

## THE DFO'S POWER TO BOARD AND SEARCH VESSELS

*Chris Watson, LLB*

The federal government regulates fisheries through the *Fisheries Act* and its regulations. All fishermen, including aboriginal fishermen with an exclusive right to fish for food, social and ceremonial purposes, require a licence. The *Fisheries Act* authorizes fishery officers to enforce the conditions of those licences. The enforcement is done in part by boarding and searching vessels and, if breaches are observed, laying charges.

Every fisherman should know what to do in response to a DFO officer's request to board and search his vessel. This question has been very much in the minds of the courts, which have now arrived at a consensus.

The starting point is section 8 of the *Charter*. That section provides that "everyone has the right to be secure against unreasonable search or seizure." Context is important. Our courts have determined that fishermen do not enjoy the same level of protection in search and seizure cases as accused persons do in criminal prosecutions because the sanctions are not as serious.

The *Fisheries Act* under the caption "Powers of Fishery Officers and Fishery Guardians" (sections 49 to 56) also deals with inspections. These sections allow officers to board vessels if they have reasonable grounds to believe that fishing activities are taking place. They have the power to open any containers if they have reasonable grounds to believe fish are in them. They may examine and take samples of fish. They may measure and test fish and gear. They may also ask anyone on board for documents relating to the fishing activities. Further, the master of the vessel must give "all reasonable assistance" to the officer in the course of the boarding.

This is a broad jurisdiction but it is not unlimited. The courts have said that once the character of the search changes from a routine inspection to ensure compliance with the *Fisheries Act* to an investigation for the purpose of securing evidence, a warrant is required. It is an investigation if the officer already has reasonable and probable grounds to believe an offence has been committed.

There is also a reasonable expectation of privacy over portions of the vessel. For example, a fisherman has no right of privacy in respect of an item left in plain view on the deck. By contrast, a fisherman can reasonably expect privacy over the living quarters of the vessel. Between these two extremes are such areas as fish holds, gear storage compartments and the wheelhouse. One recent case reveals that fishermen cannot expect privacy in relation to fish holds and storage areas, even after officers find that an offence has occurred (*ie.* when the search has changed from an inspection to an investigation). Once it is determined that an offence has occurred, officers are not required to stop the search and apply for a warrant to search those areas. They may continue to search the deck surface, holds and storage compartments. They should, however, get a warrant to search the wheelhouse and living quarters.

If a fishery officer comes alongside your vessel and requests a boarding to inspect your vessel you must, by law, let him or her board.

If an officer also requests to view your living quarters you would be within your rights to refuse this request. The fishery officer should respect your decision and, if he or she believes that an offence has been committed, should seek a warrant. However, if the officer does not respect your decision to refuse access to the living quarters, or if the officer tells you he believes an offence has been committed but comes without a warrant, then you should allow the officer to board but clearly voice your objection that the search is illegal. If you stop the officer from boarding you run the risk of committing an offence of a different and perhaps more serious sort – obstruction of fisheries officers and perhaps even assault. Practically, it will also slow down your fishing operation and cause added tension and strife on the water.

I recommend you promptly call a lawyer if you believe a DFO search may have been conducted illegally and anything has been seized.

You should also call a lawyer if you have been charged with an offence. Illegally obtained evidence is generally inadmissible. Your remedy at trial if evidence was obtained illegally will be in the form of an application to have that evidence excluded and, possibly, the charges struck.

*Chris Watson is a lawyer at MacKenzie Fujisawa, LLP in Vancouver. You can telephone him directly at 604-443-1235 or email him at [cwatson@maclaw.bc.ca](mailto:cwatson@maclaw.bc.ca). You can view his previous articles on his web page at [http://www.mackenziefujisawa.com/ourteam\\_chriswatson.htm](http://www.mackenziefujisawa.com/ourteam_chriswatson.htm).*