



**nhppa.org**  
NATURAL HEALTH PRODUCTS  
PROTECTION ASSOCIATION

# EMERGENCY KIT FOR HEALTH CANADA RAIDS

Know your Rights and Obligations Before a Raid

Minimize Damage During a Raid

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***Caveat: this is not intended as legal advice. For legal advice please see a qualified lawyer in your province.***

## **Reason for the Emergency Kit.**

Due to a number of calls to the NHPPA asking for advice for what to do when Health Canada raids, it became clear that there is a need for an outline of basic information to assist retailers, manufacturers, distributors and practitioners that may be subject to a Health Canada raid.

The purpose of this Emergency Kit is to provide a basic understanding of your rights and obligations during a Health Canada raid. This is not intended or represented as legal advice. For specific and detailed legal advice applicable to your specific situation please consult a qualified lawyer in your province.

Also, please note that the privacy laws vary from province to province.

This Emergency Kit needs to be considered in its entirety. After reading it, consult with your legal counsel to get specific instructions applicable to your unique situation.

## **This Emergency Kit will not apply if Bill C-51 returns and is passed. If Bill C-36 is passed, this Emergency Kit does not apply to substances listed or added to Bill C-36.**

This Emergency Kit is current as the law existed on September 1, 2010. It applies only to foods and drugs regulated under the current *Food and Drugs Act*. This Emergency Kit does not apply to substances or plants listed in Bill C-36.

In April 2008, the government introduced, and tried to pass, Bill C-51, an Act to Amend the Food and Drugs Act. Bill C-51 did not pass because an election was called. The government has re-introduced the sister bill to Bill C-51, Bill C-36 (formerly Bills C-52 and C-6). Bill C-36 does not apply to natural health products as a class. However, Bill C-36 does apply to substances listed or added to it. The list already includes some plants. If Bill C-36 is passed, this Emergency Kit does not apply to any substances listed,

or added to, Bill C-36. Bill C-36 and the former Bill C-51 represent a sea change in Canadian law which effectively extinguishes existing property rights and puts individuals targeted by Health Canada in danger of personal bankruptcy and/or imprisonment.

Under a Bill C-51 or C-36 scenario this Emergency Kit would not apply. In such a scenario, contact a qualified lawyer immediately, so that urgent steps are taken to avoid the personal bankruptcy of any owners and managers subject to a Health Canada raid.

To get a basic understanding of how Bill like C-36 and C-51 would impact your situation, read the “Real example of how Bill C-36 will enable Health Canada to totally destroy a business” section of the NHPPA Discussion Paper on Bill C-36 found on our website at [www.nhppa.org](http://www.nhppa.org).

## **Recommended Equipment to Obtain Prior to a Raid.**

Prior to a raid you should have on hand:

- at least two hand-held video recorders;
- small pocket tape recorders for every employee who will stay during a raid;
- spare tapes and/or storage cards to tape at least 10 hours of activity at a reasonable resolution;
- spare batteries to ensure all of the devices will work for 10 hours, and
- the phone numbers for a local lawyer who understands criminal law, including search and seizure law.

If you have the resources to have hidden cameras, with microphones, this is also recommended. It enables you to legally record the raid without risk of the cameras being illegally confiscated.

The equipment and batteries should be checked monthly. They will be of no use if inoperative or with dead batteries during a raid.

## Truth & Lies – What You Need to Know.

During a raid it is essential that you understand:

- you must tell the truth – never lie during a raid;
- say as little as possible, and
- say nothing once it is clear the raid is a criminal raid (how to make this determination is discussed below).

The reason you must tell the truth, if you speak at all, is that it is an offence to lie to a Health Canada inspector performing their duties. Under section 24 of the *Food and Drugs Act* it is an offence to knowingly make any false or misleading statement to an inspector while the inspector is lawfully engaged in his/her duties. There is no point losing the moral high ground and setting yourself up for a criminal charge. If you speak at all, speak the truth.

Say as little as possible. If you determine the raid is a criminal raid, say nothing.

During a raid, send all employees home. Only have a couple of management, or designated employees stay. Employees that are sent home are not on duty and have no obligation to talk to Health Canada inspectors or to the police.

Whereas you must speak the truth, if you speak at all, **you must understand that Health Canada inspectors and the police do not need to speak the truth – nor should you assume they are being truthful.** Many people assume inspectors and the police must be truthful. This is a false assumption. Not only are investigative bodies allowed to lie, lying is an extremely valuable tool for investigations. Lying to a person during a raid, about all of the trouble they are in, creates significant pressure to talk to the Inspector about “your side” of the story. It will not trouble a court when admitting your confession that it was induced by lies. Lies are accepted in the court system as a valid investigative tool.

Do not assume you are being lied to during a raid. At the same time do not assume that you are being told the truth. Rather, be aware that you do not know if you are being told the truth, and act cautiously.

## **Do Not Panic!**

You and your staff will be stressed by a raid. This is compounded when there are a large number of inspectors and police.

Panic will not solve any problem. It will only serve to aggravate matters. If, as has happened with some Health Canada raids, guns are being pointed by the police, panic can be dangerous. Sudden movement must be avoided.

## **Ask For Identification From All Persons Present for the Raid.**

You are under no obligation during a raid to assist the police. If the police are there, you are in a criminal raid. You have the right to silence – say nothing to anyone. Do not assist in any way.

If the police are there and do not have a search warrant, politely tell them that you are not consenting to their presence in your place of business and ask them to leave. The police, like anyone else, cannot legally remain on property you control once it is clear that you are not consenting to their presence and are asking them to leave. Be polite and ensure this is filmed.

Health Canada inspectors must be designated as inspectors. They are issued Inspector ID cards. Ask to see their identification which shows they are designated as inspectors. If a person does not have identification showing they are designated as an inspector, do not speak to them or assist them. If they do not have the proper ID politely tell them that you are not consenting to their presence in your place of business and ask them to leave. Be polite and ensure this is filmed.

## **You Have the Right to Video and Tape Record – Do Not be Intimidated – Record, Record, Record!**

Just as it is never to your advantage to speak during any search, it is not to the Health Canada's advantage to have a search recorded. Recording may show clearly that the search is a criminal search which requires a search warrant. Whether or not the search is conducted with a search warrant, recording can show that the search was not conducted in a reasonable fashion as is required by section 8 of the *Canadian Charter of Rights and Freedoms* (the "Charter").

Inspectors and police feel threatened by video cameras. It is not unusual to be told that you cannot record. This is not true. If you demand to know what law says that you cannot record a search on your own property, they will not be able to provide you with one. Do not be bullied. If your equipment is seized, that will be a factor to show the search was not conducted in a reasonable fashion.

Never voluntarily hand over recording equipment. If the State is going to illegally seize property, it becomes more unreasonable if they have to wrestle it from you. Again this goes to whether the search was conducted in a reasonable fashion.

Recordings are not only useful for legal proceedings. They can be invaluable in the area of public relations. Seizures are usually followed by Health Canada public advisories outlining the alleged dangers of the seized products and of your non-compliance. You may find yourself in the public arena having to dispel misleading information. The recordings may help.

## **Your Rights and Obligations Depend Upon Whether the Raid is Criminal or Administrative.**

If Health Canada:

1. does not believe you are committing an offence, and
2. is not gathering evidence to be used against you,

there is an obligation to assist them to check to see if you are compliant with the law. This obligation is created by subsection 23(3) of the *Food and Drugs Act* which requires persons found in a place inspected to give inspectors “all reasonable assistance” and to “furnish the inspector with any information he may reasonably require.” For as long as the inspector:

1. does not believe you are committing an offence, and
2. is not gathering evidence to be used against you,

he/she can examine your stock, equipment, conveyances and documents (including electronic documents). The inspector can also take samples for testing and make copies of documents.

**Please note that “all reasonable assistance” does not include violating Federal and Provincial privacy laws. Please see the following “Privacy Laws” section to ensure you do not allow private information to be illegally provided to Health Canada.**

The reason Health Canada can carry out inspections when they have no reason to suspect an offence has or is occurring, is that the regulatory scheme would break down if spot inspections could not be done. However, once Health Canada:

1. believes you are or have committed an offence, and/or
2. is gathering evidence of an offence,

your rights under the *Canadian Charter of Rights and Freedoms* (the “Charter”) come into play and override your obligation to assist. At this point the Charter also overrides Health Canada’s inspection power and requires a warrant. **For greater clarity, if the raid is or has become a criminal investigation:**

- **you and your employees are not obligated to say anything or to co-operate in any way. The right to silence applies;**
- **Health Canada cannot take samples, copy documents, or gather information in your premises without a warrant. The right to be free from unreasonable search and seizure applies – this requires a warrant.**

## **How to Tell if the Search is Administrative (requiring your co-operation) or Has Become Criminal (requiring Health Canada to have a search warrant and providing you with the right to silence) – Ask Questions and Pay Attention.**

Administrative searches occur when inspectors do not suspect or believe a crime has or is occurring and they are checking for compliance with no pre-conceived expectations.

A criminal search occurs when the predominant purpose of the inquiry is to determine if you committed a crime. When inspectors are seeking evidence that a crime has or is being committed, the search is criminal.

Always ask the following questions:

1. why are you here?
2. can I see your identification?
3. do you have a warrant?
4. are you planning on seizing anything?



**Sure signs the search is now a criminal search:**

- 1. the police are with Health Canada inspectors** (this will not occur if Health Canada has not asked them to attend. The police are not in the habit of attending for routine inspections unless they are criminal investigations);
- 2. the inspectors have a search warrant;**
- 3. the inspectors seize property other than a small amount for testing** (Health Canada can take small amounts such as a bottle or two for sampling as part of an administrative search. If they seize all of a product, or products, this is a criminal seizure);
- 4. if they bring seizure tape;**
- 5. if they have travelled a long way to reach you and are not checking other businesses** (Health Canada has few inspector locations. If they have to travel a long way to get to you and they are not checking other businesses or practitioners, then you have been specifically targeted. This usually does not happen unless they have a reason to target you – i.e. they believe you are committing an offence);
- 6. if they arrive with a rental truck or van to convey seized products** (this will only occur if they already believe they will need the vehicle to seize non-compliant products);
- 7. you have recently received warning letters to stop selling a product or products;**
- 8. you are asked about a specific product that is not in compliance** (if an inspector shows up asking for things like yohimbe bark which are clearly not in compliance, you are almost certainly in a criminal investigation).

If any one of the above eight sure signs is met, you are almost certainly in a criminal investigation and have no obligation to co-operate.

## **Privacy Laws – Be Aware of Your Obligations to Protect Private Information about your Patients or Customers.**

Please note that “all reasonable assistance” does not include violating Federal and Provincial privacy laws. If you are a practitioner, all personal information about your patients, including names, addresses, contact particulars, conditions and treatments is likely private and consequently illegal for you to disclose to Health Canada or to the police. Information of individual customers is also likely illegal for you to disclose to Health Canada or to the Police. It is highly recommended that all personal information on computers be encrypted. Knowing that Health Canada can and does image hard drives, encryption ensures that you comply with existing privacy laws. Practitioners should contact their professional organizations for the confidentiality rules that apply in their province. Everyone should seek advice from local lawyers concerning the privacy laws that apply in your province.

## **If the Search is Administrative – Say Little – Protect Private Information – Do not Obstruct.**

If there are no signs that you are involved in a criminal search, as outlined above, you have a duty to assist. Do the following:

- send unnecessary employees home so that they are not in the way;
- call your lawyer to attend, run interference, and to advise you of your rights and obligations as the search is occurring;
- record everything that happens;
- say no more than is necessary to assist. Protect private information as is required by the privacy laws.
- do not lie. It is better to say nothing than to say anything that could be construed as misleading. Your obligation to assist does not override the constitutional right to remain silent. If answering a question is going to incriminate you say that you are not sure of your rights and obligations and that you will be having your lawyer answer all further questions.

If at any point the administrative search becomes a criminal search (for example, if all of a product is seized because of the discovery of non-compliance), follow the steps for a criminal search.

## **If the Search is Criminal – Say Nothing – Protect Private Information.**

If there are signs that you are involved in a criminal search, as outlined above, you have no duty to assist. Do the following:

- send all employees home. You want clarity: they are not currently at work and have no obligation to assist or to answer questions that are part of a criminal investigation;
- call your lawyer to attend and run interference;
- record everything that happens;
- say nothing except that you are exercising your right to silence – all questions can be directed to your lawyer.

When Health Canada and/or the police are conducting a criminal search at your premises, it will not benefit you to provide evidence by speaking or assisting. If you mistakenly think you have something good to say, your lawyer can say it at a later date if he/she believes it is in your best interest. If you do not make any statements, you will save yourself legal fees when your lawyer does not have to spend weeks preparing to argue why your statements should not be admitted in evidence against you.

## **If there is a Search Warrant, Carefully Read the Warrant.**

Search warrants are very specific documents. They will list the place which is authorized to search. They will have a defined date and time for the search. They will specify who is authorized to perform the search. If Health Canada shows up with a search warrant, ask to see the warrant and read it carefully. If possible make a copy of the warrant. If the warrant is for a building, it does not apply to vehicles and/or outbuildings, unless it specifically lists them. For example, if the warrant is for a house, it does not include a detached garage unless it specifically says that it does. If Health Canada shows up with a warrant, it is best to say nothing during the search, and to stay out of the way, except to film.

## **If There is a Search Warrant, Expect to Have Your Movement Restricted.**

Usually when a search warrant is executed by Health Canada, they have the police attend. A search warrant **is not an arrest warrant**. Unless you are placed under arrest, you are not arrested. That said,

the practice of the police is to restrict the movement of persons found on a property to be searched. This makes sense when doing a drug raid for a meth lab where the police may be in danger of being shot. This does not make sense when raiding a health food store or a doctor's office where there could be no reasonable expectation of violence or harm.

If the police or Health Canada inspector tries to restrict your movement, ask if you are under arrest. If you are not under arrest, you are legally free to move about and film them. If you are under arrest, demand to speak to a lawyer and speak to a lawyer. If you are asked if you want to speak to a lawyer, the answer is always "yes". You extinguish your right to counsel when you say "no". You also make it much more likely that anything incriminating you say after declining to speak to a lawyer will be admissible against you.

## **Post Raid – Always Submit an Access to Information Request.**

After a raid, it is essential that you obtain as much of the information Health Canada has on your business and products as you can. If you are charged, this information can be invaluable for your defence. If you are not charged, it can be invaluable in assisting you to navigate with Health Canada in the future.

The *Access to Information Act* and Regulations can be found online. It is simple to make a request and the fee of \$5 a request is reasonable.

As a minimum request all information:

- on the business and principals of the business;
- on any products targeted.

You also have to make it clear that "all information" includes electronic documents including emails.

**Always send Access to Information Requests to Health Canada by registered mail.** Some have had the experience that requests sent through the regular mail disappear. Your request must be traceable.

We recommend having your counsel make the request.

A sample template for an access to information request is attached as Appendix 1.

## Post Raid – Public Scrutiny.

Negative publicity usually follows a raid. Health Canada almost always issues a public advisory which is picked up by various media.

It can be no exaggeration to say that the handling of the media and public relations can determine how much damage will be done to your business by the raid. You should immediately develop a public relations strategy.

For those raids that by all appearances are about control rather than safety, it is also important to get the truth into the public domain so that eventually a more balanced approach will be demanded by the public. Do not shirk any ethical obligations to share the truth.

## Obtain Advice on Criminal Negligence.

Whenever Health Canada is directing you to stop selling/manufacturing/distributing a product, or if you are a practitioner, to stop providing a treatment, you must get advice concerning the criminal negligence sections of the *Criminal Code*. Section 217 of the Code reads:

“217 Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.”

If you have been providing a product or treatment that anyone has come to rely upon for their health, this section creates a legal duty to continue to provide the product or treatment if failing to do so will cause physical harm. Under section 219 of the *Criminal Code* a person commits the offence of criminal negligence if they fail to do anything that is their duty to do. Together the sections mean it is criminally negligent to withdraw a product or treatment that persons have come to rely upon for their health. It is not a defence to say Health Canada told you to take an action that would be dangerous. If death occurs, the penalty for criminal negligence can be life imprisonment.

We cannot stress enough how fundamentally important it is to determine whether the withdrawal of a product or a treatment will result in physical harm or death. If the withdrawal will cause harm, you must ensure that you comply with the *Criminal Code*.

In addition to severe legal consequences for endangering persons by withdrawing essential treatments, there are moral considerations to take into account. In sentencing you for criminal negligence, a Court will use the moral issues as aggravating factors. You will need to consider them before taking any action that would endanger anyone.

# APPENDIX 1

## SAMPLE ACCESS TO INFORMATION REQUEST

[Your Letter Head]

[Date]

Access to Information and Privacy Coordinator  
Health Canada  
1010 Somerset Street West  
1st Floor  
Postal Locator 2301D  
Ottawa, Ontario  
K1A 0K9

**Registered Mail**

Dear: Sirs/Mesdames

Re: Access to Information Request

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Please accept this as a request pursuant to s. 4 of the *Access to Information Act* for the following information.

For the purpose of this request, “documents” refers to paper documents and to electronic documents (electronic documents include but are not limited to emails).

**Information Sought:**

All documents and information concerning and/or mentioning:

1. [your business – make sure to use all business names so if you are a corporation that does business under a different name, list both names];
2. [the names of any products involved];
3. [the names of any people involved – note that if you name any people other than the person making the request, you should include a signed authorization from that person to have personal information about them disclosed to you. Otherwise Health Canada will have to seek their permission which will slow the process down].



**Method of Access Preferred**

Electronic copies in pdf format.

**Name of Applicant**

[your name]

**Address of Applicant**

[your address]

**Phone and Fax Numbers of Applicant**

[your phone and fax numbers]

**Method of Payment**

See enclosed cheque for the prescribed fee.

[The fee is \$5 for each request. Make your cheque payable to the Receiver General of Canada].

Your attention to this is appreciated. I look forward to your response.

Yours truly,

[your name]

## APPENDIX 2 – FLOW CHART

### Pre-raid Preparation

Step 1 Before a raid ensure that you have video and audio equipment, batteries and your lawyer's phone number.

### Beginning of Raid Steps

Step 2 Get recording equipment and send non-essential employees home. Begin recording immediately. Do not be bullied or intimidated to stop recording.

Step 3 Call your lawyer and request he/she attends. If they cannot attend ensure they are available on the phone as questions arise.

Step 4 Find out what is going on.

Ask for identification to determine if they are Health Canada inspectors.

Ask why they are there.

Ask if they have a warrant. If they do not have a warrant and any police are there, politely inform the police that you do not consent to them being at your place of business and ask them to leave.

Ask if they are planning on seizing anything.

If there is a search warrant, read the warrant carefully. Make a copy if possible.

Ask if you are under arrest.

Step 5 Determine if the search is an administrative search or a criminal search. Ask your lawyer for his/her opinion. Sure signs of a criminal search include:

the police are with Health Canada;

they have a search warrant;

the inspectors seize property other than a small amount for testing;

the inspectors bring seizure tape;

the inspectors bring a rental truck or van to put seized products in;

they have travelled a long way and are not checking other businesses;

you have recently been told to stop selling a product or products;

you are asked about a specific product which is in non-compliance.

Step 6 If the search is administrative say as little as possible. Adhere to all privacy laws - do not





disclose private information. Do not lie – when in doubt say that you are unsure of your rights and that you will have your counsel answer that question. Send non-essential employees home.

If the search is a criminal search say nothing. Adhere to all privacy laws - do not disclose private information. Send all employees home.

### **Post Search**

Step 7            Submit an Access to Information Request.

Prepare to counter any misleading information which may given to the public.

If necessary obtain legal advice concerning criminal negligence. Do not do anything that will cause harm to your patients or customers. *Criminal Code* charges of criminal negligence are much more serious than regulatory *Food and Drugs Act* offences.

TEHNC