grant*, 2009 SCC 32.

<sup>19</sup> *R. v. Fitzpatrick*, *supra* note 4.

<sup>20</sup> Given the court's reference to *R. v. Buhay*, 2003 SCC 30 at para 113, it would appear that reasonable expectation of privacy is also still relevant to the issue of whether or not there has been a breach of the s. 8 right against unreasonable search.