

## Does the Right to Remain Silent Apply in Ministry of Labour OHS Investigations?

**Ryan Conlin**

The right to remain silent is one of the well-known legal protections a potential accused is entitled to in criminal and quasi-criminal investigations. One of the most confusing issues that occurs in workplace accident investigations is the issue of when a potential accused has the right to remain silent and consult counsel. It is now well established under Ontario law that Ministry of Labour Inspectors are required to “caution” a potential accused when the Inspector has “reasonable and probable grounds” to believe an offence has been committed.

Unlike other regulatory investigators, Ministry of Labour Inspectors wear “two hats” in the sense that they conduct both routine inspections and also conduct investigations for the purpose of pursuing charges in court. The difficult legal question which arises is at what point does the Inspector form the “reasonable and probable grounds” which trigger the obligation to read a potential accused his or her rights. There have been very few cases where this issue has been considered by a court in an OHSA prosecution. However, in a recent decision an Ontario court considered an argument from a defendant that the Inspector ought to have “cautioned” her about her rights before taking a statement.

### **The *Lootawan* Decision**

In *Ontario (Ministry of Labour) v. JR Contracting Property Services, Lootawan and Haniff*, a significant issue in the investigation was whether Teisha Lootawan (hereinafter “Ms. Lootawan”) was a “supervisor” of a worker injured at a residential construction project. At an early stage in the investigation, the Inspector had received conflicting information from various witnesses on the issue of whether Ms. Lootawan had any involvement with the injured worker’s employer. The injured worker claimed that Ms. Lootawan was his supervisor but other individuals interviewed by the Inspector denied that Ms. Lootawan was involved with the employer.

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The Inspector attempted to contact Ms. Lootawan to obtain a statement from her. Ms. Lootawan responded that she was not prepared to meet with the Inspector unless he was prepared to provide her with a list of questions for her lawyer to review for the purpose of determining whether she would cooperate. After these discussions with Ms. Lootawan, the Inspector learned that Ms. Lootawan was listed as a contact person on invoices issued by various community newspapers in the Toronto area. The court indicated that this evidence appeared to corroborate the injured worker's position that Ms. Lootawan had significant involvement in the matter.

Ms. Lootawan forwarded correspondence to the Inspector declining to meet with him. The Inspector responded by issuing a written order requiring Ms. Lootawan to attend at the Ministry's office. The written order indicated that if she were found guilty of refusing to comply she faced a maximum fine of \$25,000 and/or up to one year of imprisonment. The Inspector invited Ms. Lootawan to have counsel present during her interview but did not advise her of the information he had obtained about her name being listed on invoices or explain the significance of this evidence to her.

Ms. Lootawan was charged with providing false information to an Inspector and two other counts related to the accident. The providing false information charge was entirely based on a statement she gave at the meeting she was compelled to attend by way of the Inspector's order. Ms. Lootawan brought a motion to have all of the charges against her dismissed on the basis of an abuse of process or alternatively to have her statement excluded from the trial.

The court declined to dismiss the charges but did find that the Inspector violated Ms. Lootawan's Charter rights pertaining to unreasonable search and seizure, self-incrimination and her right to counsel. However, the court found that admitting the statement into evidence would bring the administration of justice into disrepute and excluded it from the trial. This means that the Ministry could not rely on the statement to convict Ms. Lootawan of providing false information to the Inspector.

## **Practical Implications**

The case confirms that the right to silence does exist in Ministry of Labour investigations and that Inspectors are required to caution a potential accused where reasonable and probable grounds exist to believe an offence has been committed. Further, Ms. Lootawan assisted her case by documenting her desire not to give a statement to the Ministry of Labour in writing and making it clear that she wished to seek legal advice about answering any specific questions posed by the Inspector.

It is my view that this decision (unless it is successfully appealed by the Ministry) makes it considerably less likely that Inspectors will issue compliance orders to potential defendants requiring them to give statements at a later stage in the investigation. However, it is important to appreciate the decision does not address the important issue of the ability of an Inspector to compel such a statement at an early stage of an investigation.

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For example, it is very common for Inspectors to pursue charges against the immediate supervisor of an injured worker. The question remains as to whether an inspector could issue a compliance order to a supervisor who refuses to give a statement immediately after an accident before the Inspector has obtained a great deal of information.

We strongly recommend that employers have an accident response plan in place which proactively addresses the issue of the provision of statements by individuals who are at risk of prosecution. In a Ministry of Labour investigation these individuals include the immediate supervisor of the injured worker, managerial personnel with responsibility for the work at issue, a worker who has acted negligently and officers and directors. Eye witnesses and other individuals who are not at risk of prosecution are most likely required to give a statement and cooperate with the Inspector.

The accident response plan should include contact information for legal counsel who can assist the employer in navigating the complex issue of giving statements to the Ministry of Labour. It may be necessary for individuals to obtain their own counsel. If an Inspector seeks to take a statement from a potential accused, the first question that needs to be asked is whether the statement is in fact voluntary. If the issue of voluntariness is not addressed, it may be open to the Ministry to argue in court that the witness voluntarily agreed to speak to the Inspector. In the event the statement is voluntary, it is in the interest of the potential accused to decline to speak with the Inspector until legal counsel has been contacted.

In the event that the Inspector indicates that he is relying on his inspection powers to compel a statement, it is recommended that the potential accused ask that the Inspector provide the request in the form of an order. The potential accused should contact legal counsel who can assess the options available for responding which include providing the statement (possibly subject to conditions), answering questions in writing or appealing the order to the Ontario Labour Relations Board.

It is important to appreciate that the law is still developing in this area. The *Lootawan* case shows that the right to remain silent can be exercised in Ministry of Labour matters. However, employers and individuals ought to seek immediate legal advice in the aftermath of an accident to ensure that their rights are protected and to minimize the risk of prosecution.

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