OH&S Due Diligence Roundup: The Latest Word from the Courts

By: Ryan Conlin

The law of due diligence under the Occupational Health and Safety Act, (the "OHSA") is constantly evolving. In recent months, the Ontario Court of Justice has issued a number of decisions which shed some light on the level of due diligence required to successfully defend OH&S prosecutions. In this update, we will provide insight on the latest decisions from the Courts and what they mean for employers from a compliance perspective.

Ontario (Ministry of Labour) v. Quinton Steel (Wellington) Limited, 2014 ONCJ 713

This case involved the death of a welder who tragically fell to his death after falling from a mobile platform which was raised 6.5 feet above the ground. The Defendant was charged under the "general duty clause" with failing to take the reasonable precaution of installing guardrails and failing to train the worker with respect to protecting himself from falls.

The "general duty clause" is the generic section of the Act which requires employers to take every precaution reasonable in the circumstances for the protection of workers. The Ministry generally relies on this section where the OHSA and Regulations do not specifically address a hazard. In such cases, the trial focuses on whether it would have been "reasonable" for the Defendant to take the specific precaution referenced in the charge.

This case was somewhat unusual in that the Industrial Regulations under the OHSA require fall protection where a worker is exposed to a hazard of more than three metres pursuant to section 85 of the Regulation. Section 13 requires a guardrail along the open side of any raised floor, mezzanine, balcony, landing, platform or other surface. The Ministry did not lay a charge under section 13 in this case.

The Defendant advanced a number of arguments to challenge the Crown's case. The Court accepted the Defence argument that section 13 of the Regulation only applies to fixed structures and is thus not applicable to the mobile platform at issue in the case. This means that only the three meter requirement for fall protection set out in section 85 of the Regulation was applicable to the case.

Thus, the Court accepted the Defence argument that the Crown cannot use the "general duty clause" to impose requirements which are stricter then what the OHSA and Regulations require. This finding represents a welcome reinforcement of the principle that the "general duty clause" should be reserved for cases where the OHSA does not impose any express requirements on a particular issue.

It is our understanding that the Crown has filed an appeal in this case which will be heard this Fall. We would be surprised if the Appeal Court interfered with the principle that the general

duty clause cannot be used to impose requirements which exceed the explicit requirements of the OHSA or Regulations.

It will be interesting to see what the Appeal Court finds with respect to the interpretation that section 13 only applies to fixed structures. The section itself does not explicitly impose such a restriction, but in our view it is certainly open to a Court to uphold the findings of the Justice of the Peace on this point.

Ontario (Ministry of Labour) v. Semple Gooder Roofing Corporation, 2015 ONCJ 183

This case is yet another illustration of how having a robust health and safety system will not always be enough to prove due diligence. The Defendant in this matter faced charges of failing to ensure that a worker was protected by fall protection when dumping garbage from a building during a commercial roofing project.

The accident occurred when a worker removed the middle guardrail on the edge of the roof and fell over with the mechanical buggy he was using to dump the garbage. The Court accepted that the Defendant had met or exceeded industry standards with respect to safety.

However, the Court found that the Defendant did not establish due diligence with respect to the specific hazard involved in the accident. The Court pointed out that the middle guardrail did not meet legal standards for a removable guardrail and that there was no evidence of the development of any kind of procedure for disposing of garbage. Essentially, each worker was allowed to follow their own procedure and thus the Defendant was convicted.

The case reinforces the principle that Defendants are required to ensure that workers must understand how to perform hazardous tasks before commencing work. In this case, the employer's safety system appeared to be quite strong, but it failed to ensure that a safe process was communicated to workers about how to use fall protection when disposing of garbage.

R. v. ABS Machining Inc., 2015 ONCJ 213

This case is the latest judgment to deal with the thorny issue of how worker error factors into the due diligence defence. This is a part of the due diligence defence which is often hard to establish for a Defendant. Crown prosecutors frequently cite the following well known passage from the Ontario Court of Appeal's decision in *R. v. Dofasco Inc.,* 2007 ONCA 769

> *.. . workplace safety regulations are not designed just for the prudent worker. They are intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless". In our view, this principle also extends to deliberate acts of employees while performing their work.*

The decision in this case turned on whether it was reasonably foreseeable to the employer that a worker in a machine shop would rotate a spindle on a new product, a task which the worker admitted in his evidence is never assigned to junior employees such as himself. The worker had extensive safety training and admitted that he failed to follow a number of aspects of his training when he chose to rotate the spindle.

The Crown did not deny that the worker contravened his training. However, it argued that the employer should have been explicitly instructed the worker not to rotate this particular spindle, should have ensured the worker was supervised at all times, fenced off the area in which the spindle was located, placed a warning sign near the spindle and chained down the spindle itself.

The Court rejected all of the Crown's arguments. It followed earlier Court decisions which have held that there is no obligation to supervise employees at all times and that the worker had been made aware of the hazards through his training. The case is a good illustration of how an employer is required to take every *reasonable* precaution as opposed to every *conceivable* precaution.

This case is consistent with earlier authorities which provide that employers can rely on the due diligence defence when a worker does something that is truly not foreseeable. This type of argument is most often successful where a worker performs a task which is clearly outside their well-established job description (see *Ontario (Ministry of Labour) v. 679052 Ontario Ltd. (c.o.b. Auction Reconditioning Centre* [2012] O.J. no. 5849 (Ont. Ct. Jus.) or is working in an area that they had no rational reason to be in (see *R v. Wabi Developments* (unreported, June 26, 2009, Ont. Ct. Jus., Carr J.) This type of argument rarely succeeds in cases where a worker fails to follow a company rule or procedure.

R v. Skyreach Window Cleaning Inc. (unreported, October 28, 2014, Ontario Ct. Jus. Triantafilopoulos J.P.)[1]

This case was a prosecution under the "general duty clause" alleging that the employer failed to take the reasonable precaution of showing workers a user manual for a custom built swing stage system on a building. A piece of the swing-stage had fallen off the device to the ground below. The Crown alleged that the swing stage had been improperly parked.

The Court granted a non-suit motion brought by the defence on the basis that the user manual did not specifically specify that the machine should be parked in any particular place for safety purposes. The Court also found that nobody had provided a user manual to the employer in any event.

This case is one example of a prosecution based on an alleged failure of an employer to show a worker the user manual. In such cases careful attention should be paid to what the manual actually requires the worker to do from a safety perspective and whether other types of training addressed the issues set out in the manual.

What employers should know

The best way to avoid a prosecution, not to mention potentially devastating workplace accidents, is to ensure your due diligence program is fully implemented and continually refreshed and improved. At the 2015 Ontario employment law conference, employment lawyer Ryan Conlin will provide guidance on scope of employer OH&S duties. This session will review:

[1] Ryan Conlin was counsel for the defence on this matter.

- Changes to the definition of a "worker" under the **Occupational Health and Safety Act** and its implications,
- Recent cases involving criminal prosecutions and jail terms for employers and corporate officers, and
- Trends in enforcement of the Act by the Ministry of Labour and how to manage Ministry investigations.

Attending the **16th annual Ontario Employment Law Conference**, presented by Stringer LLP and First Reference Inc., is more essential than ever.

The Ontario Employment Law Conference will take place at the Centre for Health & Safety Innovation in Mississauga on June 4, 2015. We look forward to seeing you and helping you apply the latest employment and labour law changes. **Come and learn the latest!™**

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