

## **Coming Soon to an Ontario OHS Inspection Near You:**

### **Administrative Monetary Penalties**

By Ryan Conlin and Jeremy Schwartz

The Ontario government has introduced the [Working for Workers Act 7](#), the latest iteration of the seemingly annual omnibus bill which makes amendments to the various labour employment law statutes. One potentially significant amendment is a proposed new power for the Inspectors to issue administrative monetary penalties (“AMPs”) for contraventions of the OHSA.

#### **What are AMPs?**

AMPs are “administrative” financial penalties imposed for violations of the OHSA outside the context of the Court system where the defendant benefits from *Charter* protections in terms of disclosure, protection against self incrimination, the right to speedy trial etc.

#### **How Will AMPs Work in Ontario?**

While most of the details of how the Ontario system will work remain to be announced, the legislation states that Inspectors can issue AMPs against parties (individuals and corporations) for contraventions of or failures to comply with the OHSA. The amount of the AMP will be determined based on criteria that will be set out in a Regulation to be published later.

The legislation specifies that a party can seek a review of the penalty from a person or entity designated by Regulation for that purpose. The entity conducting the review can confirm, rescind, or vary the penalty. At this time, it is uncertain if the review will be confined to an administrative review by a Ministry official or whether there will be a right to appeal to an independent body.

We expect that the government will initiate a similar procedure to what is followed under environmental legislation in Ontario, where a penalty issued by an officer is initially reviewed by a Director at the Ministry with a further appeal to the Ontario Land Tribunal. The Ontario Labour Relations Board (“OLRB”) currently has jurisdiction to hear several disputes arising under the OHSA. It seems logical that the OLRB will be prescribed the forum to hear appeals of AMPs.

#### **Will AMPs replace Prosecutions?**

In British Columbia, the contraventions of OH&S legislation are enforced almost exclusively by way of AMPs that proceed through the provincial workers’ compensation board (Worksafe B.C.). In other provinces, AMPs (subject to some prominent exceptions) are generally used to address less serious workplace safety violations and prosecutions are still widely used for more serious cases.

We do not anticipate that Ontario will follow British Columbia's lead and largely abandon provincial prosecutions in the OHS context. Of course, time will tell.

### **Does Due Diligence Factor into AMPs?**

It is too soon to tell. This legalistic and confusing issue is treated differently across the country. The *Canada Labour Code* explicitly prohibits consideration of due diligence in the AMP context and other jurisdictions allow it. The bottom line is that we expect that any reasonable care exercised by an employer will at minimum point toward a lower penalty and possibly amount to a complete defence.

We note that the [Nova Scotia Court of Appeal held](#) that a due diligence was available for certain AMPs even where the legislation was silent on the question.

### **Can a Party be Prosecuted in Court Under the OHSA After Paying an AMP?**

No. Thankfully, the legislation explicitly states that a party which pays an AMP cannot be charged with an offence arising out of the same facts. It appears the legislative intent is for the Ministry to "pick a lane" in terms of proceeding by way of AMP or prosecution.

### **What are the Chances of a Successful Constitutional Challenge to the AMPs regime?**

A successful constitutional challenge is a longshot in our view. The new legislation explicitly states that the purpose of the AMPs is to promote compliance with the OHSA and Regulations. This provision is likely designed to head off a Court challenge suggesting that AMPs are an unconstitutional attempt to impose punitive fines without offering the protections guaranteed by the *Charter*.

Unfortunately, Courts have not been very receptive to these type of challenges in the context of other regulatory regimes that impose AMPs. For example, the perpetrator of a "Ponzi" scheme received a 33 million administrative penalty for securities fraud. She was subsequently charged criminally and argued that her massive AMP was tantamount to a "penal consequence" and sought a dismissal of her criminal charges.

The [B.C. Court of Appeal held](#) that the AMP was "...a protective and preventative order designed to deter similar fraudulent conduct, not to denounce the appellant's conduct or reflect her moral blameworthiness." A [constitutional challenge was also rejected](#) in the OHS context in Alberta where several individuals and an employer were subject to AMPs for amongst other things, refusing to give statements to OHS authorities outside the presence of counsel. These cases suggest that even where AMPs are very high, a constitutional is not likely to succeed.

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