
Occupational Health and Safety: Prosecution and Due Diligence

Niagara Construction Association

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Agenda

■ Prosecution

- Charges and Penalties
- Disclosure
- Defences and Guilty Pleas
- Trial and Sentencing

■ Due Diligence

- Defining “due diligence”
- Record Keeping
- Discipline
- How to Deal with Subcontractors

PROSECUTION



Circumstances that can Lead to a Charge Under the OHSA

- Violation is discovered during accident investigation
- Failure to comply with an Order
- Failure to comply with other requirement under OHSA or Regulations (e.g. failure to comply with accident reporting requirements)
- Crown must have “reasonable prospect of conviction”

Limitation Periods

- Charges under Part I of the *OHS*

- A Crown has 30 days to lay a charge

- Charges under Part III of the *OHS*

- Currently 1 year

- Effective July 1, 2022, Crown has 2 years to lay a charge

Common Charges

- Failure to comply with specific requirement in regulation
(e.g. Reg. 213/91)
- Lack of instruction and/or training by an employer and supervisor(s)
- Failure to take all reasonable precautions for the safety of a worker

Charging Trends

- Multiple (sometimes overlapping) charges arising out of same factual circumstances
- Charges against multiple workplace parties
 - Supervisors
 - Directors/Officers

Penalties on Conviction

- Under Part I of the *OHSA* - Set fine amount
- Under Part III of the *OHSA* (*effective July 1, 2022*):
 - Individual
 - \$500,000 plus 12 months in jail non-Director (increase)
 - \$1,500,000 plus 12 months in jail for Director (new)
 - Corporation \$1,500,000
 - Other prescribed penalty (new)

Per charge, Plus 25% victim fine surcharge

Alternatives to Charges

- An inspector can:
 - Issue an order for an employer to comply
 - *Forthwith* (*i.e.*, before inspector leaves)
 - *Time-based* (*i.e.*, 10 days to comply)
 - *Stop use/stop work order* (until remedied)
 - Speak to a worker, supervisor or employer about actions required to ensure compliance

What to do After Receiving an Order

- Review terms of the Order
- Consult with legal counsel
 - Determine whether wish to appeal Order
 - 30 days to appeal to OLRB
 - If no appeal, submit notice of compliance to Inspector at time of compliance
- Note that Order(s) following critical injury often give clues about potential later charges

What to do After Receiving a Charge (Summons)

- Retain/advise legal counsel
- Determine if any individuals were also charged
- Consider separate representation for individuals charged
- Gather documents/information for counsel

Requesting Disclosure

- Counsel will request disclosure
- The Crown is required to disclose all records in its “possession or control”
 - Includes making reasonable inquiries of other Crown agencies/departments (*e.g.*, police, paramedics, *etc.*)
- Counsel will ask crown for additional disclosure if required (*e.g.*, if a document is missing from initial disclosure, police records if not provided, *etc.*)

Reviewing Disclosure

- Depending on nature of charges, disclosure review can be a lengthy process
- As part of disclosure review, Counsel will
 - Consider if the correct entity been charged
 - Determine whether the charges were laid within the limitation period
 - Analyze the charges and assess the crown's evidence in light of the factual circumstances
 - Determine if expert evidence needed
 - Consider witnesses and potential defences
 - Etc.

Defending Against a Charge

- Most offences under the OHSA are “strict liability” offences
- Prosecutor must prove beyond a reasonable doubt that the defendant committed the act subject to the charge
- Forms of evidence
 - Witness testimony
 - Documents
 - Physical evidence
 - Expert evidence

Defending Against a Charge

■ “Due Diligence” Defence

- Accused took all reasonable care to avoid the specific event
- Accused proves belief in mistaken facts that if true would render act or omission innocent

■ “Officially Induced Error” Defence

- Government contributed to course of action
 - Not an officially induced error to say an inspector previously inspected and didn’t issue an order

Judicial Pre-trial

- Opportunity to:
 - Learn about the Crown's theory of case
 - Obtain further disclosure
 - Canvass justice's view of reasonable resolution
- Can request continued pre-trial if not appropriate to set trial date
- Crown may also propose a “Crown pre-trial” (meeting between counsel)

Guilty Plea?

- Balance:
 - Strength of potential defence
 - Cost and time re defending charges
 - Potential for more onerous sentence if imposed after
unsuccessful trial
- Requesting crown's position on resolution not an
indication of guilt

Aggravating Sentencing Factors

- Part of new Bill 88 amendments (July 1, 2022)
 - ❑ Death, serious injury or illness
 - ❑ Defendant was reckless
 - ❑ Defendant disregarded order of inspector
 - ❑ Previous conviction
 - ❑ Defendant lacks remorse
 - ❑ Element of blameworthiness in Defendant's conduct

Aggravating Factors (per Bill 88)

- Defendant motivated by desire to increase revenue/decrease costs
- After committing offence the defendant
 - Attempted to conceal offence from MLTSD
 - Failed to cooperate with MLTSD or other authorities
- Any other prescribed circumstance

Trial

- Where no resolution by end of pre-trial, matter will be scheduled for trial
- Trial is typically before Justice of Peace unless crown elects to have trial before Provincial Court Judge
- Crown must prove all elements of charge beyond a reasonable doubt at trial (no requirement to prove intent)
- If trial results in conviction, opportunity to make submissions regarding sentence

Principles of Sentencing

■ Guided by three principles:

1. Deterrence

- ❑ Fines and penalties must seek to deter future offences

2. Retribution

- ❑ Punishment must demonstrate moral condemnation by society

3. Rehabilitation/reform

- ❑ Working with the employer to ensure no future offence is committed (*e.g.*, improved safety standards)

Sentencing Considerations

In addition to “new” aggravating factors, the Court may also consider:

- The size of the company
- The scope of the economic activity
- The extent of actual and potential harm to public
- The maximum penalty prescribed by statute
- Worker error
- Past safety record
- Restitution attempts
- Genuine demonstration of remorse
- Correction of any health and safety issues
- Appearance in court in person
- Profit realized by the offence

Recent Example in the Courts

Ont. (MLTSD) v New Mex Canada Inc., 2019 ONCA 30

- Worker with known epilepsy had a seizure while working at heights. He fell to the ground and died. Worker was not equipped with fall protection equipment and had not received any health and safety training
- At trial, the company was fined \$250,000. The directors each received a 25-day jail sentence and probation for 12 months
- Ontario Court of Appeal held the sentence was “out of the range of sentences regularly imposed” and not necessary for deterrence
- Sentence was reduced to fines of \$50,000 for the company and \$15,000 per director

Recent Examples in the Courts

Ont. (MLTSD) v Lafarge Canada Inc., 2019 ONCJ 748

- Worker died after falling at a decommissioned cement plant
- Company plead guilty
- Parties filed a joint submission as to penalty in which the parties agreed to a \$400,000 fine for the company
- Company had prior convictions under the *OHSA* with fines totaling \$765,000
- Court noted maximum penalty would be appropriate for a future violation

Recent Examples in the Courts

Ont. (MLTSD) v Vixman Construction Inc., 2020 ONCJ 64

- Company was convicted of two charges after a worker died due to improper use of a fall restraint system
- Court rejected jointly proposed fine of \$125,000
- Court stated the “fine only” sentence did not achieve the core objective of the *OHSA*: “to prevent and mitigate harm in the workplace”
- In addition to the \$125,000 fine, Court imposed 18 months’ probation *and* required the company to:
 - Publically acknowledge the offence in an article to be published in a safety magazine and on the MLTSD website
 - Produce safety training video for the MLTSD website

DUE DILIGENCE



Defining Due Diligence

■ Due diligence has 2 branches:

1. Reasonable belief in mistaken set of facts

2. All reasonable precautions taken to avoid particular offence

□ Employer met level of judgment, care, prudence reasonably expected

□ Proof that all precautions, reasonable under the circumstances, were taken

What is Due Diligence?

- Due diligence is:
 - ❑ Written policies, practices & procedures
 - ❑ Training & education
 - ❑ Competent supervisors
 - ❑ Monitoring & enforcement
 - ❑ Discipline for safety violations
 - ❑ Accident investigation & reporting

Document, document, document!



What is Not Due Diligence?

- Due diligence is not:
 - ❑ Incomplete policies, inspections or records
 - ❑ Boilerplate policies and procedures
 - ❑ Inconsistency within an organization
 - ❑ Under enforcement of or failure to enforce safety rules
 - ❑ Missing records

Due Diligence in the Courts

Ontario v Quinton Steel, 2017 ONCA 1006

- Worker died after fall from unguarded platform
- No guard required under *OHSA* but employer charged under general duty clause and for not providing sufficient employee training
- Trial judge dismissed charges because no violation of specific *OHSA* requirement
- Court of Appeal found employer guilty under general duty clause – legislation can't foresee everything!

Record Keeping

- Documents on site:
 - ❑ Policies and procedures
 - ❑ Subcontractor sign-ins / Attendance lists
 - ❑ Training materials
 - ❑ “Tool box talk” minutes
 - ❑ Discipline records
 - ❑ Daily log book



Record Keeping



- Maintain records of:
 - ❑ All orientation and training
 - ❑ Supervisor daily safety checks
 - ❑ Regular maintenance and safety inspections for all tools, equipment and vehicles
 - ❑ Joint Health and Safety Committee's monthly inspections
 - ❑ Notes and checklists from regular workplace and site inspections

Addressing Violations

- Document all violations
- REMEMBER: An employer must demonstrate something was done to *remedy* a violation
- Progressive discipline is typically the most appropriate response

Disciplining Employees for Violation of Health and Safety Policies

■ Types of discipline:

- Verbal (with record)
- Written
- Suspension
- Termination



■ Punishment must fit the crime

■ “Zero tolerance” does not mean termination in every instance

How to Deal with Subcontractors

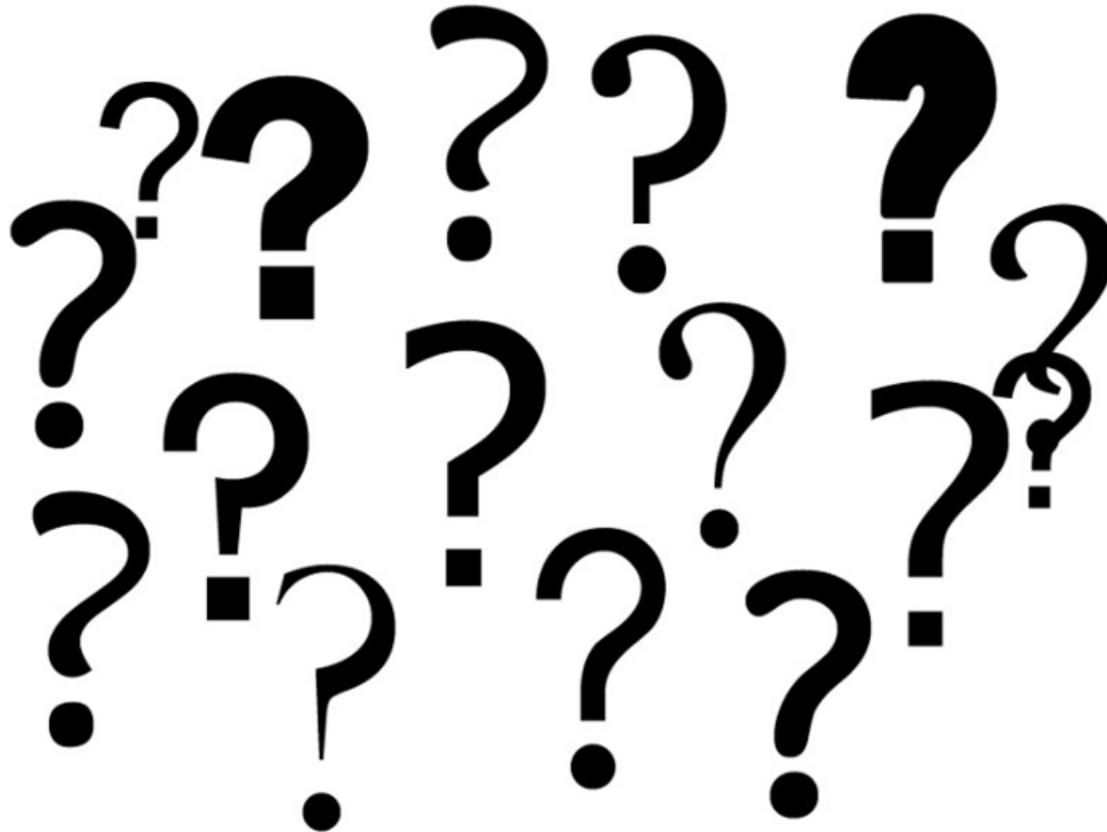
■ Best Practices:

- ❑ Provide policies and require sign off
- ❑ Collect subcontractors' policies and require sign offs
- ❑ Obtain list of anticipated workers
- ❑ Inspect/copy training cards
- ❑ Collect “tool-box talk” minutes
- ❑ Conduct regular audits
- ❑ Do not ignore or assume compliance with health and safety policies

Key Takeaways

- Frequent health and safety self-audits and inspections, written work instructions, training and strong supervision help prevent injuries and strengthen due diligence defence
- A company should contact legal counsel as soon as possible if a critical injury or other reportable incident occurs in the workplace
- There are many steps in prosecution process – be sure to work with experienced legal counsel!

Questions?





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