

OHS Legal Risk Management for Managers & Management

Presented by:

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- **In Canada in 2015:**
 - 232,639 accepted lost time claims
 - Majority of claims: Health & social services, manufacturing, construction
 - 815 fatalities
 - Majority of claims in construction and manufacturing

Internal Responsibility System: OHS Law



The Internal Responsibility System:

- The philosophy behind the *OHSA*
- Basis of all Canadian OHS Law
- Allocates Responsibility, Rights and Accountability to workplace stakeholders

Internal Responsibility System: OHS Law



- The Internal Responsibility System promotes:
 - Participation of workers in the protection of their own health and safety
 - Right to participate
 - Provision of health and safety information to workers for their protection
 - Right to know
 - Internal resolution process for health and safety issues that arise at the work site
 - Right to refuse unsafe work



OHSA & Regulations: General Overview



OHSA and Regulations/Codes:

- Statute (*e.g.* OHSA) sets out the framework or principles for workplace health and safety
Regulations and/or Codes made under the statute set out precautionary measures and requirements to eliminate, control and protect workers from OHS hazards
- The OHSA states who does what for the system to protect employees and Regulations/Codes state how to protect employees health & safety

OHSA & Regulations: General Overview



- Each province/territory has its own health and safety legislation, Regulations, Codes etc.
- Legislation sets out duties of workplace parties, including:
 - Employers
 - Supervisors
 - Workers
 - Officers/Directors
 - Constructors/Prime Contractors, etc.

Supervisor: Responsibilities



Case Study: *R. v. Kenaidan Contracting Ltd.*

Booth J.: “... I believe that it was incumbent upon the supervisor on the job site to take that [use of safety equipment] in hand and do something about it, and if he couldn’t handle it, it was up to him to advise his supervisors of the situation. It appears to me he did neither, and therefore, on count one I am going to register a conviction.”



Enforcement & External Responsibility System



- Regulator's role in health and safety is to set, communicate, and enforce health and safety laws (*OHSA* and regulations)
- Enforcement of the *OHSA* and regulations occurs when workplace parties fail to comply with legal responsibilities
- External responsibility system invoked where the Internal Responsibility System fails

Enforcement & External Responsibility System



- Regulators may enforce the *OHSA* and regulations by:
 - Issuing compliance and stop work Orders when they perceive a contravention
 - Recommend Administrative Monetary Penalties
 - Laying quasi-criminal charges
 - Recommending police lay criminal charges

Enforcement & External Responsibility System



- 1 year limitation period on charges being laid in Ontario
- Regulator will likely commence prosecution:
 - fatal or critical/serious injuries
 - failing to report critical (reportable) injuries
 - non-compliance with Orders
 - obstruction of Inspectors or Officers
 - poor health and safety record

Enforcement & External Responsibility System



Legal Liability & Penalties:

- Fines for individuals and/or corporations
- Jail for individuals (e.g. supervisors)
- Fines exclusive of government tax (25% victim surcharge)
- \$500,000 per count Corporation; \$25,000 per count Individuals

Who are OHS Inspectors and what is their purpose?



- **Inspectors & Officers are appointed to administer the *OHSA***
 - Educate workplace parties about their responsibilities under the *OHSA*, promote continuous improvement of workplace safety
 - Powers to inspect workplaces, investigate offences are derived from the *OHSA* and *Provincial Offences Act*, if applicable
 - Can be compelled to testify as a witness in *OHSA* prosecution, by either the Crown or the accused

When do OHS Inspectors have the right to attend your workplace?



- **May enter the workplace at any time, with few exceptions, however, they are most likely to enter because:**
 - A worker has filed a complaint with the Regulator regarding working conditions;
 - Receipt of an injury or incident report from the employer; or
 - The Inspector is conducting a random inspection.

What powers does an OHS Inspector have when entering a workplace?



Powers of Inspection

- Take up or use machinery, materials, biological, chemical or physical agents
- Conduct or require employer to conduct health and safety testing
- Require production of drawings, specifications, licences, documents and reports, and to inspect, examine, copy and remove same
- Be accompanied and assisted by persons with professional knowledge
- Take photographs and video

What powers does an OHS Inspector have when entering a workplace?



(cont'd)

- Make inquiries of any person separate and apart from another person
- Require equipment or machinery to be tested by professional engineer
- Require report bearing seal of professional engineer regarding safety of equipment, machinery, and facilities

What powers does an OHS Inspector have when entering a workplace?



(cont'd)

- Require report regarding evaluation conducted by personnel with professional knowledge of biological, chemical, or physical agents
- Require production of training materials for workers or supervisors

What rights do individuals and employers have during an investigation?



- **Rights under the *Charter of Rights and Freedoms* for persons under Investigation:**
 - Right to retain and instruct legal counsel
 - Freedom from unreasonable search and seizure
 - Freedom from unlawful detention
 - Right of an individual “suspect” to remain silent

What is the role of counsel during an investigation?



Role of Counsel During an Investigation

- Prepare, and if permitted be present during Interviews
- Assist organization and individual to comply with the *OHSA* and avoid self-incrimination or waiver of legal rights
- Intermediary with Inspector
- Ensure that sufficient evidence, jurisdiction exists to issue Orders under *OHSA*
- *R. v. Horner* – no absolute right to have a lawyer present during witness interview.

Orders and the Right to Appeal



- Inspector's Orders are based on an alleged contravention of the *OHSA* and regulations, Code etc.
- Orders may be an indication of likelihood of charges to follow

Orders & the Right to Appeal



- Who can appeal?
 - employer, constructor, licensee, owner, worker, or trade union
- Why appeal?
 - because aggrieved by inspector's Order or decision, or refusal to make Order or decision

Orders & the Right to Appeal



- Must commence appeal within specified time periods (e.g. Ontario – 30 days)
- Method of commencing appeal varies with statute and province/territory
- Must comply with Order pending appeal unless suspension granted
- Legal counsel recommended to address appeal of Orders

Orders & the Right to Appeal



- Outcome of Appeal:
 - Suspend order pending appeal
 - Substitute findings
 - Rescind order
 - Affirm order
 - Make new order

General Guidelines for Dealing with Inspectors



- Be Polite and Respectful
- Remember it is the Officer that puts forward the Recommendation for a Prosecution
- The attitude and cooperation of a party are factors that will be considered by the Crown when deciding whether to proceed with a prosecution
- A poor attitude may result in charges against you personally as well as your employer
- During inspection do not agree or disagree with Inspector as this may constitute an admission

Inspector Misconduct



- Inspectors have a great deal of power under the *OHSA*
- **Joseph Ah-Hone**, MOL Inspector, Toronto, offered to give a “clean” inspector report in exchange for money: He was charged with:
 - 1) Breach of Trust
 - 2) Accepting a Benefit from Person Having Dealings with Government
 - 3) Extortion

Due Diligence



- Legal defence to *OHSA* charges
- An effective occupational health and safety management system

Due Diligence



- Legal definition - Two Branches:
 - *R. v. City of Sault Ste. Marie* (1978): “The defence will be available if the accused [1] reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or [2] if he took all reasonable steps to avoid the particular event.”

Due Diligence



- Application of the Second Branch:
 - *R. v. City of Sault Ste. Marie* (1978): “...[T]he question will be...whether the accused establishes all reasonable care by [1] establishing a proper system to prevent commission of the offence and [2] by taking reasonable steps to ensure the effective operation of the system.

Offence of OHS Criminal Negligence



- Enforced and prosecuted separately from OHS legislation
- Broad political and public support for bill
- Royal Assent given - November 7, 2003
- In force since March 31, 2004
- Police getting more involved and laying more charges than ever

OHS Duty in Criminal Code



- OHS legal duty – s. 217.1:
 - “Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task”.

OHS Criminal Negligence for Individuals



OHS Criminal Negligence ...

is established where the individual, in undertaking to direct how another person does work, [1] contravenes his or her duty to take “reasonable steps” to prevent bodily harm, and [2] shows wanton or reckless disregard for the lives or safety of others

OHS Criminal Negligence for Individuals



- Penalties for criminal negligence:
 - Injury - 10 years in prison
 - Death - life imprisonment

OHS Criminal Negligence for Organizations



- If acting within the scope of their authority ...
 - 1. One or more **representatives** commits the offence of OHS criminal negligence
 - and -
 - 2. **Senior officer** departs markedly from the standard of care that could reasonably be expected to prevent a representative from committing the offence

OHS Criminal Negligence for Organizations



- Penalties for criminal negligence:
 - \$ UNLIMITED
 - Non-tax deductible

R. v. Metron Construction & Swartz



- Facts:
 - 4 workers died when the swing stage they were using to repair balconies at a Kipling Ave. apartment building came apart, leaving them to fall 13 stories. A 5th worker was critically injured
 - 61 *OHSA* charges against Metron, the company supervisor, and scaffold supplier, Swing “N” Scaff were also laid by the Ministry of Labour
 - Joel Swartz (President) and Metron Construction Inc. each charged with 4 counts of criminal negligence causing death and 1 count of criminal negligence causing bodily harm

R. v. Metron Construction & Swartz



- June 2012 – Guilty Plea
- Fines were imposed on Metron Construction and its President, Joel Swartz following guilty pleas by both parties.
 - \$90,000 plus 22,500 victim surcharge for 4 convictions under the *OHSA* for Swartz
 - \$200,000 for Metron (Crown sought \$1M)
 - Court of Appeal increased fine to \$750,000
 - Reasons include employer’s failure to prevent worker drug use

Project Manager – V. Kazenelson



- Facts:

- June 2015 – Project Manager Vadim Kazenelson convicted of 4 counts of criminal negligence causing death & 1 count of criminal negligence causing bodily harm
- January 2016 - 3½ years in prison for each count (served concurrently) - appealing conviction



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STEPS to *OHSLAW* Due Diligence:

- PRIORITIZE SAFETY by senior management
- RISK identification and assessment
- ELIMINATE or control workplace hazards
- VERIFY OHS programs and procedures
- ENGAGE managers and workers in Training
- NOTE and document OHS program compliance
- TOTAL OHS management system auditing



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