

**AN UPDATE ON THE
CURRENT DEVELOPMENTS UNDER THE
OCCUPATIONAL HEALTH AND SAFETY ACT**

Robert W. England – Miller Thomson LLP

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TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	THE NATURE OF REGULATORY OFFENCES	1
C.	INTERPRETATION OF THE OHSA.....	4
D.	PROOF OF THE FACTUAL ELEMENTS IN STRICT LIABILITY OFFENCES.....	5
	(a) Standard of Proof	5
	(b) Proof of the Charge Particularized	6
E.	DEFENCES	10
	(a) Officially Induced Error	10
	(b) Due Diligence.....	11
	(i) Origins of Due Diligence.....	11
	(ii) Mistake of Fact	12
	(iii) All Reasonable Precautions.....	14
	a. General	14
	b. The Requirement that Due Diligence be Due Diligence with Respect to the Specific Charge.....	14
	c. Determining What Standard of Care is Required to Establish Due Diligence	15
	d. The Foreseeability of Harm.....	18
	e. Worker Error or Negligence and Employer or Constructor Due Diligence	19
	f. Evidence of Remedial Measures	24
	g. Compliance with Industry Standards	25
	h. Failure to Comply with Ministry of Labour Orders	26
	i. Financial Inability to Comply	26
F.	MINISTRY OF LABOUR ATTENDANCES AT A WORKPLACE OR PROJECT	26
	(a) Types	28
	(b) Inspections.....	28
	(c) Consultations	28
	(d) Investigations	29
	(e) Orders	30
G.	COMPLIANCE INSPECTIONS	30
	(a) Compliance Inspections and Penal Investigations	30
	(b) Powers of Inspector Conducting Compliance Inspection	30
	(c) Obligation to Co-operate and Assist Inspector Conducting Compliance Inspection.....	31
	(d) No Necessity for Prior Judicial Authorization	31
	(e) Requirement to Provide Documentation	32
	(f) Requirement to Answer Questions of Inspector	32

H.	INVESTIGATIONS TO DETERMINE PENAL LIABILITY	33
I.	THE CONSEQUENCES OF DETERMINING THAT THE INVESTIGATION IS TO DETERMINE PENAL LIABILITY	35
J.	EXERCISE OF POWERS DURING INVESTIGATION TO DETERMINE PENAL LIABILITY	36
K.	PRACTICAL ADVICE IN DEALING WITH THE MOL	37
	(a) Due Diligence.....	38
	(b) Steps Prior to a MOL Inspection or Investigation.....	38
	(c) Dealing with the Inspector	40
	(d) Warrants	41
L.	CONCLUSION.....	42

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A. INTRODUCTION

It is axiomatic that the *Occupational Health and Safety Act* (“OHSA”) is a public welfare statute, a breach of which is almost always a strict liability offence.¹ It is my hope, in this paper, to canvas how the public policy interests served by the OHSA have increasingly led to a much different judicial approach to regulatory prosecutions than to criminal prosecutions and to offer some practical advice with respect to OHSA regulatory compliance.

Two initial caveats are in order.

First, all ten provinces², three territories³ and, for those under its legislative authority, the federal government⁴ have legislation that governs workplace health and safety. There are significant differences in the legislation from one jurisdiction to another. That which follows is based upon the Ontario OHSA although, obviously, I would hope that some of the principles discussed in this paper will be of assistance to those who must deal with those other statutory regimes.

Second, that which follows is not intended to be an overview of the OHSA. My goal is much more modest - to simply touch upon current issues that might, because they illustrate the increasingly liberal judicial interpretation of the OHSA, be of interest to practitioners.

B. THE NATURE OF REGULATORY OFFENCES

As established in *R. v. Sault Ste. Marie*⁵ public welfare offences, as distinct from criminal offences, are of two kinds: absolute liability offences and strict liability offences. In a strict

¹ Certain sections of the OHSA are worded such that the offence of breaching those sections would be a traditional *mens rea* offence: see for example section 62(3) and 62(5); see *R. v. Sault Ste. Marie (City)* (1978) 85 D.L.R. (3d) 161 (S.C.C.) at page 182; *R. v. Timminco Ltd.* (2001) 54 O.R. (3d) 21 (Ont. C.A.) at page 26

² Alberta: *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2 (“Alberta OHSA”)
British Columbia: *Workers Compensation Act*, R.S.B.C. 1996, Chapter 492 (“BC WCA”)
Manitoba: *Workplace Safety and Health Act*, C.C.S.M. c. W210 (“Manitoba WSHA”)
Ontario: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“Ont. OHSA”)
New Brunswick: *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2 (“NB OHSA”)
Newfoundland: *Occupational Health and Safety Act*, R.S.N.L. 1990, c. O-3 (“NFLD OHSA”)
Nova Scotia: *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 (“NS OHSA”)
Quebec: *An Act Respecting Occupational Health and Safety*, R.S.Q., c. S-2.1 (“Quebec OHSA”)
Prince Edward Island: *Occupational Health and Safety Act*, R.S.P.E.I. 1988, c. O-1.01 (“PEI OHSA”)
Saskatchewan: *Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1 (“Sask. OHSA”)

³ Northwest Territories: *Safety Act*, R.S.N.W.T. 1988, c. S-1
Nunavut: *Safety Act*, R.S.N.W.T. 1988, c. S-1
Yukon Territories: *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159

⁴ *Canada Labour Code*, R.S.C. 1985, c. L-2, as amended, Part II

⁵ *R. v. Sault Ste. Marie (City)* (1978) 85 D.L.R. (3d) 161 (S.C.C.)

liability offence the Crown need only prove beyond a reasonable doubt the factual elements that constitute the offence. However, it remains open to accused to escape conviction if it can establish, on a balance of probabilities, that the prohibited act or omission occurred despite the accused having taken all reasonable care. This due diligence defence was described by Dickson J. as follows:

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*: the doing of a prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.⁶

Strict liability represents a compromise which acknowledges the importance and essential objectives of regulatory offences while at the same time mitigating the harshness of absolute liability which was found, in *R. v. Sault Ste. Marie*, to violate the fundamental principles of penal liability.

The rationale for the distinction between criminal and regulatory offences is said to flow from the fact that criminal liability is meant to constrain human behaviour at its limits and to punish conduct that is morally repugnant whereas regulatory offences prohibit conduct that is not inherently wrongful but needs be regulated in order to protect society:

While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.⁷

R. v. Sault Ste. Marie was, of course, decided prior to the Charter. The principles of fundamental justice referred to in Section 7 of the Charter prohibit the imposition of penal liability and punishment without proof of fault. Fault was thus elevated from a presumed element of an offence in *Sault Ste. Marie* to a constitutionally required element under the Charter. The degree of fault that is required will vary with the nature of the offence and the penalties available upon conviction. Where, however, imprisonment is available as a penalty absolute liability cannot be imposed since it removes the fault element entirely and, in doing so, permits the punishment of the morally innocent.⁸

The same public policy underpinning that led the Supreme Court of Canada in *Sault Ste. Marie* to recognize the necessity for there to be differential treatment of regulatory offences for prosecution purposes forms the basis for the differential treatment of regulatory offences for Charter purposes as well. The Charter is to be interpreted contextually as mandated by the

⁶ *R. v. Sault Ste. Marie*, supra, at page 181

⁷ *R. v. Wholesale Travel Group Inc.* (1991) 84 D.L.R. (4th) 161 (S.C.C.), per Cory J. at page 206

⁸ *R. v. Wholesale Travel Group Inc.*, ibid, per Cory J. at page 219

Supreme Court of Canada in the *Big M Drug Mart*⁹, *Edmonton Journal*¹⁰ and *Keegstra*¹¹ cases. To quote Mr. Justice Cory:

In the present case, the contextual approach requires that regulatory and criminal offences be treated differently for the purposes of Charter review. Before proceeding to the substantive analysis, however, it is necessary to consider the justifications for differential treatment. They are twofold: the first relates to the distinctive nature of regulatory activity, while the second acknowledges the fundamental need to protect the vulnerable through regulatory legislation.¹²

As to the first point, the argument is that the regulated actor, by having chosen to enter into the field that is regulated, makes a conscious decision to enter into that field of activity and, accordingly, has implicitly accepted the regulatory terms and conditions under which that activity operates. Furthermore, those persons who choose to enter the regulated field of activity are best positioned to control the harm that may result and therefore should be held to account. Such terms and conditions include different Charter protections than would be available in a criminal matter.¹³ This is said to be the licensing argument or justification. Second, the regulatory framework is designed to protect the vulnerable and the regulatory measures in place to protect the vulnerable constitute a further justification for differential treatment, for Charter purposes, of regulatory and criminal offences.¹⁴ To quote Mr. Justice Cory:

It was regulatory legislation with its enforcement provisions which brought to an end the shameful situation that existed in mines, factories and workshops in the 19th century. The differential treatment of regulatory offences is justified by their common goal of protecting the vulnerable.¹⁵

It follows, then, that regulatory offences and crimes embody different concepts of fault:

The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.¹⁶

Negligence measures the conduct of the accused on the basis of an objective standard irrespective of the accused's subjective mental state. Where negligence is the basis of liability, as it is in an OHSa prosecution, the question is not what the accused intended but rather whether the accused exercised reasonable care.¹⁷ In regulatory offences a conviction will result if the accused has failed to meet the standard of care required. The question is not whether the accused has exercised some care but whether the degree of care exercised was sufficient to meet the

⁹ (1985), 18 C.C.C. (3d) 385 (S.C.C.)

¹⁰ (1989), 64 D.L.R. (4th) 577 (S.C.C.)

¹¹ (1990), 61 C.C.C. (3d) 1 (S.C.C.)

¹² *R. v. Wholesale Travel Group Inc.* (1991) 84 D.L.R. (4th) 161 per Cory J. at page 212

¹³ *R. v. Wholesale Travel Group Inc.*, *ibid*, at pages 213-215

¹⁴ *R. v. Wholesale Travel Group Inc.*, *ibid*, at pages 216-217 and at page 221

¹⁵ *R. v. Wholesale Travel Group Inc.*, *ibid*, at page 217

¹⁶ *R. v. Wholesale Travel Group Inc.*, *ibid*, at page 206

¹⁷ *R. v. Wholesale Travel Group Inc.*, *ibid*, at page 220

standard imposed. The burden is upon the accused to show on a balance of probabilities that it took reasonable precautions to avoid the harm which actually resulted.¹⁸

C. INTERPRETATION OF THE OHSA

As stated in a leading textbook on criminal law “(t)he prohibited act, or actus reus, of an offence is a matter of statutory interpretation.”¹⁹ Traditionally, the criminal law was to be strictly construed to the benefit of the accused.²⁰ That approach is, as noted by Prof. Roach, “in some tension with modern purposive approaches to statutory interpretation.”²¹ That tension is resolved in Criminal Code matters, according to Prof. Roach, who states:

The purposive approach to statutory interpretation has been reconciled with the doctrine of strict construction by holding that the preference for the interpretation that most favours the accused applies only if, after consulting the purposes of the statute, reasonable ambiguities remain in its meaning. Thus a criminal law should be given a purposive reading and the doctrine of strict construction only applied if there are still reasonable ambiguities after such a broad interpretation.²²

There is now, however, no doubt but that the purposive approach is to be used when interpreting the OHSA. The OHSA is to be interpreted in a manner consistent with its broad purpose.²³ As stated by the Court of Appeal a narrow, technical reading of the provisions of the OHSA and the regulations to the OHSA creating an offence is to be avoided:

The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature’s public welfare objectives are to be avoided.²⁴

It is my contention that there has been, over the last few years, considerable jurisprudence evidencing the application of this liberal approach to the interpretation of the OHSA. That approach can be seen in a number of ways, including in cases dealing with amendments to Informations charging OHSA offences, to proof of the factual elements of such offences and in sentencing. Furthermore, at the same time and for the same public policy reasons, our courts, in my view at least, are becoming much more demanding in determining what constitutes due diligence.

¹⁸ *R. v. Wholesale Travel Group Inc.*, *ibid*, at page 224

¹⁹ Roach, *Criminal Law*, (2004) 3rd edition, page 73

²⁰ *Marcott v. Canada (Deputy A.G.)* (1976), 19 C.C.C. (2d) 257, at page 262 (S.C.C.)

²¹ Roach, *Criminal Law*, *ibid*, page 76

²² Roach, *Criminal Law*, *ibid*, page 77

²³ *R. v. Timminco* (2001) 54 O.R. (3d) 21 (Ont. C.A.)

²⁴ *Ontario (Ministry of Labour) v. Hamilton (City)* (2002) 58 O.R. (3d) 37 (Ont. C.A.), at page 43; *R. v. Timminco Ltd.* (2001) 54 O.R. (3d) 21 (Ont. C.A.), at page 27

D. PROOF OF THE FACTUAL ELEMENTS IN STRICT LIABILITY OFFENCES

(a) Standard of Proof

As noted above, for the most part the OHSA creates strict liability offences.²⁵ In such strict liability prosecutions the burden is on the Crown to prove the actus reus (or factual) elements of the offence beyond a reasonable doubt.²⁶

Notwithstanding the differential treatment of criminal and regulatory offences, the burden remains upon the Crown to prove the factual elements of the offence beyond a reasonable doubt. As stated by Cory J. in *Wholesale Travel*:

I wish to emphasise, however, that the difference in the scope and meaning of section 11(d) in the regulatory context does not imply that the presumption of innocence is meaningless for a regulated accused. The Crown must still prove the actus reus of regulatory offences beyond a reasonable doubt. Thus, the Crown must prove that the accused polluted the river, sold the adulterated food or published a false advertisement.²⁷

Proof beyond a reasonable doubt is:

- (a) not a doubt based upon sympathy or prejudice;
- (b) rather, it is based upon reason and common sense;
- (c) it is logically connected to the evidence or absence of evidence;
- (d) it does not involve proof to an absolute certainty;
- (e) it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- (f) more is required than proof that the accused is probably guilty.²⁸

Merely establishing on a balance of probabilities that it is more probable than not that the accused committed the offence does not suffice to meet the obligation on the Crown to prove the factual elements of the offence beyond a reasonable doubt.²⁹

It is made clear by the Supreme Court of Canada, that the burden of proof placed upon the Crown lies much closer to absolute certainty than to a balance of probabilities with the result that

²⁵ Certain sections of the OHSA are worded such that the offence of breaching those sections would be a traditional *mens rea* offence: see for example sections 62(3) and 62(5); see *R. v. Sault Ste. Marie (City)*, supra, at page 182; *R. v. Timminco Ltd.*, supra, at page 26. This is not to say that the Crown could not by its particularization of a charge, create a *mens rea* offence. Such would be the case if, for example, the Crown alleged that an accused knowingly committed an offence. Furthermore, certain sections of the OHSA would, if breached, clearly be *mens rea* offences.

²⁶ *R. v. Sault Ste. Marie (City)* (1978) 40 C.C.C. (2d) 353 (S.C.C.) at page 373; *R. v. Rio Algom Ltd.* (1988) 46 C.C.C. (3d) 242 (Ont. C.A.) at page 247.

²⁷ *R. v. Wholesale Travel Group Inc.*, supra, per Cory J. at page 227

²⁸ *R. v. Lifchus* (1997) 118 C.C.C. (3d) 1 at page 13

²⁹ *R. v. Snap-On Tools of Canada Ltd.* [2001] O.J. No. 5221 at para.20

if a court concludes that an accused is probably guilty of an offence, then it is obliged to acquit because such a conclusion does not satisfy the criminal standard of proof or, it is submitted, the regulatory standard of proof.³⁰

(b) Proof of the Charge Particularized

The factual element or elements that need be proven beyond a reasonable doubt are those particularized in the Information. In *R. v. Rooke and De Vries*³¹ the Supreme Court of Canada affirmed that it is the obligation of the Crown to prove the offence as pleaded:

I am of the view that the appeal must be dismissed. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. R.*, [1986] 1 S.C.R. 31 at 37, [1986] 2 W.W.R. 385, 42 Alta. L.R. (2d) 257, 50 C.R. (3d) 179, 24 C.C.C. (3d) 257, 25 D.L.R. (4th) 560, 68 A.R. 241, 64 N.R. 189, this court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in the case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit “the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial”: *R. v. Côté*, p1978] 1 S.C.R. 8 at 13, [1977] 2 W.W.R. 174, 40 C.R.N.S. 308, 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752, 13 N.R. 271 [Sask.].³²

The same point was made by the Supreme Court of Canada more recently in *R. v. Saunders* wherein McLaughlin J. held:

It is a fundamental principal of criminal law that the offence, as particularized in the charge, must be proved...The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove that the offence thus particularized. To permit the Crown to prove some other offence charaterized by different particulars would be to undermine the purpose of providing particulars, which is to permit “the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial...”³³

An illustration of this point can be found in a prosecution, some years ago, of Domtar. In that case a court refused to convict an accused for failure to lock-out equipment when the charges against that accused were that it had failed to provide adequate guarding. The trial court stating:

The Crown submits that count two, an alleged violation of Section 25(2)(h) of the *Occupational Health and Safety Act*, is a section which involves lockout and guarding and that, even in the event the guarding count fails, it would be open to me to convict on count two as a result of the evidence with respect to Edwin Skorlatowski working in that area with the conveyor running. Clearly, the evidence does show that the Conveyor #365 was not locked out and was running when Edwin Skorlatowski died.

³⁰ *R. v. Starr* [2000] 2 S.C.R. 144 at page 262

³¹ (1990) 56 C.C.C. (3d) 220

³² *R. v. Rooke and De Vries*, supra., at page 223

³³ *R. v. Saunders* [1990] 1 S.C.R. 1020, per McLaughlin J. at page 1023

Defence counsel made no submissions to me on this point, except to say that you can't do this. I must agree. A defendant is entitled to make full answer and defence to the charge it must meet. It is, therefore, entitled to full disclosure and is entitled to rely upon the offence, as particularized, to determine the case it must meet. In this situation, as particularized, the Defendant clearly faced a prosecution with respect to a guarding matter and it has addressed its concerns towards a guarding issue. Considerations which might establish that the Defendant acted with due diligence, with respect to guarding, might not even be relevant with respect to lockout procedures. Given the manner in which count two is particularized, it, therefore, also fails, and the Defendant is found not guilty on this count as well.³⁴

While even today the result in *R. v. Domtar* might be the same, it is clear that since then, the purposive approach to interpreting the OHS Act has resulted in courts taking an increasingly liberal view of what constitutes the factual elements of the offence. This is evidenced, in my view, in three Court of Appeal cases: *R. v. Timminco Ltd., Ontario (Ministry of Labour) v. Hamilton (City)* and *R. v. Dofasco*.

First, in *R. v. Timminco Ltd.*³⁵ the defendant Timminco had been charged with a breach of that section of a regulation to the OHS Act that required equipment with an exposed moving part "that may endanger the safety of any person, to be guarded." At a trial, the defendant was acquitted because the trial judge found that the Crown had failed to prove the factual elements of the offence because it did not lead evidence of apparent danger. That finding was reversed on appeal and the reversal was upheld by the Court of Appeal. The Court of Appeal, applying the purposive approach to the interpretation to the OHS Act, held that although the Crown must establish that the exposed moving part may endanger a worker before there can be a conviction, it was not required as part of the factual element of the offence to show that the employer in fact knew of the danger.

Second, in *Ontario (Ministry of Labour) v. Hamilton (City)*³⁶ the Court of Appeal allowed a Crown appeal in a case where the respondent employer had been charged with three breaches of the OHS Act. Put shortly, the Crown alleged that the employer had failed to provide a signaller as required by section 104 of the Construction Regulation. In fact, there was a signaller and it was a signaller who was killed when hit by a reversing piece of equipment. The trial judge had rejected the Crown argument that a signaller in section 104 means a signaller performing the duties defined by section 106. It held that section 106 created a different offence and that the Crown, having laid the charge under section 104, could not seek a conviction on the basis of a departure from the requirements of section 106. The Court of Appeal held otherwise and stated that a narrow, technical reading of the provisions of the OHS Act and the regulations to the OHS Act creating an offence is to be avoided:

The OHS Act is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or

³⁴ *R. v. Domtar Incorporated* (May 27, 1999) Justice of the Peace Daub, at page 16

³⁵ *R. v. Timminco*, supra

³⁶ *Ontario (Ministry of Labour) v. Hamilton (City)*, (2002) 58 O.R. (3d) 37 (Ont. C.A.)

technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.³⁷

The Court of Appeal specifically referred to the *Saunders* case, just previously mentioned in this paper, and held that the principle expressed in that case - that the Crown must prove the charge as particularized - was not applicable given the relationship between subsections 104 and 106 of the Construction Regulation. Put shortly, the Court of Appeal held that the two sections were to be read together as creating an offence and that such an interpretation did not impair the right of an accused to make full answer and defence.

Third, the purposive approach was again resorted to by the Court of Appeal in *R. v. Dofasco*.³⁸ In that case, Dofasco had been charged with five breaches of the OHSA two of which were withdrawn at trial. On the count at issue for appeal purposes - that Dofasco had failed to ensure that a pinch point was guarded - the trial judge concluded that although the pinch point was not guarded, an acquittal should nevertheless be entered because Dofasco had led evidence of procedures and enhancements to the process in question which procedures precluded the need for a guard.

The Court of Appeal allowed the Crown appeal. It held that, as a matter of statutory interpretation, the regulatory provision required a physical guard and the procedures in place by Dofasco did not meet the requirements of that regulatory provision. Employing the purposive approach to statutory interpretation, the Court of Appeal rejected Dofasco's argument that the regulatory provision in question could be interpreted in a fashion that would have allowed Dofasco, in lieu of a guard, to have an operating control in place of the guard or, alternatively, that a push bar device by which a worker carried out the process in question at a distance could constitute compliance. The Court of Appeal stated "...the purpose of guarding under the regulation is to prevent advertent and inadvertent conduct on the part of the employee from resulting in injury to the worker and, in particular, to take individual discretion, judgement and degree of concentration and capability out of the equation." It therefore interpreted the provisions in question in a manner that necessitated guarding.

Furthermore that same purposive approach led the Court of Appeal to hold that employee misconduct was simply irrelevant to the factual element of the offence. Put another way, the employer either had an obligation to provide a guard or it did not. In the *Dofasco* case the Court of Appeal found that it had such an obligation and the absence of a guard meant it was negligent. To that question worker misconduct was irrelevant.

An illustration of that purposive approach can be seen in a recent decision of Justice Griffen in a prosecution of Goodyear Canada Inc. ("Goodyear Canada"). In that case Goodyear Canada had been charged with having failed to ensure that a worker locked-out a piece of machinery as required by section 76(a) of Regulation 851 to the OHSA. That section provides:

Where the starting of a machine, transmission machinery, device or thing may endanger the safety of a worker,

³⁷ *Ontario (Ministry of Labour) v. Hamilton (City)*, supra, at page 43; *R. v. Timminco Ltd.* (2001) 54 O.R. (3d) 21 (Ont. C.A.), at page 27

³⁸ *R. v. Dofasco*, 2007 O.N.C.A 769

- (a) control switches or other control mechanisms shall be locked out; and,
- (b) other effective precautions necessary to prevent any starting shall be taken.

On the facts of that case it was clear that a piece of equipment was operating, that the rubber ply being processed by the equipment became entangled and that the worker in question, rather than locking out, was injured when she attempted to separate the pieces of ply that had become entangled. At the conclusion of the Crown's case, Goodyear Canada argued that the factual elements of the offence had not been made out because the equipment in question had at all times been running and it was not, on the facts, a case where a worker was "starting" the machine. Reliance was made by Goodyear Canada upon an earlier case, *R v. Proboard Ltd.*³⁹ in which the court in that case held, when considering the identical provision to that in issue in the *Goodyear Canada Inc.*⁴⁰ case, that the Crown had failed to prove the factual elements of the offence because, in that case, "...this machine had not been stopped; the progress of the auger had merely been impeded...this was not the starting of the machine...The machine was apparently working and running throughout. It was not a situation where lockout was necessary."⁴¹ Justice Griffen in *Goodyear Canada* rejected the "attractive" argument based upon the *Proboard* analysis. He did so in light of the Court of Appeal decisions in the *City of Hamilton* and *Timminco* cases.

A similar result occurred in the well known *Modern Niagara*⁴² case. In that case Modern Niagara had been contracted to install a supplementary cooling system in a mechanical room of an office tower. To ensure that the supplementary cooling system did not have leaks in it a nitrogen test was conducted. The test involved pressurizing the pipes with nitrogen. In due course the test would be concluded, the pipe would be depressurized and the cap removed. It turned out, when the workers started to remove the cap, the pipe turned out to be under pressure as a result of which the cap was blown off injuring a worker. One of the charges against Modern Niagara was that it failed to comply with the section of the Construction Regulation which required that "when a drum tank pipeline or other container is to be repaired or altered, (a) its internal pressure shall be adjusted to atmospheric pressure before any fastening is removed..."

Modern Niagara's "neat argument" was that applying and removing the leak test, which included capping the ends of the pipes and removing the caps, was an independent or mutually exclusive action and not a vital part of the installation of a new system. That argument was rejected by the Court as a narrow and technical interpretation of the regulatory section which was inconsistent with the need to interpret the OHS Act "generously", as mandated by the Court of Appeal in the *City of Hamilton*⁴³ case.

³⁹ *R v. Proboard v. Ltd.* (1990) 12 W.C.B. (2nd) 567

⁴⁰ *R. v. Goodyear Canada Inc.* (unreported, April 22, 2008)

⁴¹ *R v. Proboard*, supra, at pages 16 and 17

⁴² [2003] O.J. No. 3332

⁴³ *R. v. Modern Niagara Toronto Inc.* [2003] O.J. 3332

E. DEFENCES

(a) Officially Induced Error

The defence of “officially induced error” is available notwithstanding that the POA specifically bars as a defence a mistake of law.⁴⁴ The successful application of the “officially induced error” defence will lead to a judicial stay of proceedings rather than an acquittal.⁴⁵

The defence of “officially induced error” is available when an accused has reasonably relied upon the erroneous legal opinion or advice of a public official who is responsible for the administration or enforcement of a particular law. In order to successfully raise the defence, the accused must show that he relied on the erroneous legal opinion or advice of the official and that such reliance was reasonable. The reasonableness of the reliance will depend upon several factors including the efforts the accused made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice and the clarity, definitiveness and reasonableness of the advice given.⁴⁶

The Court of Appeal recently held in a case called *Maitland Valley Construction Authority v. Cranbrook Swine Inc.*⁴⁷ that there are five elements that must be satisfied in order for this defence to succeed.

In that case the Defendant Cranbrook retained the Defendant Landmark to build on Cranbrook’s property a liquid manure storage tank. Cranbrook and Landmark obtained building permits for the tank. It turned out that the permits were issued in error because the location of the tank was in violation of the *Conservation Authorities Act*. A stop work order was therefore issued and charges were laid. At trial the Defendants moved for a directed verdict. They succeeded on the basis that the Crown had failed to prove that the area in question was a “wetland” within the meaning of the requisite regulation. On appeal that finding was overturned but the Crown appeal nevertheless failed on account of the defence of officially induced error. On further appeal the Court of Appeal allowed the appeal and ordered a new trial and, as noted above, held that there were five conditions that need to be satisfied in order to make out the defence.

Those five elements that an accused needs to establish, on a balance of probabilities, to make out a mistake of fact defence are:

- (a) the accused must establish that it considered the legal consequences of its actions and sought legal advice;
- (b) the accused must establish that the legal advice was given by an appropriate individual;
- (c) the accused must establish that the legal advice was erroneous;

⁴⁴ POA, sec. 81

⁴⁵ *R v. Jorgenson* (1995) 102 C.C.C (3rd) 97 (SCC).

⁴⁶ *R v. Jorgenson*, supra; *Levis (City) v. Tetreault*; *Levis (City) v. 2629-4470 Quebec Inc.*, [2006] 1 S.C.R. 420

⁴⁷ (2002), 225 D.L.R. (4th) 455 (Ont. C.A.)

- (d) the accused must establish that it relied upon the erroneous advice; and,
- (e) the accused must establish that reliance upon the erroneous advice was reasonable.

In considering a due diligence defence, a court must consider the objective reasonableness not only of the advice but of the reliance upon that advice.⁴⁸

In the end, the success of a defence of officially induced error may turn, at least in part, on the relative disparity of sophistication as between the defendant who sought the advice and the official from who it was sought.⁴⁹ To be honest the defence is rarely made out.

(b) Due Diligence

(i) Origins of Due Diligence⁵⁰

The leading statement on the due diligence defence, and its effective origin in Canada, is *R. v. Sault Ste. Marie (City)*. In that case the accused was charged with discharging or causing to be discharged polluting substances into the water system. Dickson J., as he then was, used this context to give judicial recognition to that category of offences known as “strict liability” offences. Such offences were in addition to traditional criminal offences and, at the other end of the spectrum, absolute liability offences. As to strict liability offences, Dickson J. stated:

“Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. The offences may properly be called offences of strict liability.”⁵¹

R. v. Sault Ste. Marie effectively sets up two branches of the due diligence defence:

- (a) mistake of fact; and
- (b) all reasonable precautions.

It should be noted that the OHSA specifically provides, in certain circumstances, for a defence that the accused took every precaution reasonable in the circumstances.⁵² There is, however, no statutory provision for the first branch of the due diligence of a mistake of fact.

⁴⁸ *Levis (City) v. Tetreault*, supra, per LeBel

⁴⁹ *R v. Cancoil Thermal* (1988) 1 C.O.H.S.C. 169

⁵⁰ The due diligence standard is a mixed question of fact and law. *R. v. Goebel* [2003] A.J. No. 591, 2003 A.B.Q.B. 422 (Alta. Q.B.) per Slatter J. at para. 11

⁵¹ *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.) per Dickson J. at page 374

⁵² OHSA, s. 66(3)

At the outset, it should be noted that the Crown does not need to disprove due diligence beyond a reasonable doubt⁵³ or, for that matter, does not need to disprove it to any standard.

(ii) Mistake of Fact

The mistake of fact defence is available if the accused reasonably believed a mistaken set of facts which, if true, would render the prohibited act or omission innocent. There is a distinction between a mistake of fact and a mistake of law. Only the former constitutes a defence. It is not a defence to be mistaken as to the law.⁵⁴

The mistake of fact defence requires a consideration of both:

- (a) the belief of the accused which involves consideration as to his state of mind and whether or not he believed in a mistaken set of facts; and
- (b) whether or not such belief, if proven, was reasonable in all the circumstances.

Two Court of Appeal decisions illustrate the difficulty of making out the defence. In the *Rio Algom* case the accused operated a mine site at which there was a dump. Railcars were used to transport material along the rail tracks into the dump. A gate had been installed to prevent such railcars and workers from inadvertently going into the dump. Parallel to the track leading into the dump was a second track used for other purposes. As a result of damage to the gate, which damage was known to the employer, the gate developed an over-swing. A worker operating a locomotive on the bypass track inadvertently hit the gate which, due to its over-swing, swung into the path of the locomotive on the bypass track killing a worker. The Court of Appeal addressed whether or not the defence of mistake of fact would be available to the accused. In doing so it stated:

A defence to a strict liability offence put forward on the basis of a reasonable belief in a mistaken set of facts cannot prevail where an accused simply proves that he was mistaken in believing there was no danger of injury to any employee as a result of a failure to ensure equipment or protective devices were maintained in good condition or that every precaution reasonable in the circumstances was taken for the protection of a worker unless such failure or failures were based on a reasonable belief in a mistaken set of facts which, if true, would render the act or omission innocent. There was no evidence in this case that the respondent through its employees, servants, agents or officers had any belief in any mistaken set of facts. The facts were known to them. They simply failed to consider the potential to employees which might result from the correct facts which were known to them or were mistaken as to the harm which might be suffered by employees as a result of the facts concerning the existence of which there was no mistaken belief on the part of the respondent's supervisory personnel.⁵⁵

No evidence was led to suggest that the respondent reasonably believe that the gate was not in a state of disrepair or that it did not “over-swing” to the degree which would interfere with cars on the bypass track or that no cars would travel on the bypass track or

⁵³ *R. v. Wholesale Travel Group Inc.*, supra, per Cory J. at page 224

⁵⁴ *R. v. Cancoil Thermal Corp and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.) 298 at pp 301 and 304; *R. v. Dofasco*, 2007 O.N.C.A. 769

⁵⁵ *R. v. Rio Algom* (1988), 66 O.R. (2d) 674, 46 C.C.C. (3d) 242 at page 250

some other reasonable belief in a mistaken set of facts which would have resolved the respondent from blame.⁵⁶

The Ontario Court of Appeal again considered the mistake of fact defence in *R. v. London Excavators & Trucking Ltd.*⁵⁷ In that case, an excavating sub-contractor had been contracted to perform site grading. The general contractor had advised the sub-contractor that there were no services in the area to be excavated. The sub-contractor proceeded to carry out the excavation and at one point its back-hoe operator hit a concrete pad with the back-hoe. The general contractor's on-site supervisor advised the sub-contractor's employee that that concrete was part of the footing of an old building that had previously been exposed on the site. This was not factually correct. In fact, the concrete encased a hydro duct. Accordingly, when the back-hoe operator cut through the concrete pad there was an explosion. The Court of Appeal held that despite the sub-contractor's honestly held subjective belief that the general contractor had accurate information and had furnished accurate information to it (i.e. the mistaken set of facts), it was nevertheless not objectively reasonable for the sub-contractor's foreman and back-hoe operator to have accepted and acted upon that information without making further inquiries.

Specifically, the Court held that one of the factors to be considered in assessing the reasonableness of the reliance on the advice given by the general contractor was the gravity of the potential harm should that advice prove to have been wrong. The Court went on to point out that the sub-contractor had an obligation under the Construction Regulation to ensure that, prior to excavation, all services in or near the area to be excavated had been accurately located and marked. The Court held that it was not objectively reasonable for the sub-contractor to continue to rely on the advice of the general contractor when it knew that it had hit concrete in an area that the general contractor had pronounced to be safe. The Court held that the only reasonable course would have been to satisfy itself as to the safety of continued excavation. The Court held that it could have done so in any number of ways including insisting on seeing the site plan, a locate certificate or having ordered its own locates.

The mistake of fact defence did come up in a relatively recent case in which an employer was charged with having failed to ensure that every part of a project, including a temporary structure, was adequately braced to prevent movement. The sub-contractor had been retained to shore up the roof of a bingo hall to permit removal of concrete walls underneath that roof. In determining the scope of that work and, therefore, what would be the appropriate quotation, the principal of the sub-contractor briefly attended the site, visually examined the roof to be supported from inside the building and then inspected an architectural drawing. Neither the visual inspection nor the architectural drawing gave any indication that there was, in fact, a layer of concrete on the roof. The weight of that concrete resulted in a collapse of the roof when the interior wall was removed. It was only then that the existence of the concrete on the roof was discovered. The court accepted that the principal of the sub-contractor truly and honestly believed that the roof supports his company installed were adequate to support the load that he had observed and as set out in the architectural drawing. However, the court refused to accept the mistake of fact defence. It refused to do so because the sub-contractor:

⁵⁶ *R. v. Rio Algom*, supra, at page 680

⁵⁷ (2007) 40 O.R. (3d) 32

“...made no other inquiries of the nature of the composition of the roof or if the drawing truly represented the condition as it existed, notwithstanding that I am reasonably certain that such inquiries would have yielded no additional information. The point is he simply made no further inquiries. He simply relied upon the drawing.”⁵⁸

Lastly, there is an interesting issue related to the mistake of fact defence that is about to be addressed by the Court of Appeal. In the *Modern Niagara* case, the facts of which are discussed more fully later in this paper, a worker was injured when he was working on pipes that he thought to be depressurized. At trial the trial judge held that Modern Niagara’s project manager reasonably believed that the pipes had been depressurized and that, therefore, the mistake of fact defence had been made out. On appeal, that finding was reversed. The appellate court judge found that the trial judge had been in error in simply looking to the belief of the project manager that the pipes had been depressurized. Instead, Lane J. held that the court ought to have considered the beliefs and actions of all of the relevant workers and that, had that been done, the defence would not have been made out.⁵⁹ The case is now on appeal to the Court of Appeal.

(iii) All Reasonable Precautions

a. General

As noted above, the second breach of the due diligence defence established in *R. v. Sault Ste. Marie* is the defence available if the accused “...took all reasonable steps to avoid the particular event”.

As also noted above, the OHSA specifically provides for a due diligence defence based upon the accused having taken every precaution reasonable in the circumstances. However, section 66(3) of the OHSA limits the availability of that defence. It has been held that the due diligence defence afforded at common law is applicable to all strict liability prosecutions under the OHSA notwithstanding the more limited availability of that defence envisioned by section 66(3) of the OHSA.⁶⁰

b. The Requirement that Due Diligence be Due Diligence with Respect to the Specific Charge

Due diligence is not made out by simply acting reasonably in the abstract or taking care in a general sense. As stated by Tarnopolsky J.A.:

The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably.⁶¹

⁵⁸ *R. v. A.C. Metal Fabricating Ltd.* [2004] O.J. No. 1469

⁵⁹ *R. v. Modern Niagara* [2006] O.J. No. 3684

⁶⁰ *R. v. Bradsil* (1967) Ltd. (1994), 23 W.C.B. (2d) 565 Ontario Court (Prov. Div); leave to appeal to the Court of Appeal refused July 4, 1995,

⁶¹ *R. v. Kurtzman* (1991), 4 O.R. (3d) 416 (Ont. C.A.) at page 429; see also *R. v. Alexander* (1999), N.J. No. 19 (Nfld. C.A.) per Green J.A. at para 18

It is the specific reasonable care or absence of negligence in relation to the factual elements of the particular offence charged that is determinative of whether or not due diligence has been established and not a general state of reasonable care or absence of negligence:

In the case of the second branch or aspect, it is not “reasonable care” or “non-negligence” at large in the overall prevailing situation that exonerates, but rather “reasonable care” or “non-negligence” specifically relational to the statutorily defined actus reus (be it commission or omission) of the particular offence charged.⁶²

The same point was made more recently by Justice Hill:

Turning to the second point, proof of due diligence requires the employer to demonstrate, not its general safety record, but whether it took all reasonable steps “to avoid the particular event”: *R. v. Sault Ste. Marie*, at page 374. Put differently, “The employer must show it acted reasonably with regard to the prohibited act alleged...not some broader notion of acting reasonably”: *R. v. Brampton Brick*, at para. 28; *R. v. Kurtzman*, at p.429; *R. v. Imperial Oil*, [2000] B.C.J. No. 2031 (QL) (C.A.), at para. 23, 28. In *R. v. Rio Algom Ltd.*, at p.252, the court stated:

I note that the trial judge appears to have been satisfied that the respondent, in the operation of the mine where the accident took place, has kept safety foremost in its corporate mind at all times and has a good inspection and reporting system in effect to accomplish this purpose. Those are relevant facts to be kept in mind with respect to sentence. They do not, however, assist the respondent to avoid responsibility for the lack of care on its part which resulted in the unfortunate fatal accident. The respondent has failed to prove it was not negligent with respect to the circumstances which caused the fatal accident.⁶³

In order for an accused to demonstrate that it has taken all reasonable steps to avoid the commission of the offence it is not necessary, in order to trigger the due diligence defence, for the accused to be able to demonstrate what actually caused the prohibited act or omission. That said, where the accused can prove the actual cause of the act or omission it may be able to narrow the range of preventative steps that it must show to establish that it took all reasonable care.⁶⁴

In determining due diligence, the test is an objective one and the objective test need be applied to the specific area of deficiency alleged to have caused the breach.⁶⁵

c. Determining What Standard of Care is Required to Establish Due Diligence

In determining what is the standard of due diligence the Court in *R. v. Inco Ltd.*,⁶⁶ adopted with approval a statement from Justice Stuart in *R. v. Gonder*⁶⁷ wherein Stuart J. stated:

⁶² *R. v. Cancoil Thermal* (1988) 1 C.O.H.S.C. 169 (Ont. Prov Ct.) Megginson J. at page 186

⁶³ *R. v. Canada Brick*, 2005 CanLII 24925 (Ont.S.C.), para. 138

⁶⁴ *R. v. Petro Canada*, supra.

⁶⁵ *R. v. Cancoil Thermal* (1988) 1 C.O.H.S.C. 169 at page 186

⁶⁶ [2001] O.J. No. 4938

⁶⁷ (1981), 62 C.C.C. (2d) 326

“The approach consists of two stages. First, the existence of any general standard of care common to the business activity in question must be determined. Is there a standard of practice of care commonly acknowledged as a reasonable level of care and did the accused act in accordance with that standard? The second stage examines any special circumstances of the case which might require a different level of care other than the level suggested by the standard practice. Evidence of a standard practice is only one important component of that test. The ultimate test is the degree of due diligence required in the circumstances of each case.”⁶⁸

• • •

Reasonable care implies a scaling of caring. The reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual setting. The degree of care warranted in each case is principally governed by the following circumstances:

- (a) gravity of potential harm;
- (b) alternatives available to the accused;
- (c) likelihood of harm;
- (d) degree of knowledge or skill expected of the accused;
- (e) extent of underlying causes of the offence are beyond the control of the accused.

...The greater the potential harm for substantial injury, the greater the degree of care required.”⁶⁹

Stuart J. further stated that the reasonableness of care is best measured by comparing what was done against what could have been done:

Alternative available to the accused - reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or ought to have known were available is a primary measure of due diligence. To successfully plead the defence of reasonable care, the accused must establish on a balance of probabilities that there were no feasible alternatives that might have avoided or minimized injury to others.

The statement of Justice Stuart in *Gonder*, approved by Serre J. in *Inco*, was also approved of in *R. v. Canada Brick Ltd.*⁷⁰ by Mr. Justice Hill. In *Canada Brick* Justice Hill also relied upon a statement made by the court in *R. v. Canadian Tire Corporation*:

“Due Diligence is in law the converse of negligence”: *R. v. Ellis-Don Ltd.*, at p.428. The Act “does not impose a duty on the accused to anticipate every possible failure, but only to exercise reasonable precaution”: *R. v. St. Lawrence Cement Inc.*, at para. 32. In *R. v. Canadian Tire Corp.* (2004), 9 C.E.L.R. 248 (Ont. S.C.J.), at para. 85-7, the court stated:

⁶⁸ *ibid*, at page 331

⁶⁹ *ibid*, at pages 331 and 332

⁷⁰ 2005 CanLII 24925 (ON S.C.)

Accidents or innocent breaches of a regulatory offence inevitably occur. An absolute liability offence is not at issue here. In assessing the efficacy of a due diligence defence, the court must guard against the correcting, but at times distorting, influences of hindsight. In considering the defendant's efforts, the court "does not look for perfection" (*R. v. Safety-Kleen Canada Ltd.* 1997 CanLII 1285 (ON C.A.) (1997), 114 C.C.C. (3d) 214 (Ont. C.A.) at 224) nor some "superhuman effort" on the defendant's part (*R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 (Ont. Prov. Ct.) at 77). If the facts suggest a discoverable causative flaw "could readily" have been remedied, due diligence will fail: *R. v. Rio Algom Ltd.*, supra at 249, 252. In this regard, in the regulation of the environment, it was observed in *R. v. Alexander*, [1999] N.J. No. 19 (C.A.) at para. 16, that: "As a matter of principle, it should be observed that arguments based on the expense associated with compliance cannot generally be sustained".

In any given case, the question is not whether the defendant has exercised some care, but whether the degree of care exercised was sufficient to meet the objective standard properly imposed. Therefore, a corporate defendant may absolve itself by showing it took all the care which a reasonable person might have been expected to take in all the circumstances: *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 (S.C.C.) at 343-4...

...

As well, in testing the due diligence defence, it is often appropriate to ask what, in the circumstances, the defendant ought reasonably to have known taking into account the activity involved and the degree of tolerable risk in light of the nature and gravity of the potential harm at issue. In *R. v. Gulf of Georgia Towing Co. Ltd.*, [1979] 3 W.W.R. 84 (B.C.C.A.) at 87, the court stated:

I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake.⁷¹

...

Due diligence does not require "zero tolerance". Such a standard is beyond due diligence. In setting the due diligence standard regard can be had to:

- (a) the gravity of the potential harm;
- (b) the likelihood of harm;
- (c) the available alternatives;
- (d) the skill required; and,
- (e) the extent to which the accused could control the casual elements of the offence.⁷²

Due diligence requires, among other things, that the persons in charge had been doing what they were supposed to be doing:

⁷¹ *R. v. Canada Brick*, supra, para. 134

⁷² *R. v. Goebel*, supra.

I must agree with the Crown that the obligation of the constructor is much more than to simply create a system to inform employers concerning their responsibilities under the Acts; it must take the next reasonable step and ensure the effective operation of the system through its supervisors. Due diligence must be in addition to a good system, establish that the person in charge is doing what he is supposed to do.⁷³

To impose an unrealistic burden upon an employer would, in effect, convert strict liability offences into absolute liability offences. That point was, it is submitted, made by Harris J. in *R. v. Blair* where he held:

It should be recognized from the outset that the standard of care must not be characterized as being unrealistic, superhuman, or beyond that which is reasonable. If that was the case, the offence would be converted to one of absolute liability, because that type of onus could never be discharged. On the other hand, the onus should not be characterized as being flimsy, elusive, a figment of imagination, or something made of comprise.⁷⁴

d. The Foreseeability of Harm

The foreseeability of harm is properly to be considered as part of due diligence.⁷⁵

However, due diligence is not made out simply because the employer or constructor did not foresee an accident happening. The test to be applied with respect to foreseeability is much stricter. As stated by Goodman J.A. in *R. v. Algoma Ltd.*:

The trial judge, however, appears to have focused his attention on the fact that none of the witnesses foresaw “this type of accident happening” and that “no one had foreseen the happening of what happened on September 3rd”, In my view, in purporting to determine whether the respondent had taken the care which a reasonable man might have been expected to have taken in the circumstances, he applied the wrong test. The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way that it did happen, but rather whether a reasonable man in the circumstances would have foreseen that an “overswing” of the gate could be dangerous in the circumstances and if so whether the respondent in this case had proven it was not negligent in failing to check the extent of overswing in order to consider and determine whether it created in any way a potential source of danger to employees and in failing to take corrective action to remove the source of danger.

As noted above, Justice Hill stated in *R. v. Canada Brick*:

Turning first to the foreseeability issue, subjective foresight of a defendant respecting a hazard is a factor for consideration in a due care defence presentation but not to the exclusion of the overarching approach of an objective assessment of the reasonableness of the foresight of circumstances of harm or a potential accident. “Negligence...measures the conduct of the accused on the basis of an objective standard, irrespective of the accused’s subjective mental state”: *R. v. Wholesale Travel Group Inc.* 1991 CanLII 39 (S.C.C.), (1991), 67 C.C.C. (3d) 193 (S.C.C.), at p.252 per Cory J. In

⁷³ *R. v. Stelco Incorporated* (1989), 1 C.O.H.S.C. 76 (Ont. Prov. Div.) Bennett J. at page 87

⁷⁴ *R. v. Blair* [1993] O.J. No. 1477 (QL) at para 169

⁷⁵ *R. v. Rio Algom* (1988) 66 O.R. (2d) 674; *R. v. Timminco Ltd.*, supra

other words, liability exists where a defendant knew, or *ought to have known*, of the dangerous work conditions.⁷⁶

Put shortly, the employer or constructor must guard against that which is objectively foreseeable:

In this regard then, one important factor to be taken into account in determining the degree of diligence required would relate to how much injury or damage would result in the event that some error is made or might be made. It is put by myself that the greater the risk; the greater for potential harm; the greater the care required.

I should not be taken in saying, however, that the accused should be able to foresee the future, that he should be a seer; that he should perhaps be required to guard against that which is unexpected, unknown or beyond any expectation. No. But, he must take precautions which are adequate to guard against that which is foreseeable, that which might be expected.⁷⁷

The issue of foreseeability also comes up in the *Modern Niagara* case referred to earlier in which the trial judge concluded:

Upon reviewing the circumstances of this case, I conclude that it was not objectively foreseeable that an accident would result because an experienced journeyman steamfitter who was trained in an industry standard procedure, who had used and followed this procedure many times and who had the responsibility to check the entire line and open all of the valves to release the pressure, would have erroneously assumed that upon hearing the sounds of gas being released on two occasions that this would have fooled his mind into thinking that the entire system had been discharged of pressure, and thereby altering his intention to check the system himself.⁷⁸

On appeal Lane J. specifically rejected this finding and held specifically that:

...the potential for substantial injury was serious and the likelihood of harm readily foreseeable if there were a breakdown in communication.⁷⁹

There is much to be said for the opinion of Justice Lipman that "...due diligence means an area of precaution sufficient to prevent the foreseeable, but not the unforeseeable, unexpected or unintended."⁸⁰

e. Worker Error or Negligence and Employer or Constructor Due Diligence

From time to time an employer or constructor is charged with a breach of the OHSA in circumstances where a breach of a provision of the OHSA or the regulations to the OHSA (often resulting in an accident or fatality) has occurred and the employer or constructor believes that the

⁷⁶ *R. v. Canada Brick*, supra. para. 137

⁷⁷ *R. v. Sault Ste. Marie (City) Public Utilities Commission* [1989] O.J. No. 2622 (QL), 3 C.O.H.S.C. 1 (Ontario Provincial Court) page 5

⁷⁸ *R. v. Modern Niagara*, supra., para. 145

⁷⁹ *R. v. Modern Niagara*, [2006] O.J. 3684, para. 81

⁸⁰ Lipman, *Regulatory Offences in Canada*, (Earlscourt Legal Press Inc.) at page 7

accident was due to worker neglect, carelessness or error). The relationship between the alleged breach and that neglect, carelessness or error is of importance in a number of respects when:

- (a) the charge as particularized by the Crown sets out, not only the statutory or regulatory provision said to have been breached but, in addition, particularizes as a result an injury, a critical injury or a fatality involving a worker; and/or
- (b) the charge does not particularize any specific injury, critical injury or fatality but the employer or constructor argues that the worker error, carelessness or neglect took place despite all due diligence on its part.

As to the first point, particularizing a specific fatality or critical injury will typically be surplusage and therefore the Crown need not prove, in order to secure a conviction, facts that constitute “surplusage.”⁸¹

It is the second point - that the accident occurred due to worker error, neglect or carelessness - that is more commonly encountered.

In *R. v. Sault Ste. Marie* Dickson J. stated:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment; “the question will be whether the act took place without the accused’s direction or approval, thereby negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure effective operation of the system.”⁸²

Given that one of the public policy considerations upon which the OHSA is based is the need to protect the vulnerable, it is not surprising that courts have held that that a “proper system to prevent the commission of the offence” requires that the reasonable man as an employer and/or supervisor cannot simply consider the actions of the trained worker as the OHSA seeks to protect as well the “foolish, heedless, thoughtless employee”.⁸³

To what degree, then, is the employer absolved (if at all) from regulatory liability when the breach involves worker neglect? On first principles it would appear that the correct view would be that employer or constructor neglect and worker neglect are separate matters. The issue for the employer or constructor should be whether or not breach of the OHSA occurred despite all due diligence on its part. In other words was it negligent or not negligent with respect to the alleged breach or omission irrespective of whether or not the worker was, in addition, also negligent, careless or in error. Logically, worker negligence, carelessness or error is irrelevant to the inquiry as to whether or not the employer or constructor was negligent. Put another way, the fact that an employee may have been negligent is not defence to an employer if it too was negligent.

⁸¹ *R. v. St. Lawrence Cement Inc.* [1993] O.J. No. 1442, per Hurley J. at page 4; *R v. Domtar* (unreported, May 27, 1999) Daub, J.P. at page 3

⁸² *R. v. Sault Ste. Marie*, supra, per Dickson J. at page 185

⁸³ *R. v. Commodore Business Machines*, (unreported, 1985)

While it remains true that the due diligence standard does not require “perfection”, “that an employer anticipate every possible failure” or “isolated acts of carelessness” by an employee, at least in my view, it is clear that an extremely high standard of compliance will be required of an employer. It is my submission that our courts have become increasingly strict in distinguishing between worker neglect and employer neglect. I suggest that when the factual elements of the offence are made out by the Crown an employer will only be relieved from liability if it establishes that it was not in any way negligent.

Furthermore, I think there is much to be said for the observations of Lane J. in *Modern Niagara* that cases decided prior to the Court of Appeal decision in *R. V. Wyssen*⁸⁴ should be treated with caution. In *Wyssen* the Court of Appeal stated that the position of an employer insofar as OHSA dates were concerned was “virtually that of an insurer. Since that decision in 1992 courts have come, in my view, to be much more careful in distinguishing between worker neglect and employer neglect and in holding that the presence of the former does not preclude conviction of the employer when it too has been negligent.

The following cases illustrate the point.

In one of the commonly referred to cases involving a failure to lock-out the court accepted that “there is no question that the purpose of the Occupational Health and Safety Act is not to place the employer in a position of an insurer”.⁸⁵ However, in that case the court held that the OHSA clearly seeks to protect workers from their own negligence or carelessness and that while the actions of the worker were unforeseeable “...the employer cannot rely on the unforeseeability of such actions where they have failed in their obligation to provide adequate information, instruction or have failed to ensure compliance with a necessary procedures”.⁸⁶

Similarly and not surprisingly, an employer charged with failure to ensure lock-out was convicted where the injured worker testified that he was never instructed in lock-out procedures until after the accident and that no locks were available to him for the machine in question prior to the accident.⁸⁷

Similarly, the court in *R. v. Moran Mining & Tunnelling* stated as follows:

It is true that in certain cases, despite a comprehensive system of safety and despite an effective system of supervision and enforcement, an unforeseeable isolated act of a worker will not render the employer liable. We’ve got a comprehensive system here, but in my respectful submission, there was not effective supervision and enforcement of that system. And so, we can’t heap it on Chad Lemond [the deceased worker] as a momentary act of negligence. The employer has to wear this. There’s too much evidence here of a frequency to see this as an isolated act.⁸⁸

⁸⁴ *R. v. Wyssen c.o.b. Jake Wyssen Enterprises* (1992) 10 OR (3d) 193

⁸⁵ Although the Court of Appeal has stated that the position of an employer was “virtually that of an insurer”: *R. v. Wyssen*, supra

⁸⁶ *R. v. Harvard Machine Limited* (unreported, March 20, 2003) Ont. C.J., Woodsworth J.P., at page 20

⁸⁷ *R. v. Lake Ontario Cement Ltd.* (1990), 5 C.O.H.S.C. 192 (Ont. Ct. (Prov. Div.))

⁸⁸ *R. v. Moran Mining & Tunnelling* [2004] O.J. No. 5592, para 28

The same point was made by Justice Hurley in *R. v. St. Lawrence Cement Inc. (c.o.b. Dufferin Construction Co.)* who after reviewing the authorities stated:

“...the Act does not impose a duty to anticipate every possible failure, but only to exercise reasonable precaution; that workers must accept some responsibility to ensure that the workplace is safe; then the employer who has taken all reasonable precautions cannot be held responsible if a worker then deliberately or inadvertently and unforeseeably, breaches a regulation. It is not enough for the accused to orally order the worker to conform to certain safety procedures and sent them pamphlets that repeat and reinforce that order. If that were so, the accused could fulfil their obligation under the Act by holding meetings and distributing pamphlets. I adopt the trial judge’s statement, at p. 18 of his reasons, that ‘It must be recognized, however, that the Occupational Health and Safety Act, was designed, in part to protect workers...’”⁸⁹

This same issue – the employer obligation “to protect stupid workers from themselves”⁹⁰ – is, again, working its way up to the Court of Appeal in the *Modern Niagara* case. In that case *Modern Niagara*, a reputable and well known mechanical contracting firm, had been contracted to install a supplementary cooling system in the mechanical room of an office tower. As part of the work and prior to connecting the new supplementary system into the existing cooling system, the supplementary cooling system that had been installed had been pressurized with nitrogen gas to test for leaks. As part of their work, the injured worker and his immediate supervisor were to remove a metal cap and coupling from the end of a pipe. They proceeded to do so believing that the cooling system was no longer pressurized. It was not. The worker was seriously injured.

The pressurization of pipes to conduct a leak test is, the Trial Court found, a common practice known to steam fitters and plumbers. Such tests, the trial judge found, are normally conducted for a period of 24 hours but, from time to time, the testing takes longer and the apparatus for a leak test remains in place for such longer periods of time. The evidence at trial indicated that tests of this sort are routinely done by steam fitters and plumbers, are not complex or difficult, that the presence of the testing apparatus indicates to workers that the test is under way and, finally, removal of the test and the testing apparatus is not difficult and is normally undertaken by the person who originally applied the test. However, in the *Modern Niagara* case midway through the testing the client asked, and *Modern Niagara* agreed to provide, an additional bypass valve to the system. *Modern Niagara* workers attended on a weekend to install the bypass system and, in doing so, removed the test apparatus and did not replace it. The system remained pressurized. Some days later the injured worker and his supervisor attended to the site and, as noted above, believing the system at that point to not be pressurized commenced the work that ultimately lead to the critical injury.

Modern Niagara was charged with:

- (a) failing to provide information, instruction and supervision to a worker, particulars of which were “the worker had not been informed that there was pressurized gas in the pipe”;

⁸⁹ *R. v. St. Lawrence Cement Inc.*, supra, page 8

⁹⁰ *R. v. Modern Niagara* [2003] O.J. No. 3332

- (b) failing to as an employer to acquaint a work with a hazard which, again, was particularized as failing to acquaint the worker with the hazard of pressurized gas in the pipe;
- (c) failing as an employer to ensure that the measures and procedures prescribed in the Construction Regulation were carried out which was particularized as having failed to ensure, as required by a provision in that regulation, that the pressure in the pipe had not been released as required by the regulation; and
- (d) with failing to take every precaution reasonable in the circumstances for the protection of a worker which precaution was particularized as having a procedure in place to ensure that all pipes were depressurized before work was performed on those pipes.

As to due diligence, Modern Niagara contended that it had a procedure, albeit an unwritten procedure and, in addition, it relied upon the industry standard within which the training of workers in leak testing of pipes and in acquainting them with the hazards associated with working on pipe pressurized with gas is done during a steam fitters or pipe plumbers apprenticeship. Accordingly, Modern Niagara argued that it expected its journeymen steam fitters and plumbers to know how to test the pipe and be cognizant of the hazards associated with gas pressurized pipes before they were hired and, therefore, a written procedure was not in circumstances necessary for what was, in fact, a fundamental skill of their trades. The Crown, on the other hand, argued that Modern Niagara could not rely upon apprentice training programs to excuse it from its obligations under the OHSA and that, therefore, reliance upon apprenticeship training meant that Modern Niagara did not, itself, have an effective program or system in place to prevent its employees from being injured while working on pressurized pipe.

Modern Niagara argued that the unfortunate incident was the result of a series of mistakes that were made by reliable workers in their implementation of, or more accurately their failure to implement, Modern Niagara's procedures. To which the Crown, in response, argued that Modern Niagara failed to "develop have a fail safe system to protect stupid workers from themselves."

The trial judge acquitted Modern Niagara. On two of the four counts the trial judge found that the Crown had failed to prove the factual elements of the offence. On the remaining two counts the trial judge acquitted Modern Niagara on the basis that it had established on a balance of probabilities that a it reasonably believed in a mistaken set of facts - that the pipe had been depressurized - which rendered its acts innocent and, alternately, even if there had not been a mistake of act that it had exercised all reasonable care in the circumstances. Central to the reasoning of the trial judge was his finding that Modern Niagara had utilized experienced employees to conduct the work, all had received training in the appropriate procedures during their apprenticeship training and that the work being performed was not particularly complicated and was performed in accordance with industry standards. The trial judge found that it was not foreseeable to Modern Niagara that its workers would fail to follow their training and Modern Niagara's procedures.

On appeal, Lane J. allowed the Crown appeal. Put shortly, the appellate court judge found that although Modern Niagara relied upon industry standards, apprenticeship training and the experience of its workers, it did not use all reasonable precautions to ensure that the appropriate

standards and practices were followed at the time of the occurrence. The appellate court judge applied the test set out in *R. v. Gonder* referred to earlier in this paper. While acknowledging that:

There is also a compelling line of cases to the effect that an employer will not be held responsible for the isolated acts of carelessness of their worker if the employer demonstrates on a balance of probabilities that it acted in due diligence to guard against such injudicious acts...The precondition is the key. Due diligence in this context requires that the employer demonstrate taking every reasonable precaution to ensure that its procedures for protection of the worker were monitored and carried out.⁹¹

While the standard imposed upon an employer to establish due diligence may well be high, it can still be met. The point is illustrated in two cases.

First, after the Court of Appeal decision in *R. v. Timminco Ltd.* referred to earlier, Timminco was retried. It was acquitted in light of the “overwhelming evidence” of the employer’s efforts to ensure workplace safety.⁹²

Second, in a quite recent decision of Mr. Justice Giffen in *R. v. Goodyear Canada Inc.*⁹³ In that case, the employer was charged with having failed to ensure that a worker locked out a piece of equipment. The facts are set out earlier in this paper. It is indisputable that the actions of the worker in question were careless. The trial judge found, quite properly, that the factual element of the offence had been made out. In making that finding the court referred to the *Dofasco* case as establishing the proposition that worker error was irrelevant, on the facts, to prove the factual element of the offence. However, the trial judge acquitted Goodyear because he was satisfied that the actions of the worker occurred despite the due diligence of Goodyear in taking every reasonable precaution to prevent the offence.

f. Evidence of Remedial Measures

The orthodox view had always been that evidence of remedial measures taken after an accident was inadmissible as evidence going to the issue of negligence⁹⁴ although in civil cases that orthodox view has, at least for some purposes, been rejected in Ontario.⁹⁵

In OHSA prosecutions evidence of remedial measures taken after a breach is sometimes admitted or rejected as proof of neglect, and therefore breach, without analysis.

For example, in *R. v. The Corporation of the City of London* Justice of the Peace Trachy held that:

...the court must assess the evidence prior to the alleged violations of the Act and, certainly, not in relation to what steps were taken subsequent to the alleged violations.⁹⁶

⁹¹ *R. v. Modern Niagara* [2006] O.J. No. 3684, at para 75

⁹² *R. v. Timminco Ltd.* [2004] O.J. No. 5324

⁹³ (unreported, April 22, 2008)

⁹⁴ *London (City) v. Grand Truck Railway* (1914), 20 D.L.R. 846

⁹⁵ *Algoma Central Railway v. Herb Fraser & Associates Limited* (1990) 36 C.P.C. (2d) 8

In the *Modern Niagara* case referred to earlier, the trial Court seemed to both exclude and admit evidence of post-remedial measures. The trial court held that post-accident changes to the safety policies and procedures at issue in that prosecution “do not illustrate that Modern Niagara had failed to take every reasonable precaution in the circumstances.”⁹⁷ However, later in its decision, in response to Modern Niagara’s argument that the Court should not consider evidence of changes or improvements made after the accident, the trial court held “...it is not without precedent to do so” and relied upon a statement in *R. v. Gondor* wherein Stuart C.J. stated:

Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or ought to have known were available, is a primary measure of due diligence. To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities that there were no reasonable, feasible alternatives that might have avoided or minimized injury to others.⁹⁸

There has not, however, been an appellate court statement, however, as to whether such evidence is admissible in a regulatory prosecution.

However the issue was before the Court of Appeal in a case involving Pioneer Construction.⁹⁹ In that case the employer argued an appeal that the trial judge had erred in law in that he considered the actions of the employer subsequent to the accident to improve safety as being admissible to the question of due diligence. Regrettably, the Court of Appeal declined to address the issue because it felt that admission of the evidence of remedial measures had not affected the core of the trial judge’s reasons.

After an occurrence that gives rise to a MOL Inspection or Investigation there will often be a necessity to take remedial measures to correct the circumstances which gave rise to the occurrence. Those steps must be taken, irrespective of whether or not evidence of post remedial measures will be admissible in a prosecution, in order to protect employees in the future and, second, in order to mitigate any potential penalty that might be imposed upon the company and individuals should the MOL choose to prosecute.

g. Compliance with Industry Standards

As noted above, one of the elements of due diligence is compliance with standards in the industry within which an employer or constructor operates. Predictably enough, there are hundreds, if not thousands, of standards available to assist employers and constructors in how best to safely carry out their work practices. Many of those standards are published by the Canadian Standards Association. There are, of course, other organizations, both domestic and foreign, that develop standards. Given the public policy considerations noted above, our courts will assume that an employer or constructor, by having chosen to enter the field of regulated activity, is best positioned to determine what are the appropriate industry standards and to ensure that those standards are followed in the workplace. There are many cases in which the courts

⁹⁶ *R. v. London (City)*, supra., page 5

⁹⁷ *Modern Niagara*, supra, page 29

⁹⁸ *Modern Niagara*, supra. page 30-31

⁹⁹ *R. v. Pioneer Construction* (2006) 79 O.R. (3d) 641

have held that the employer obligation to take every precaution reasonable in the circumstances for the protection of a worker requires compliance with such standards.¹⁰⁰

That said, it goes without saying that, merely because other similarly situated employers in the industry are doing things in a similar fashion does not constitute regulatory compliance given that the standards of the industry may be suspect.¹⁰¹

h. Failure to Comply with Ministry of Labour Orders

When an accused is charged with having failed to comply with an MOL order, to mount a due diligence defence an accused has to accept the validity of that order and show that it attempted to comply with it. Due diligence might be established if, for example, the defendant demonstrated reasonable, although unsuccessful, efforts to comply with an order or an inability to comply because of weather conditions or lack of resources. Due diligence cannot, however, be established by claiming that the order in question is unreasonable and then refusing to comply with it. That constitutes a form of collateral attack under the guise of due diligence.¹⁰²

i. Financial Inability to Comply

It would appear to be open to an accused to demonstrate that any efficient method to comply with the statutory requirement is prohibitively costly for the defendant to absorb or pass on to its customers and thereby to establish that a less effective method of compliance constituted due diligence.¹⁰³ That said, this statement is at odds with a decision of the Newfoundland Court of Appeal in which Green J.A. stated:

As a matter of principle, it should be observed that arguments based on the expense associated with compliance cannot generally be sustained.¹⁰⁴

This latter statement was adopted with approval by Mr. Justice Hill in *R. v. Canada Brick*.¹⁰⁵

I confess that I know of no case where financial inability to comply was sufficient to make out due diligence.

F. MINISTRY OF LABOUR ATTENDANCES AT A WORKPLACE OR PROJECT

As we all know, whatever may be the moral duty, there is no legal duty, in general, to assist the police in the investigation of a crime, no duty to provide information to the police and no obligation, absent a warrant or assistance order, to provide documents to the police or access to property. In order to secure a conviction in a criminal prosecution the Crown is obliged to prove beyond a reasonable doubt both the factual element and the mental element that constitute the

¹⁰⁰ see Exner and McGrath “What is Reasonable in the Circumstances? Finding an Appropriate Standard under Section 25(2)(b) of the Occupational Health and Safety Act” (December 10, 2007)

¹⁰¹ *R. v. Laidlaw Medical Services Ltd.* [1995] O.J. No. 4279

¹⁰² *R. v. Consolidated Maybrun Mines Ltd.* (1996) 133 D.L.R. (4th) 514 (Ont. C.A.) per Laskin J. at page 540

¹⁰³ *R. v. Nickel City Transport* (1993) 14 O.R. (3d) 115, per Tarnepolsky J.

¹⁰⁴ *R. v. Alexander* [1999] N.J. No. 19 (C.A.) per Green J.A. at paragraph 15

¹⁰⁵ *R. v. Canada Brick*, *supra*.

offence. Nothing in the amendments to the *Criminal Code* brought about in 2003 by Bill C-45 changes this.

The matter is quite different in public welfare statutes. Most regulatory statutes, and certainly the OHSA, are predicated upon self compliance by those to whom the statutes apply.¹⁰⁶ Because such regulatory regimes are seen to be in the public interest (for the reasons articulated above) the public interest is served by there being periodic inspections or audits of those regulated. This is to ensure regulatory compliance. Our courts have routinely held that those conducting an inspection or audit function do so without engaging the Charter rights of those regulated.¹⁰⁷

Finally, even when Charter rights are engaged it is important to note that not all of the Charter rights enjoyed by an individual are available to a corporation.¹⁰⁸ The Charter rights of interest to us here are:

- (a) the right afforded to an individual, but not a corporation, to silence that is a component of the right to fundamental justice¹⁰⁹ or, put another way, the right to not incriminate oneself;
- (b) the right of both an individual and a corporation to be secure against unreasonable search and seizure;¹¹⁰
- (c) the right of an individual, but not a corporation, to not be arbitrarily detained or imprisoned;¹¹¹
- (d) the right of an individual, but not a corporation, on arrest or detention:
 - (i) to be informed promptly of the reasons thereof;
 - (ii) to retain and instruct counsel without delay and to be informed of that right;¹¹²
- (e) the right of both an individual and a corporations to a fair trial.¹¹³; and,
- (f) the right of an individual, but not a corporation, to not be compelled to be a witness in proceedings against that person in respect of an offence.¹¹⁴

¹⁰⁶ *R. v. McKinlay Transport Ltd.* [1990] 1 S.C.R. 627

¹⁰⁷ *R. v. Jarvis*, [2002] 3 S.C.R. 757

¹⁰⁸ *R. v. Inco Ltd.* (2000), 54 O.R. (3d) 495

¹⁰⁹ *Canadian Charter of Rights and Freedoms* (“Charter”), sec. 7. Corporations cannot claim the protection of section 7: *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927 at page 1004

¹¹⁰ Charter, sec. 8

¹¹¹ Charter, sec. 9. Corporations cannot claim the protection of section 9: *Canadian Egg Marketing Agency v. Richardson* [1998] 3 S.C.R. 157 at page 183

¹¹² Charter, sec. 10(a) and (b) Corporations cannot claim the protection of section 10: *Canadian Egg Marketing Agency v. Richardson*, supra.

¹¹³ Charter, 11(b)

¹¹⁴ Charter, sec. 11(c)

In Ontario Ministry of Labour (“MOL”) Inspectors have broad powers. Rather than recite, at this point, those powers it is, I think, more instructive to consider in practical terms how an Inspector comes to be at a workplace or project.

(a) Types

The MOL uses the term “Field Visits” to describe any attendances by an Inspector at a “workplace” or “project”. A Field Visit may fall into one of three categories:

- (i) an Inspection which is a field visit designed to monitor compliance with the OHSA;
- (ii) a Consultation which is an attendance to consult with management and/or workers on a particular subject for which the participation of an Inspector is sought; and,
- (iii) an Investigation which is an attendance or attendances in response to an “event.”

Both an Inspection and a Consultation are pre-arranged by the Inspector. An Investigation is a response to an event. If at an Inspection or a Consultation an Inspector were to determine to investigate a matter then that Field Visit, be it a Consultation or an Inspection, is suspended and another Field Visit for an Investigation is initiated.

(b) Inspections

In conducting an inspection the Inspector, upon arrival, meets with representatives of management and labour and, at the outset, verifies the information maintained by the MOL with respect to that employer or constructor. Typically, the Inspector then reviews the documentation relevant to that employer or constructor such as, for example, minutes of Joint Occupational Health and Safety Committee (“JHSC”) meetings, outstanding or unresolved issues, the employer/constructor’s health and safety policy and procedures, recent incidences, worker training, presence of designated substances and any new or altered equipment, processes or activities. Thereafter, and again typically, the Inspector then conducts a physical inspection of the workplace or project in the company of worker representatives. On leaving the workplace or project the Inspector provides a Premise/Project Form in which any verbal orders that he or she may have given are reduced to writing. In addition, in the Narrative portion of the Premise/Project Form the Inspector outlines those parts of the premise or project that were inspected, the persons he or she met with and a summary of the orders issued and any findings or observations that he or she may have made.

It should be noted that unless there is an agreement between the employer and labour for announced inspections, which agreement has been approved by the MOL, inspections are typically carried out without notification to the employer or constructor.

(c) Consultations

Consultations take place when management and/or labour seek the attendance of an Inspector in order to obtain his or her advice. At the conclusion of the consultation a Premise/Project Form is provided to the workplace parties.

(d) Investigations

In Ontario there are eight events that can give rise to an investigation:

- (a) an “Injury/Incident” which is an unplanned event causing injury or bodily harm. Such events are a fatal injury, a critical injury, another injury (i.e. an incident that is neither fatal nor critical but a worker is nevertheless disabled from performing regular duties or requires medical attention), death to a worker by natural causes, an injury or incident to a non-worker, a motor vehicle injury or incident or a criminal act;
- (b) a “Complaint” which is a concern registered with the MOL regarding health or safety issues;
- (c) a “Dispute” which is a disagreement between workplace parties regarding:
 - (i) assessments or control programs under a designated substance regulation;
 - (ii) involving the establishment of a JHSC under section 9 of the OHSA; or,
 - (iii) between certified JHSC representatives;
- (d) an “Occupational Illness or Disease” is a condition that results from exposure in a workplace to a physical, chemical or biological agent to the extent that normal physiological mechanism are affected and the health of the worker is impaired thereby and includes an industrial disease as define in the *Workplace Safety and Insurance Act* (an occupational illness may become a critical injury when or if hospitalization is required);
- (e) an “Occurrence” which is an unplanned event at a workplace or project that, although not causing injury or bodily harm, may or may not be an occurrence that requires a report to the MOL and, in any event, warrants an attendance at the project or workplace;
- (f) a “Reprisal” against a worker who has acted in compliance with the OHSA or sought enforcement of the OHSA;
- (g) a “Work Refusal” under the OHSA; and,
- (h) a “Work Stoppage” which is a cessation of work by an employer or constructor when a certified member of the JHSC of the workplace finds “Dangerous Circumstances” to exist.

In its policy manual, the MOL states that Inspectors “investigate” injury/incidents, work refusals and work stoppages while Inspectors are required to “respond” to an occupational illness/disease and reprisals. In all cases an Inspector attends (with rare exceptions) at the project or workplace to inquire into the event and in all cases prepares (or at least should prepare) a Premise/Project Form, a copy of which left at the workplace.

It may be of interest to you, or to your clients, that some events are deemed to be of sufficient gravity that there is a “Hot Issue Reporting” process by which the MOL Inspector must report the event to the Minister of Labour, the Deputy Minister of Labour and senior management in the Operations Division of the Ministry of Labour.

(e) Orders

As noted above, whenever an Inspector attends at a project or workplace he or she is required to prepare a Premise/Project Form. That form has substantive components: the Narrative section in which the Inspector recites who he met, what he observed and what, if any, discussions he had with the workplace parties and, second, the Orders section. In the Orders section the Inspector specifies what specific orders he or she has made.

An order is only made when the Inspector finds a contravention of the OHSA or the regulations.¹¹⁵ The policy of the MOL with respect to orders is as follows:

Where a contravention is found by an Inspector, an order shall be issued except in the limited circumstances where an Inspector is satisfied, on reasonable grounds, that due diligence has been exercised or the contravention is merely technical. Compliance with MOL orders must take place at the earliest practicable date.

G. COMPLIANCE INSPECTIONS

(a) Compliance Inspections and Penal Investigations

For convenience, I shall use the phrase “compliance inspection” to refer to inspections, consultations and investigations, as those terms are used by the MOL, for the purposes of ensuring regulatory compliance and use “investigation” to refer to an investigation into determining whether or not there has been a contravention of the legislation.

(b) Powers of Inspector Conducting Compliance Inspection

When the Inspector attends at the project or workplace for a compliance inspection he or she is afforded significant powers to carry out the inspection, participate in the consultation or conduct the compliance inspection.¹¹⁶ An Investigator whose purpose in attending at a workplace is to carry out a compliance inspection is entitled to enter the workplace or project without prior authorization¹¹⁷ and may, for the purpose of ensuring regulatory compliance, exercise significant powers (described in one case as “...the panoply of warrantless power...”¹¹⁸). The key powers may be summarized as the power to:

- (a) seize anything found at a workplace¹¹⁹ including documents, records and the like;¹²⁰

¹¹⁵ Ont. OHSA, sec. 57(1)

¹¹⁶ Ont. OHSA, sec. 54

¹¹⁷ Ont. OHSA, sec. 54(1)(a)

¹¹⁸ *R. v. Canada Brick Ltd.* [2005] O.J. No. 2978 per Hill J.

¹¹⁹ Ont. OHSA, sec. 54(1)(b)

- (b) take away and copy any documents;¹²¹
- (c) test¹²², or cause to be tested¹²³ or operated¹²⁴ anything found at a workplace;
- (d) make inquiries of any persons at a workplace either alone or in the presence of another person;¹²⁵
- (e) be assisted in an inspection by any person in carrying out an inspection;¹²⁶; and,
- (f) require that an employer, constructor, et cetera, obtain expert reports which are to be provided to the MOL;¹²⁷

(c) Obligation to Co-operate and Assist Inspector Conducting Compliance Inspection

Not only may the Inspector enter the workplace or project without prior authorization and exercise the powers outlined above but no person may hinder, obstruct, molest or interfere with him or her in the exercise of those powers.¹²⁸ Further, every person must furnish all necessary means in that person's power to facilitate any entry, search, inspection, investigation, examination, testing or inquiry by the an Inspector in the exercise of those powers.¹²⁹ In short, during a compliance inspection the employer or constructor must not only grant access to the Inspector but must co-operate with and assist him or her.

(d) No Necessity for Prior Judicial Authorization

Obviously an Inspector engaged in a compliance inspection can, by exercising the powers just noted, obtain information from a regulated entity, require that entity to create information for the Inspector and compel the employees of the entity to answer questions. Provided that such information is obtained for the purpose of a compliance inspection, the Inspector need not obtain any prior judicial authorization and Charter rights are not engaged.

Accordingly, such Inspectors do not need to have reasonable and probable grounds to believe that a contravention of the legislation has taken place in order to gain access to a workplace without first obtaining judicial authorization. Such attendances do not violate the Charter right to be secure against unreasonable search and seizure.¹³⁰

¹²⁰ Ont. OHSA, sec. 54(1)(c)

¹²¹ Ont. OHSA, sec. 54(1)(d) and (o)

¹²² Ont. OHSA, sec. 54(1)(e)

¹²³ Ont. OHSA, sec. 54(1)(f) and (k)

¹²⁴ Ont. OHSA, sec. 54(1)(j)

¹²⁵ Ont. OHSA, sec. 54(1)(h)

¹²⁶ Ont. OHSA, sec. 54(1)(g)

¹²⁷ Ont. OHSA, sec. 54(1)(f), (k), (m), (n) and (o)

¹²⁸ Ont. OHSA, sec. 62(1)

¹²⁹ Ont. OHSA, sec. 62(2)

¹³⁰ *Comité paritaire de l'industrie de la Chemise v. Sélection Milton* [1994] 2 S.C.R. 406

(e) Requirement to Provide Documentation

Similarly, an Inspector conducting a compliance inspection may obtain without prior authorization documents from the regulated entity without triggering Charter rights. It is argued that there is a lesser privacy expectation with respect to documents produced in the course of a regulated business than with respect to strictly personal documents. Accordingly, in an environment that is regulated for the public good, the compelled production of such documents for the purpose of a compliance inspection does not infringe the Charter protection against unreasonable search and seizure.¹³¹

Further, the Charter protection against self incrimination is not engaged when documents are used against the person making the documents in a subsequent prosecution which documents are produced as required by a regulatory regime and which are provided as required to the regulatory authority. The licensing argument referred to earlier is said to justify this result. As stated by La Forest J.:

Surely it defies common sense to argue that the state, in seeking to regulate the commercial fishery by attaching certain conditions to a fishing license, is coercing an individual to furnish information against himself. Quite the opposite, in fact, is true; the individual is furnishing information that is meant to benefit him or her, through the proper and fair distribution of scarce fishing resources. Just because this information may later be *used* in an adversarial proceeding, when the state seeks to enforce the restrictions necessary to accomplish its regulatory objectives, does not mean that the state is guilty of coercing the individual to incriminate himself. The state required certain information to be provided and the individual voluntarily assumed the obligation to do so in deciding to become a fisher in the first place. It ill lies in the mouth of someone who knowingly assumes an obligation for a beneficial purpose to argue later that this obligation has the effect of denying him his rights.¹³²

(f) Requirement to Answer Questions of Inspector

Our concern, for present purposes, is with the right to silence before a trial. At a trial the accused cannot be compelled to be a witness at his or her own trial and, further, has the right, should he or she testify, not to have self incriminatory evidence used against him or her in a subsequent proceeding (although corporate officers, managers, et cetera, can be compelled to testify against the corporation¹³³). However, regulatory regimes have requirements, like the Ontario OHSA, that compel persons to answer the questions of Inspectors who are carrying out a compliance inspection.

At the compliance inspection stage employees are required to answer questions put to them by the MOL. Requiring employees to do so does not infringe the Charter rights of the employee.¹³⁴ Furthermore, as there is no arrest or detention at that point, the Inspector does not need to caution the employee as to his or her right to remain silent. If the employee wants counsel present at the

¹³¹ *British Columbia (Securities Commission) v. Branch* [1995] 2 S.C.R. 3

¹³² *R. v. Fitzpatrick* [1995] 4. S.C.R. 154, per La Forest J. at page 178. That said, a different result pertains with respect to compelled reports with respect to motor vehicle accidents: *R. v. White* [1999] 2 S.C.R. 417

¹³³ *R. v. Amway Corporation* [1989] 1 S.C.R. 21

¹³⁴ *British Columbia (Securities Commission) v. Branch*, supra

interview, notwithstanding that the interview is only being conducted as part of a compliance inspection, it is an unresolved question as to whether or not he or she has that right. In a recent Alberta case it was held that the employee could not insist upon having counsel present.¹³⁵

However, an employee compelled to give evidence for the purpose of a compliance inspection will, in subsequent proceedings, be able to claim the protection of derivative use immunity.¹³⁶

H. INVESTIGATIONS TO DETERMINE PENAL LIABILITY

That said, at some point during the compliance inspection it may transpire that the purpose of the inquiry is no longer to determine whether or not there is regulatory compliance but is, instead, to determine whether or not there is penal liability. Once the inquiry has so shifted Charter rights are engaged. From that point forward the Inspector can no longer rely upon the inspection powers outlined above.

To quote from an Ontario Provincial Court case:

As a matter moves from an administrative regulatory/auditing function towards a criminal quasi-criminal investigation, the rules of engagement change and the procedures for obtaining evidence are also subject to change...There appears to be a public interest to be served in ensuring that public officials who possess the ability to lay charges in quasi-criminal matters not be allowed unfettered power of collecting evidence beyond the point where they have turned their minds from mere administration or regulation to prosecution.¹³⁷

The issue, then, is when does that shift take place so as to trigger Charter rights.

The mere fact that the attendance of the Inspector at a workplace was due to a complaint of an alleged statutory or regulatory breach is clearly not sufficient to engage Charter rights.¹³⁸ As stated by Madame Justice L'Heureux-Dube:

A mere complaint is insufficient in itself to justify Inspectors being subject to the requirements of *Hunter v. Southam Inc.* There is an important distinction between having reasonable and probable grounds to believe that an offence was committed and simply having information, especially if the latter is given anonymously.¹³⁹

• • •

The rules in *Hunter v. Southam Inc.* requiring a system of prior authorization based on the existence of reasonable and probable grounds simply do not apply to administrative inspections, like those at issue here, in the case of a regulated industrial sector.¹⁴⁰

¹³⁵ *Ebsworth v. Alberta (Human Resources and Employment)* [2005] A.J. No. 1792

¹³⁶ *British Columbia Securities Commission v. Brant* [1995] 2 S.C.R. 3

¹³⁷ *R. v. Soviak* [1997] O.J. No. 1215 (QL) (Ont. Prov. Div.)

¹³⁸ *Comité paritaire de l'industrie de la Chemise*, supra

¹³⁹ *Comité paritaire de l'industrie de la Chemise*, supra, at page 454

¹⁴⁰ *Comité paritaire de l'industrie de la Chemise*, supra, at page 444

Similarly in those statutory regimes where there are separate inspection and investigation branches the fact that an inquiry is being conducted by the investigation branch does not in and of itself mean that the inquiry has shifted into a determination of penal liability.¹⁴¹

Until recently, it would have seemed clear that the line was crossed when the Inspector has reasonable and probable grounds to believe that an offence has been committed. In *R. v. Inco Ltd.*¹⁴² the Ontario Court of Appeal held that an Inspector who had reasonable and probable grounds to believe that an offence had been committed could not rely upon the powers granted to such Inspectors to carry out compliance inspections. Instead the Court held that the Inspector would require, absent exigent circumstances, judicial authorization. The “reasonable grounds” standard requires something more than mere suspicion but less than the standard applicable in civil matters of proof on a balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief based on compelling and credible information.¹⁴³

There is an intriguing issue as to when reasonable and probable grounds exist in a strict liability offence. As noted earlier, in a strict liability offence the Crown need only prove the factual element of the offence in order to secure a conviction. It would seem to follow that as soon as an Inspector believes that there has been a breach of the OHSA then he or she would have reasonable and probable grounds to believe that the offence had been committed and would not need to inquire any further. Assume, however, for the sake of argument, that the Inspector also turns his or her mind to the question of whether or not the breach occurred despite due diligence on the part of the employer. As noted above, at least in Ontario, the issuance of an Order does not take place, at least according to the MOL Manual, until the Inspector is satisfied that the contravention has taken place and that there has been no due diligence. Arguably, then, at the time an order is issued it would be indisputable that reasonable and probable grounds existed. However, the argument that the Inspector had reasonable and probable grounds at the moment he wrote the order was rejected in a recent Ontario case.¹⁴⁴

The determination of “reasonable and probable grounds” may not, however, be the point at which the Inspector’s inquiry shifts from a compliance inspection to an investigation for the purposes of determining penal liability. In *R. v. Jarvis*¹⁴⁵ the Supreme Court of Canada considered the question of when an inquiry by an official of the Canada Customs and Revenue Agency shifted from an inquiry for audit and compliance purposes to an investigation for the purposes of determining penal liability. The Supreme Court of Canada held that where the predominant purpose of an inquiry is the determination of penal liability, then there exists an adversarial relationship between the taxpayer and the state. Once that adversarial relationship crystallizes Charter rights are engaged.

To determine whether the predominant purpose of an inquiry is the determination of penal liability, the court held that all factors which bear upon the nature of the inquiry must be considered. Apart from a clear decision to pursue a criminal investigation, no one factor was determinative. Even, according to the court, when reasonable grounds to suspect an offence

¹⁴¹ *R. v. Inco Ltd.*, supra; *R. v. Jarvis*, supra

¹⁴² *R. v. Inco Ltd.*, supra

¹⁴³ *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100

¹⁴⁴ *R. v. Canada Brick Ltd.*, supra

¹⁴⁵ *R. v. Jarvis*, [2002] 3 S.C.R. 757

exists, it will not always be true that the predominant purpose of an inquiry was the determination of penal liability. Those factors to be considered in determining the predominant purpose of the inquiry include but are not limited to such questions as:

- (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (c) Had the auditor transferred his or her files and materials to the investigators?
- (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
- (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?¹⁴⁶

I. THE CONSEQUENCES OF DETERMINING THAT THE INVESTIGATION IS TO DETERMINE PENAL LIABILITY

Once the line is crossed and the investigation is for the purposes of determining penal liability, Charter rights, as noted above, are engaged. The following are the key consequences that result.

First, documentation and records obtained during a compliance inspection of either an individual or a corporation are available to, and can be used by, the regulatory authority in a prosecution of either the individual or the corporation. To quote from the Supreme Court of Canada:

...there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of the CCRA's audit function. Nor, in respect of validly obtained audit information, is there any principle of derivative use immunity that would require the trial judge to apply the "but for" test from *S(RJ)*, supra, if a particular piece of evidence comes to light as a result of the information validly contained in the auditor's file, then investigators may make use of it.¹⁴⁷

Second, once the predominant purpose of the inquiry is the determination of penal liability then no further statements may be compelled from an individual suspected of having breached the OHSA and no further documents may be inspected, examined or taken from that individual

¹⁴⁶ *R. v. Jarvis*, supra, per Iacobucci J. and Major J. at pages 806-807

¹⁴⁷ *R. v. Jarvis*, supra, per Iacobucci J. and Major J. at page 808

except pursuant to a warrant. Furthermore, no documents may be compelled from the individual for the purpose of advancing the criminal investigation.¹⁴⁸

However, while an employee can insist upon his section 7 right to be protected from self incrimination, a corporation has no such right and, as a result, has no standing to prevent its employees from being compelled to give statements when the corporation, rather than the employee, is being investigated for penal liability.¹⁴⁹

Third, while employees who are compelled to give evidence are protected from use of that evidence in prosecutions against them, a corporation enjoys no similar rights. Corporate employees are compellable as witnesses in prosecutions as against the corporation.¹⁵⁰

J. EXERCISE OF POWERS DURING INVESTIGATION TO DETERMINE PENAL LIABILITY

Once Charter rights are engaged the powers afforded to the regulatory authority are circumscribed. From that point forward the information cannot be compelled from either individuals or a corporation that is subject to the penal investigation without:

- (a) consent; or
- (b) statutory authority (i.e. warrant).

In order for a consent to be valid the person giving the consent “...must be possessed of the requisite informational foundation for a true relinquishment of the right.” The person must have sufficient information to make consent meaningful.¹⁵¹

Absent any such consent, the Inspector must obtain a warrant. On application without notice, judicial authorization may be granted “authorizing an Inspector...to use any investigative technique or procedure or to do anything described in the warrant if...” the judicial authority “...is satisfied by information under oath that there are reasonable grounds to believe that an offence against this Act or the regulations has been or is being committed and that information and other evidence concerning the offence will be obtained through the use of the technique or procedure or the doing of the thing.”¹⁵² The statutory authority allows for authorization to enter and search the place for which the warrant was issued and “without limiting the powers” of the judicial authority the warrant “may” in respect of the alleged offence authorize the Inspector to:

- (a) seize or examine and copy any drawings, specifications, licence, document, record or report;
- (b) seize or examine any equipment, machine, device, article, thing, material or biological, chemical or physical agent;

¹⁴⁸ *R. v. Jarvis*, supra, per Iacobucci J. and Major J. at page 808

¹⁴⁹ *R. v. Inco*, supra, per McMurtry J. at page 509

¹⁵⁰ *R. v. Amway Corporation*, supra

¹⁵¹ *R. v. Borden* (1994) 92 C.C.C. (3d) 404 (S.C.C.)

¹⁵² Ont. OHS Act, sec. 56(1)

- (c) require a person to produce any item described in clause (a) or (b);
- (d) conduct or take tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent, and take and carry away samples from the testing;
- (e) take measurements of and record by any means the physical circumstances of the workplace; and
- (f) make inquiries of any person either separate and apart from another person or in the presence of any other person.¹⁵³

The warrant may contain such other terms and conditions as the judicial authority “considers advisable in the circumstances.”¹⁵⁴

Provision is also made to allow for seizure, during execution of the warrant, of anything that is in plain view¹⁵⁵ and, in addition, there is authority for search and seizure in exigent circumstances where it would be impractical to obtain a warrant.¹⁵⁶

While the statutory provision with respect to warrants is broad in scope and can be used to obtain evidence of due diligence,¹⁵⁷ the powers exercised under a warrant are not unlimited. Such powers do not authorize investigative “fishing expeditions” nor do they diminish the proper privacy interests of individuals or corporations. This is particularly so with respect to personnel records which may contain highly personal information unrelated to the investigation.¹⁵⁸ Furthermore, there is a live issue in Ontario as to whether or not warrants issued under the OHSA can authorize the detention and interrogation of a material witness. In two recent Ontario cases applications for an interim stay of such warrants were allowed pending the hearing of the applications to quash the warrants as being unconstitutional for infringement of the section 7 and 8 Charter rights of those sought to be questioned.¹⁵⁹

K. PRACTICAL ADVICE IN DEALING WITH THE MOL

We should ask ourselves why any of this matters. In each and every case counsel will, if consulted, determine the degree to which the corporation or individual wishes to cooperate with the MOL. There will often be occasions when, whatever may be the legal requirements, a decision will be made to voluntarily provide documentation to the MOL. Furthermore, it is indisputable that even in those cases where documentation or statements are wrongfully obtained by the MOL the effective remedy available to the corporation may well be limited.

¹⁵³ Ont. OHSA, sec. 56(1.2)

¹⁵⁴ Ont. OHSA, sec. 56(1.4)

¹⁵⁵ Ont. OHSA, sec. 56.1(1)

¹⁵⁶ Ont. OHSA, sec. 56.1(2)

¹⁵⁷ *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)* [1999] 1 S.C.R. 743

¹⁵⁸ *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, supra.

¹⁵⁹ *Jans v. Her Majesty the Queen (Ministry of Labour)*, unreported February 11, 2004, Nordheimer J.; *R. v. Morrison* [2005] O.J. No. 5255

All of that said, knowledge of the foregoing principles is important in order to frame the appropriate response to the MOL and equally important to ensure that, through inadvertence and neglect, a prosecution case against the corporation and/or its employees is not made out. All of us who practice in this area can attest to cases where an employer did, in our estimation, exercise considerable due diligence to avoid a breach of the OHS Act but was unable to prove its defence because of ill-considered responses made, undoubtedly for the best of intentions, to MOL Inspectors during compliance inspections and penal investigations.

In light of the foregoing, I think that corporate counsel may wish to consider the following practical suggestions.

(a) Due Diligence

First and foremost, a prudent employer will want to ensure that it fully understands its obligations under the OHS Act and takes every reasonable step to comply with those obligations.

It is simply not enough to assume that an employer is compliance with the OHS Act merely because it has never had an accident. It is essential that those with the authority to direct how work is performed understand their, and their employer's, OHS Act obligations.

(b) Steps Prior to a MOL Inspection or Investigation

First, you want to make sure that all of your employees have the training on OHS Act compliance that is appropriate for their job duties and responsibilities. For supervisory and managerial employees that training should include training with respect to the role and responsibilities of MOL Inspectors and training with respect to the company's policies and procedures with respect to dealing with such Inspectors.

Second, recognizing that however good and comprehensive your training is, there will nevertheless be MOL attendances at your facilities and, from time to time, there may be contraventions and accidents. It is, therefore, imperative that you have in place a policy to deal with interaction with the MOL.

Third, I think it imperative that the corporate policy be that one person at the workplace be responsible for dealing with the MOL. The designated individual should, obviously, fully understand the OHS Act, the role of the Inspector and the obligations of the workplace parties. That individual should be designated in advance and, if possible, a second person should be appointed to deal with the MOL in the absence of the designated contact person.

Forth, I think it prudent that the corporation require that any orders issued by an MOL Inspector be brought to the attention of senior management or counsel rather than simply be dealt with at the operational level. This will ensure that the corporation can determine how best to respond to such orders, whether or not such orders ought to be appealed and, finally, whether or not the orders are of sufficient importance that outside counsel should be consulted. On this point it is important to bear in mind that the failure to appeal an order issued under the OHS Act may well

preclude an employer from arguing at trial that the Inspector making the order lacked jurisdiction to do so. Such an attack might well be barred by the collateral attack rule.¹⁶⁰

Fifth, the policy should anticipate the circumstances in which the corporation will consider the retention of independent counsel to provide advice to supervisors and managers. There are principles governing the retention of such counsel and when it is appropriate, and when it is not appropriate, to indemnify officers, directors and supervisors for legal fees and fines that might be incurred. Both the *Ontario Business Corporations Act* and the *Canada Business Corporations Act* contain provisions dealing with the indemnification of officers and directors for legal fees and fines incurred in OHS matters. The Court of Appeal in *R. v. Bata Industries Limited*¹⁶¹ dealt with the limitations upon a trial judge's ability to impose, as part of a sentence upon a corporate accused, a term prohibiting such indemnification.

At one point in time it was not uncommon in cases of a critical injury or fatality for a corporation and one or more of its supervisors to be represented by the same legal counsel. Not only did this save money but it ensured a unified defence vis-à-vis the MOL. While it may well still be appropriate, in some cases, for corporate to act on behalf of both the employer and supervisors at the initial stages of inspection or investigation, in my view, in any case where a prosecution appears likely, and certainly in any case where charges are laid, the employer and the supervisors should have independent counsel. The point is, I think, illustrated in a recent case involving a prosecution of Con-Drain Company (1983) Limited and Carl Emmanuel.¹⁶²

The facts are straightforward. A large contractor, Con-Drain, was charged with breaches of the Occupational Health and Safety Act ("OHS") in that it had failed to ensure, at a construction project, that there was, as required, a signaller present to aid in the backing up of construction equipment. A worker who was driving a piece of construction equipment was also charged. Both accused were charged in a joint Information. The worker, after briefly obtaining independent legal advice, engaged as his counsel, counsel that had been retained on behalf of Con-Drain.

The matter proceeded to trial slowly and, in due course, counsel for Con-Drain and the worker brought a motion to have the prosecution as against each of them stayed for a breach of their respective right under section 11(b) of the Charter to a speedy trial. As you know, the test to be applied in determining whether or not an accused has been prejudiced by a delay is different for a natural person than for a corporation. The court was satisfied that the right of the worker to a speedy trial had been prejudiced to such a degree that a stay was warranted. The court made that finding (notwithstanding some difficulties with the evidentiary record before the court) because it was satisfied, based on the evidence before it, that the delay in bringing the matter to trial was prejudicing the "security of the person" in that the worker, who suffered from dementia, was experiencing significant adverse health effects due to the delay. The judge stated "I accept that his behaviour has changed and that his memory has deteriorated significantly since April 2007." That prejudice was beyond, in the view of the court, that which would normally be inferred from a long delay. However, the application for a stay on behalf of Con-Drain was dismissed in part,

¹⁶⁰ *R. v. Consolidated Maybrun Mines Limited* (1996) 28 O.R. (3d) 161

¹⁶¹ (1995) 25 O.R. (3d) 321

¹⁶² *R. v. Con-Drain Company (1983) Limited and Carl Emmanuel* (unreported, November 12, 2007) Newmarket Docket No. 0700170 (Ont. C.J.), Justice Armstrong

at least, because “there is no proper evidentiary record to support such claims [of prejudice to the employer]”.

It was on October 25, 2007 that the court stayed the prosecution as against the worker and dismissed Con-Drain’s application for like relief. That same day the Crown advised that, as a result of the staying of the charges as against the worker, the worker had become a compellable witness and, accordingly, the Crown advised that it would bring a motion to remove counsel for Con-Drain. That firm then sent the worker for independent legal advice and obtained from the worker a Certificate of Independent Legal Advice and a Conflict Waiver. The Crown brought its motion anyway. The motion was opposed by the law firm.

The motion to remove the employer’s law firm from acting for it at trial came on before the same judge who heard the motion for a stay. Not surprisingly, the motion was granted. The court held that there was a disqualifying conflict both because:

- (a) the law firm possessed confidential information from one client which was relevant to another client involved in the same matter; and,
- (b) the differing interests of those two clients in the same matter made it impossible for the law firm to advocate effectively for both.

Sixth, a secure channel should be established to ensure that all legal communications and reports are kept confidential and privileged. The last thing you want to have is correspondence or reports that you intend to be privileged to and from counsel falling into the hands of the MOL or those employees who may, in the circumstances, have an adversarial relationship to the employer.

A cautionary tale in this regard is to be found in the case of *R. v. Bruce Power*.¹⁶³ In that case, a critical injury investigation at the workplace conducted by the employer, with worker representation on the investigatory committee, led to the production of a report. The employer believed the report would be privileged. However, a worker member of the investigatory team, in breach of his undertaking to destroy his copy of the report, provided a copy to the Ministry of Labour after charges had been laid as against the corporation and two supervisors. A motion to stay the prosecution was granted at trial and then set aside on appeal. The matter is now working its way up to the Court of Appeal.

(c) Dealing with the Inspector

First, when the Inspector arrives at the workplace or project the person designated for dealing with the MOL should meet with the Inspector. At that time the company representative should clearly ask the Inspector the purpose of his or her attendance.

Second, the representative of the employer or constructor should remain with the MOL Inspector at all times during the latter’s attendance at the workplace or project. The only exception would be in those circumstances when the Inspector asks that he or she be left alone.

¹⁶³ *R. v. Bruce Power, Ritchie and Burley* (unreported, November 13, 2007) Justice Morneau

Third, the employer representatives should keep detailed notes of their dealings with the Inspector. Those notes should include reference to those portions of the workplace that were visited, the timelines of the visit, the persons met and spoken to, any requests made by the Inspector and any responses given to such requests.

Fourth, the person accompanying the Inspector should, if in any doubt as to the propriety of the Inspector's requests, immediately contact a senior management member who can decide if it is necessary to contact counsel. If the Inspector refuses to allow a consultation with counsel then that should be noted although we would not recommend that anything be done that could be construed as obstruction.

Fifth, any and all documents that are given to the Inspector should be given with a covering letter stating that they are being provided pursuant to statutory compulsion. Counsel can assist in the wording of such a covering letter.

Sixth, if the Inspector wishes to interview anyone then he or she should be asked the purpose of the interviews. If the Inspector advises that he or she is simply engaged in a compliance inspection then the interview can proceed but the person being interviewed should advise that he or she is answering the questions under statutory compulsion. If the Inspector wishes to conduct the interview because he or she has reasonable and probable grounds to believe that the company or the individual has committed an offence, those to be interviewed should advise that they wish to consult counsel beforehand.

Seventh, it is important that those interviewed by the MOL are given some advice as to the interview process and the importance of ensuring not only that the answers are truthful but, further, are complete and, furthermore, are not speculative.

(d) Warrants

In my view, anytime a warrant is issued counsel should be consulted. Obviously, for the reasons outlined above, the warrant has been issued because there are grounds – be it reasonable and probable grounds or an adversarial relationship – to think that an offence has occurred and prosecution is more than a mere possibility.

Second, while it may not be possible to have counsel in place at the time that the warrant is being executed, that person who is designated to deal with the MOL should ask for a copy of the warrant and send a copy to legal counsel immediately. You should know, however, that those executing the warrant do not need to allow the employer or constructor to consult with counsel before they proceed to execute the warrant.

Third, the warrant will be quite specific as to the date and time that it is to be executed and the items to be sought. You should do your best to confine the Inspector to the terms of the warrant and if, for any reason, you feel that the Inspector is exceeding the terms and conditions of the warrant that objection should be noted to the Inspector.

Fourth, the Inspector should be accompanied as he or she conducts the search. Detailed notes should be made of everything that he or she examines, seizes and any comments that he or she might make.

L. CONCLUSION

I hope the foregoing is of assistance to you.