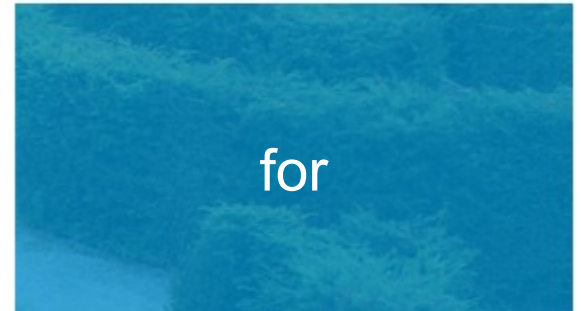


Occupational Risk Management: Liability, Due Diligence and Best Practice



For the 2011 Rims Canada Conference

by David Law

"There are no accidents in my philosophy. Every effect must have its cause. The past is the cause of the present, and the present will be the cause of the future. All these are links in the endless chain stretching from the finite to the infinite."

Abraham Lincoln

- What does occupational risk tolerance mean?
- Accidents Statistics and OHS Risks
- Overview of *OHSA* & Risk Management Steps
- Bill C-45: OHS Criminal Negligence
- Risk Management Action Items
- Bill 168: Preventing Workplace Violence

Something to think about:

If an organization tolerates unnecessary risk for its workforce, what does that tell us about that organization?

What are the questions to ask in exploring this topic?

What approach should we expect of an organization?

National Workers' Compensation Statistics

- In Canada in 2009:
 - 260,284 accepted lost time claims
 - 939 fatalities (384 in Ontario)
 - Approximately 20 work-related deaths per week
 - Average # fatalities per year between 1998 and 2008 = 948
 - Most fatalities due to traumatic injuries and occupational diseases



(Source: Association of Workers Compensation Boards of Canada)

Workplace insurance / Workers' compensation

- Arguably, the cost of injury is always inherently too high, because of the effects on people
- But a certain degree of injury is almost inevitable
- *What you pay:* premiums to WSIB based on payroll, rates established based on industry-wide risk
- *What you get:* total coverage for all workers
- *What you may pay:* surcharges, based on excess uptake in insurance over “expected cost”
- *What you may get:* rebates, if your experience is better than “expected”

Cost

- it is impossible to operate a due diligence system under the OHSA, that will both work and satisfy the regulator, without **personnel devoted to the effort**
- the cost of building a policy, assessing providers and personnel, continually reviewing and renewing the effort
- training, equipment, systems, committee meetings, improvements
- MOL “tickets”, workplace changes imposed by Order of the MOL, or fines imposed by Courts upon conviction for offenses
- legal fees, interruptions to production, lost management and personnel time

Benefit

- A prevention model that can work to eliminate, reduce or protect against risk
- The reduction in your potential liabilities under OHSA
- A system of due diligence, vital to a defence against charges
- A system of evidence collection, necessary to a defence against charges

- Human:

- personal injury, pain & suffering, diminished lifestyle, disability



- Economic:

- lost production, accident investigation time, re-training costs, overtime payments, workers' compensation premiums and penalties

- Legal:
 - investigations, stop work/compliance orders, quasi-criminal prosecution, director & officer liability, high fines & jail terms



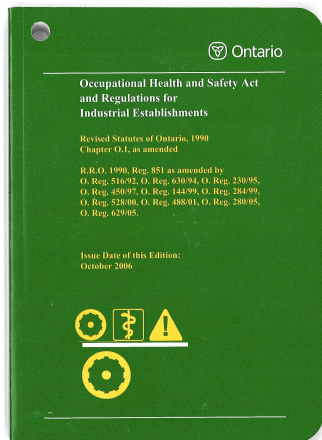
In Ontario:



The Ministry of Labour (2008/2009)

- Conducted 25,430 investigations
- Issued 155,057 Orders
- Convicted 1,303 employers and individuals
- Collected \$28,272,120 penalties

■ The *Occupational Health & Safety Act* (“*OHSA*”) came into force on October 1, 1979



- The foundational concept of the *OHSA* is the Internal Responsibility System (IRS)
- The enforcement of the *OHSA* is through the external responsibility system (ERS)
- Purpose is to protect the health and safety of Ontario workers

In Ontario and across Canada,

- The Internal Responsibility System also promotes:
 - the participation of workers in the protection of their own health and safety,
 - the provision of health and safety information to workers for their protection, and
 - an internal resolution process for health and safety issues and problems that arise at the workplace

Also known as:

- right to participate, right to know, and right to refuse

- Part I: Application

- **OHSA** applies to all provincially regulated employers including the Crown, except for:
 - Farming operations
 - Owners, occupants and their services performing work in private residences



- **Part II: Administration**

- Sets out requirements for:
 - Appointment of Ministry of Labour Inspectors
 - Worker health and safety representative
 - Joint health and safety committee (JHSC)
 - Worker trades committee



•Part III: Duties of Workplace Stakeholders



- Sets out minimum legal obligations for:
 - Constructors
 - Licensees
 - Employers
 - Supervisors
 - Workers
 - Owners
 - Suppliers
 - Professional Engineers and Architects
 - Directors and Officers of a Corporation



- **Part IV: Toxic Substances**

- Sets out requirements for:
 - Use of physical, chemical and biological agents in workplaces
 - Manufacture, distribute or supply new chemical and biological agents
 - Workplace Hazardous Materials Information System (WHMIS)





- Part V: Right to Refuse or Stop Work
- Sets out requirements for:
 - Work refusals
 - Bilateral and unilateral work stoppages



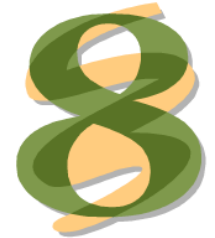
- **Part VI: Reprisals by Employer Prohibited**

- Sets out:
 - Situations and conditions where employers are prohibited from disciplining workers
 - Procedure for workers' complaints of prohibited disciplinary actions

•Part VII: Notices

- Sets out requirements and time frames for notifying MOL, JHSC and Union (if any) of:
 - Fatal or critical injuries
 - Non-critical injuries
 - Occupational illnesses
 - Near misses on construction projects and mines





•Part VIII: Enforcement

- Sets out:
 - Powers of Ministry of Labour Inspectors
 - Process for appeals of Ministry of Labour Inspectors' Orders



•Part IX: Offences and Penalties

- Types of offences and defences
- Prosecution process
- Maximum penalties for offences

•Individuals:

- \$25,000, and/or
- 12 months imprisonment

•Corporations:

- \$500,000 for corporations

•Plus 25% Victim Surcharge





•Part X: Regulations

- Provides Lieutenant Governor in Council with powers to make regulations under the **OHSA**
- **OHSA** sets out the framework or principles for workplace health and safety
(i.e.: Internal Responsibility System)
- Regulations made under the **OHSA** set out precautionary measures and requirements to eliminate, control and protect workers from occupational health and safety hazards
- Generally, the **OHSA** states who does what for the system to protect workers and Regulations state how to protect workers' health & safety

• Regulations made under the *OHSA*

- Construction Projects
- Industrial Establishments
- Mines and Mining Plants
- Health Care and Residential Facilities
- Roll-Over Protective Structures
- Window Cleaning
- Workplace Hazardous Materials Information System (WHMIS)
- X-Ray Safety

(For a complete list, see Appendix D of the *OHSA*)

- Workplace Parties with Responsibilities:
 - Owners
 - Constructors
 - Employers
 - Supervisors
 - Workers
 - Officers & Directors
 - Suppliers, Licensees, Professional Engineers, Architects

- OHS policy, and program to implement OHS policy
- Train managers/supervisors to meet three criteria of “competent person” definition
- Provide necessary and appropriate OHS information, instruction and supervision to workers
- Identify, assess and control all workplace hazards
- Follow OHS hierarchy of hazard risk management: eliminate, control or provide PPE

- Develop written safe work procedures
- Provide and maintain appropriate level of equipment, machinery, tools and materials
- Establish Health and Safety Representative or Joint Health and Safety Committee (JHSC) and ensure at least two committee members are “certified”
- Support Rep/JHSC but not abdicate managerial duties
- Post required information (policy, *OHSA*, etc.)

- “Take every precaution reasonable in the circumstances for the protection of the worker”
a.k.a. general duty clause
- Legal duty supporting the requirement for a complete and effective health and safety management system specific to the particular workplace or environment

- Directors & Officers have legal duties under the *OHSA*:
 - Ensure corporation complies with *OHSA* and regulations
 - Ensure corporation complies with orders and requirements of MOL inspectors, Directors or Minister

Supervisor: Responsibilities

- Definition of *supervisor* – s.1 of the *OHSA*
 - “means a person who has charge of a workplace or authority over a worker.”

Duties

- Ensure workers are advised of workplace hazards
- Ensure workers comply with *OHSA* and regulations
- Ensure workers use or wear equipment or devices required by the employer
- Take every precaution reasonable for the protection of a worker

Who is a *Competent* Supervisor?

- Definition of *competent person* – s.1 of the OHSA

“means a person who,

- a) Is qualified because of knowledge, training and experience to organize the work and its performance,
- b) Is familiar with this Act and the regulations that apply to the work, and
- c) Has knowledge of any potential or actual danger to health or safety in the workplace.”

- **Definition of worker - s.1 of the OHSA...**
- “means a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program.”

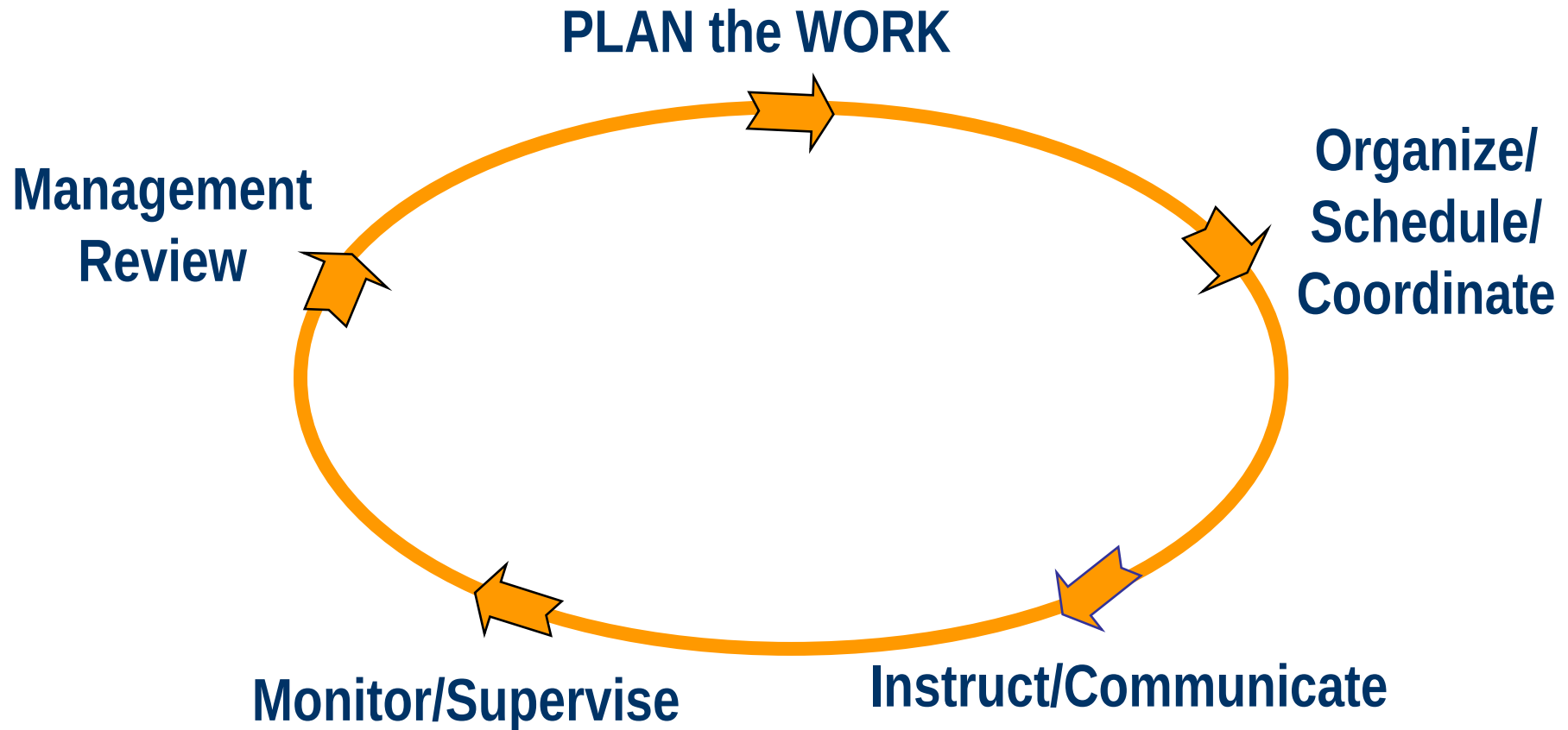


- Sections 28, **OHSA**:
- Positive Requirements
 - Works in compliance with the **OHSA** and regulations
 - Uses and wears protective equipment required by employer

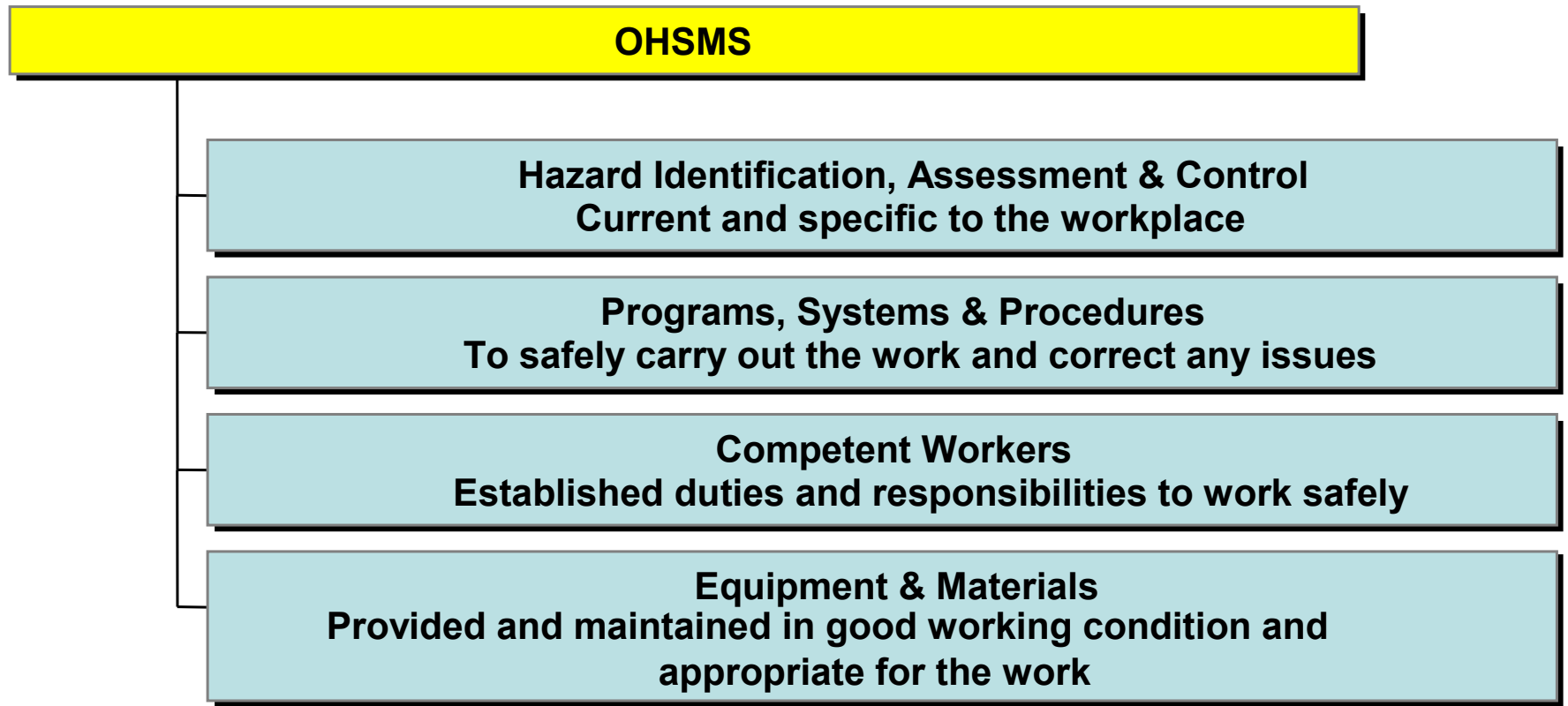


- Sections 28, *OHSA*:
- Reports to Supervisor
 - Absent or defective equipment or protective device
 - Contravention of *OHSA* or regulations
 - Existence of hazards

Managerial/Supervisory Functions



- An OHSMS typically includes:



Planning

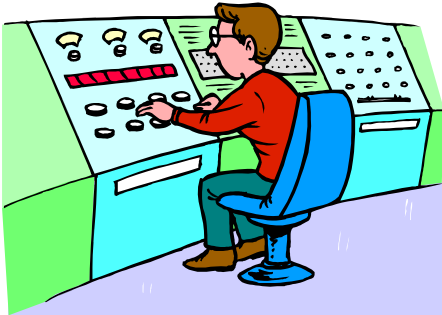
- Identify:
 - Employees, work activities, equipment, machinery, and processes required to perform work
 - Actual and potential hazards of the task(s) and workplaces(s)
 - Applicable provisions in **OHSA** and regulations
 - Employers' applicable policies and procedure



- Organizing/Scheduling/Coordinating
- Assess:
 - Risks of workers' exposures to hazards or dangers (actual and potential) identified
 - Quantitative or qualitative assessment
 - Comparison with legislative requirements, employer's policies and procedures, industry standards and best practices

Supervisory Functions: Health & Safety

- Organizing/Scheduling/Coordinating
 - Control:
 - Eliminate or reduce risk of exposure to hazards by implementing:
 - engineering controls
 - administrative controls
 - work practices (e.g. policies and procedures)
 - hygiene practices and facilities
 - personal protective equipment



- Instructing/Communicating
 - Health and safety responsibilities and rights
 - Actual and potential hazards applicable to the work
 - Risks and control measures for hazards
 - Specific requirements for performing work safely and reporting hazards, deficiencies, or unsafe conditions to supervisor

- Monitoring/Supervising
 - Workers, work activities, equipment, machinery, and processes by conducting inspections (JHSC) or walkthroughs, observing tasks, responding to work refusals or accidents in order to:
 - Identify, assess and control hazards
 - Evaluate effectiveness of existing controls for hazards
 - Assess workers' performance with requirements and expectations



Supervisory Functions: Health & Safety

- Reviewing/Correcting
 - Commending workers for compliance with health and safety requirements and expectations
 - Providing feedback to employer on program
 - Disciplining workers for deficiencies in meeting health and safety requirements and expectations as a last resort after all other aspects of the OHS management system have been exhausted



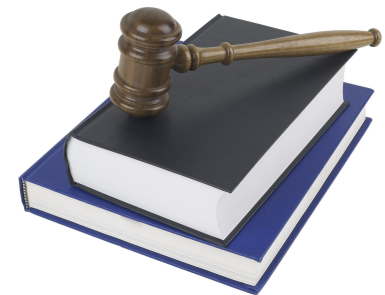
- The External Responsibility System in Ontario...
 - Mandated by the Provincial Government
 - Authorized by the *OHSA* and *Provincial Offences Act*
 - Enabled through the Ministry of Labour (MOL)
 - Enforced by Inspectors and MOL Legal Branch
 - Adjudicated by OLRB (Orders) and the Courts (Charges)



Ministry of
Labour

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- The External Responsibility System in Ontario,
 - Failure to comply with responsibilities and fulfill rights set out in the **OHSA** may result in enforcement by the Ministry of Labour
 - The **OHSA** provides Ministry of Labour inspectors with powers to enter workplaces, inspect and investigate to identify violations of the **OHSA**
 - The **OHSA** may be enforced by:
 - issuing orders, and/or
 - laying quasi-criminal charges



- **Section 54, OHSA**
 - creates broad powers of search and seizure without a warrant to inspect for safety compliance
- **Section 62, OHSA**
 - No person shall, or attempt to, hinder, obstruct, molest or interfere with an inspector in the exercise of a power or performance of a duty

- **Section 56, OHSA**

- If inspector has reasonable grounds to believe there is a contravention of **OHSA** or regulations, a search warrant must be obtained.
- An inspector who executes a search warrant issued by a court may seize, or examine and copy, any drawings, specifications, licence, document, record or report.

ss. 56.1(2) An inspector may exercise any of the powers in s.56(1) without a warrant if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would be impractical to obtain the warrant

- **Section 61, OHSA**

- MOL inspector's Orders are based on an alleged contravention of the **OHSA** and regulations
- MOL inspectors' Orders - indication of likelihood of charges to follow



MOL Inspector's Orders: Right to Appeal

- Who can appeal?
 - employer, constructor, licensee, owner, worker, or trade union
- Why appeal?
 - because aggrieved by MOL inspector's Order or decision, or refusal to make Order or decision

MOL Inspector's Orders: Right to Appeal

- 30 days to commence appeal to Ontario Labour Relations Board (OLRB)
- OLRB has legal procedures for handling appeal of orders
- Need to apply to suspend Order pending appeal
- Mediation with labour relations officer available through OLRB
- Legal counsel recommended to address appeal of MOL Orders

MOL Inspector's Orders: Right to Appeal

- OLRB may:
 - Suspend order pending appeal
 - Substitute findings
 - Rescind order
 - Affirm order
 - Make new order

- Workplace parties with duties in the **OHSA** may be subject to charges and legal liability
- PART III: Duties of Employers and Other Parties - sections 23 to 32: constructors, owners, employers, supervisors, workers, directors, officers, etc.

Workplace Parties: Legal Liability

- 1 year limitation period on charges being sworn
- MOL will likely commence prosecution of a workplace party because of:
 - fatal or critical injuries
 - failing to report critical injuries
 - non-compliance with Orders
 - obstruction of MOL inspector
 - poor health and safety record



Three Categories of Offences

- *Mens rea* offences, requiring proof of intent, knowledge, or recklessness together with a contravention of the legislation (“guilty mind”)
- *Strict liability* offences, where there is no requirement to prove *mens rea*, however, the defence of due diligence is available
- *Absolute liability* offences, where proof of a statutory contravention only is required with no defence of due diligence

•Sentencing Trends

- Prosecution seeking higher fines
- Defendant must prove financial hardship
- Sentencing factors in *R. v. Cotton Felts*
- Jail terms now being imposed on supervisors

Sentencing Supervisors After Conviction

- Individual defendants may receive fine or jail term
- Fines primary penalty for **OHSA** contravention
- Jail term imposed only in very serious cases (i.e., fatalities)
- Supervisor may be put on probation as well
- **OHSA** training may be term of probation

Due diligence can be a defence to **OHSA** Charges and an effective occupational health and safety management system

- Ensuring **reasonable care was exercised** regarding worker health and safety (hazards are identified, assessed and controlled)
- Proving there was **no negligence** with respect to circumstances that caused accident
- **Not ignoring workers' concerns** about health and safety
- Due diligence requires a standard of **reasonableness** NOT of perfection



•Application of Due Diligence:

- *R. v. City of Sault Ste. Marie* (1978): “...[T]he question will be...whether the accused established all reasonable care by [1] establishing a proper system to prevent commission of the offence and [2] by taking reasonable steps to ensure the effective operation of the system.”



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10 Steps for Due Diligence

1. Prepare, post and distribute an OHS policy, s.25(2)(k)
2. Develop, maintain and review annually an OHS program, s.25(2)(j)
3. Establish and support HSR or JHSC, depending on size of workplace, s.8 and s.9
4. Certification training for JHSC members, s.9(26)
5. Only appoint supervisors and managers that meet the “competent person” definition, s.1(1)

10 Steps for Due Diligence

6. Provide Due Diligence training for managers and supervisors, s.25(2)(a)
7. Conduct job hazard analyses and develop written safe work procedures, s.25(2)(h)
8. Worker training on OHS policy, safe work procedures, right to refuse unsafe work, s.25(2)(h)
9. Identify and control hazards through WHMIS, inspections & accident investigations, s.37-42.
10. Regular workplace audits – see OHS Management System

- Established *OHS* legal duty in *Criminal Code*
- Response to tragedy of Westray Mine disaster
- Reforms criminal law for organizations
- Applies to federal and provincial workplaces
- In addition to existing *OHS* legislation

OHS legal duty – s. 217.1:

“Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task”.

This applies to both individuals and organizations.

- Applies to every individual to whom the new duty in s. 217.1 of the *Criminal Code* applies
- Prohibited act: contravention of new duty to take “reasonable steps” to prevent bodily harm
- Fault element: shows “wanton or reckless disregard for the lives or safety of others”
- Prosecution must prove both prohibited elements of the offence beyond a reasonable doubt

OHS Criminal Negligence for Individuals

Example of Individual Liability:

- Supervisor aware of employer's policy to always have press machine guarded – as required by *OHS* Regulation
- Supervisor directs worker to work on unguarded press machine in order to reach production quotas (aware of risk of injury to worker)
- Worker's hand caught in press – resulting in amputation
- Supervisor convicted of *OHS* criminal negligence if prosecution can prove beyond a reasonable doubt:
 - Breach of duty to take “reasonable steps”, i.e. - no guard
 - and
 - Wanton or reckless disregard for the safety of the worker

OHS Criminal Negligence for Individuals

- Penalties for criminal negligence:

- Injury - 10 years in prison
- Death - life imprisonment



“Organization”:

“Public body, body corporate, society, company, firm, partnership, trade union, municipality and associations, with a common purpose, with an operational structure that holds itself out as an association”

OHS Criminal Negligence for Organizations

- If acting within the scope of their authority ...
 1. One or more **representatives** commits the offence of OHS criminal negligence
 - and -
 2. **Senior officer** departs markedly from the standard of care that could reasonably be expected to prevent a representative from committing the offence

Representatives and Senior Officers

“Representative”:

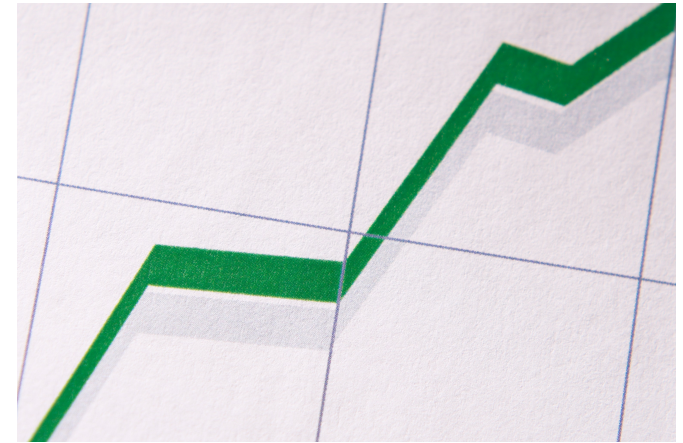
“Is a director, partner, employee, member, agent, or contractor of the organization.”

“Senior Officer”:

“Means a representative who plays an important role in the establishment of the organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.”

Penalties for criminal negligence

- \$ *UNLIMITED*
- Non-tax deductible



The first conviction

- Transpavé, Québec based manufacturer
- 23 year-old worker fatally injured when crushed by heavy equipment
- CSST report alleges that an optic security system was “neutralized”
- Employer plead guilty
- March 17, 2008 - Transpavé was fined \$100,000 and an additional victim surcharge of \$10,000

- Higher individual/organization *OHS* legal risk
- No insurance for *OHS* criminal negligence penalties
- Increased importance of *OHS* law compliance
- Increased importance of accident/injury prevention
- Mandatory to develop *OHS* management system

OHS Risk Management for all Organizations

- Successful defences of due diligence and proof of taking “reasonable steps” to prevent bodily harm include:
 - **Identified** all actual and potential occupational hazards (applicable to the offence)
 - **Assessed** the risk of exposure of workers to hazards identified
 - **Eliminated** hazard or implemented **controls**, where necessary, to minimize risk of exposure to hazards
 - **Communicated** hazards, risks and controls to workers, JHSC and management

OHS Risk Management for all Organizations

Continued ...

- **Monitored** workers, work practices and workplace (equipment, machinery, facilities)
- **Corrected** unsafe work practices and **remedied** hazardous situations
- **Disciplined** worker/supervisor if they were in violation of their legal duties or corporate OHS policy or procedure
- **Document** action of the above mentioned actions

Jurisdictions that impose specific OHS duties with respect to workplace violence prevention:

- Alberta
- British Columbia
- Manitoba
- Nova Scotia
- Ontario
- PEI
- Quebec
- Saskatchewan
- Federal Government (*Canada Labour Code*)

Bill 168 - Defining Workplace Violence in Ontario

- Bill 168 defines “workplace violence” as:
 - “The exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker,
 - An attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker,
 - A statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.”

- Defining Harassment and Violence
- Policy Requirements
- Risk Assessment Requirements
- Program Requirements
- Domestic Violence Responsibility
- Work Refusal Changes
- Education and Training
- Reporting of Violence to MOL
- Accountability under the *OHSA*

- **Accidents almost always hinge on prior mistakes:** lack of attention, work methods, the wrong equipment, poor planning, incorrect resource allocation, lack of discipline.
- The very best safety system can be subverted and undermined by a single individual.
- **Know your people.** The worker who is prepared to put her own health at risk, is probably willing to put work quality at risk too.
- The person who feels at risk, will feel less trusting and less loyal.
- The person who feels reasonably safe will feel valued and respected. Talent and training can be lost, or kept here.
- **The supervisor** who doesn't see, or who overlooks, safety risks may also be overlooking production and quality risks.

Strategies for Senior Officers

- Comply with all legal **requirements and standards** associated with work activities
- Foster a culture of health and safety in the workplace (e.g., regularly **communicating** the importance of safety in all operations, awareness of injuries and trends within all departments)
- Ensure that a health and safety management **system** is in place for the facility
- Identify work areas and major job activities with significant health and safety risks and ensure that a **safety plan** is in place for each identified risk
- Ensure that **new employees** receive safety orientation
- Ensure that a person has been appointed in **every department** to coordinate and disseminate health and safety information to relevant parties
- Appoint **competent supervisors** and ensure that they attend due diligence training
- Ensure health and safety concerns are receiving **appropriate attention** and response

Tolerance of occupational risk may be a signal about the general inclination of the organization to comply with regulation and best practice in other domains

Similarly, grappling and managing occupational risk may reflect and encourage a more disciplined and effective approach to production and other demands

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