EMPLOYEE SAFETY AND WORK-RELATED INJURY
Recent Trends in the Law and Managing Your Risks

Toronto – November 29, 2007

Due Diligence in Managing Risks

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"REASONABLE STEPS" DEFENCE

- **Section 217.1 of the *Criminal Code* reads:**

  "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"

- ***Criminal Code* does not define "reasonable steps"**
- **No court decision yet that interprets what "reasonable steps" means**

2

- **Reason dictates that "reasonable steps" defence will be the same or close to due diligence defence**
- **Will require adherence to provincial occupational health safety legislation**
- **Adherence to industry standards and best practices**
- **Burden on prosecutor to prove accused did not take all "reasonable steps"**

3

DUE DILIGENCE DEFENCE

- **Legal defence of due diligence - Get Out of Jail Free card**
- **Created by Supreme Court of Canada in *R. v. Sault Ste. Marie***
- **2 parts to legal defence:**

i) employer must prove it reasonably believed in a mistaken set of facts which, if true, would make the prohibited act or omission innocent;

a) employer has an honest subjective belief in a set of facts that, if true, would render the act innocent and;

4

b) that belief is objectively reasonable in the circumstances

ii) <u>employer must prove that it took all reasonable steps to avoid the particular prohibited event</u>

- **Now codified in the *Occupational Health and Safety Act* (*"OHSA")* at section 66**
- **Reverse onus – burden of proof on accused to prove defence**

5

DUE DILIGENCE – what is required

- **Section 25 of *OHSA*:**
  - **Instruct, inform and supervise workers to protect their health and safety [section 25(2)(a) of *OHSA*]**
- **Due diligence requires an employer to provide positive evidence that it:**
  - **Has established a safe and effective procedure to protect the safety of workers**

6

- **Has communicated that system to the workers**
- **Has reasonable ongoing procedures in place to monitor and ensure the proper operation of that system**
- **Has put it mind to the entire course of action and, in an organized way, has set out all the steps necessary to obtain a particular goal**

7

- **Appoint competent persons as supervisors [*OHSA*, section 25(2)(c)]. "Competent person" has a very specific meaning under the Act. He or she must:**
  - **Be qualified–through knowledge, training and experience – to organize the work and its performance**
  - **Be familiar with the Act and the regulations that apply to the work being performed in the workplace**
  - **Know about any actual or potential danger to health and safety in the workplace**

8

- **Inform a worker, or a person in authority over a worker, about any hazard in the work and train that worker in the handling, storage, use, disposal and transport of any equipment, substances, tools, material, etc. [*OHSA*, section 25(2)(d)]**
- **Help committees and health and safety representatives to carry out their duties [*OHSA*, section 25(2)(e)]**
- **Take every precaution reasonable in the circumstances for the protection of a worker [*OHSA*, section 25(2)(h)]**

9

- **Post in the workplace a copy of the Occupational Health and Safety Act, as well as explanatory material prepared by the ministry that outlines the rights, responsibilities and duties of workers. This material must be in English and the majority language in the workplace [*OHSA*, section 25(2)(i)]**
- **Prepare a written occupational health and safety policy, review that policy at least once a year and set up a program to implement it [*OHSA*, section 25(2)(j)]**

10

DUE DILIGENCE – what the Courts have said

R. v. Dofasco Inc. **, 2007 ONCA 769 (CanLII)**

- **Charges against the employer arose when an employee suffered a serious hand injury while working on a cold-rolling steel mill.**
- **Dofasco's argued employer cannot be held where employee injured as the result of his and a co-worker's deliberate conduct in failing to follow company procedures and protocols. Injured worker said to his co-worker "to hell with it lets do it the way we used to".**
- **Workplace safety regulations are not designed just for the prudent worker, but intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless. This principle also extends to deliberate acts of employees while performing their work.**

11

- **Dofasco's argument ignores common sense. Employees do not deliberately injure themselves.**
- **Dofasco argued injury worker suffered was as a result of his deliberate act, but Court of Appeal found it was an act done in furtherance of productivity in the work undertaken for the employer and not for any other reason.**
- **Court of Appeal stated to suggest that the responsibility for the injury, pain and suffering rests squarely on his shoulders would be unfair because defects in the process for performing the work in question and the absence of a physical guard contributed significantly to the accident. Court of Appeal rejected this submission.**
- **Dofasco did not lead evidence that it had taken any steps to place a guard or other device at the pinch point as required. In these circumstances, Court found Dofasco cannot show that it took all reasonable steps to avoid the incident.**

12

R. v. Modern Niagara Toronto Inc. **, 2006 ONCJ 336 (CanLII)**

- **Before they began to remove the cap, worker specifically asked other worker if there was pressure in the pipes and was told "no". As worker leaned over the pipe to remove one of the bolits, the cap from the vitaulic clamp blew off and struck him in the face, so that he was bleeding and unconscious. At the time, the pipe commencing from the balancing valve to the end of the line was pressurized with nitrogen gas.**
- **Employer virtually in the position of an insurer who must make certain that prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors.**

13

- **Modern Niagara relied on the procedure for depressurizing pipes taught in apprenticeship training and on the experience of its workers. Modern Niagara had a general safety policy made known to all workers, there were "toolbox talks" from time to time, and safety audits by the safety consultant.**
- **Did nothing more to supplement the apprenticeship training, nor to ensure that the system they said was in place was being properly followed.**
- **Whatever system the employer thought it had in place, it was not operating effectively, and the persons in charge were not doing what they were supposed to do.**
- **The cumulative errors in this case are strong evidence that there was no safe effective system in place at all, and that the procedure the employer relied on was not sufficiently comprehensive to achieve the required objective.**

14

- **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: *R. v. Inco. Ltd. [2001] O.J. No. 4938 (Ont. Sup. Ct.); R. v. St. Lawrence Cement Inc. [l993] O.J. 1442 (Ont. Ct. Gen. Div.); R. v. Spanway Buildings Ltd., (April 3, l986, unreported, Ont. Prov. Ct.).* The precondition is 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.**
- **Respondent wrongly relied on the industry standard and the apprenticeship training of its workers, and did nothing more to ensure that the procedures for depressurizing pipes were in place and were being followed by their workers.**

15

- **Duty of the employer applies to all workers (inexperienced and experienced), are applicable notwithstanding the work is routine, must be enforced even if there is no history of non-compliance, are non-delegable (to apprenticeship training), and cannot be based on an industry standard that is inconsistent with OSHA and its regulations.**
- **To successfully plead reasonable care, the defendant must establish on a balance of probabilities that there were no feasible alternatives that might have avoided or minimized injury to others.**
- **There were alternatives means of communication (signs, tags) and procedures for continuity (one person does everything, no one else touches the system) that could have been readily identified and enforced had the employer addressed the issue.**

16

- **Due diligence requires that the respondent provide positive evidence that it has established a safe and effective procedure to protect the safety of workers, that it has communicated that system to the workers, and that it has reasonable ongoing procedures in place to monitor and ensure the proper operation of that system.**
- **One form of the due diligence test is holding a reasonable belief in a mistaken set of acts. Such a defence is only available 1) where the employer has an honest subjective belief in a set of facts that, if true, would render the act innocent and 2) that belief is objectively reasonable in the circumstances.**
- **One of the factors to be considered in assessing the reasonableness of relying on advice is the gravity of the potential harm should that advice prove to be wrong.**
- **In considering the mistake of fact defence, the court is obliged to consider the beliefs and actions of all the relevant workers.**

17

***R. v. Chrima Iron Works Limited*, 2007 ONCJ 78 (CanLII)**

- **Mr. Bahia drove the forklift to the other side of the smoke box, placed the forks into a cut out area of the smoke box, and lifted the smoke box 6 to 8 inches off the ground. The supervisor, Robert Neidig, standing beside the forklift, and beside the smoke box, commenced to tilt the smoke box by either shaking or pushing the bottom of the smoke box. It appeared the purpose of this shaking was to have the smoke box fall inward on the forklift to facilitate it being flipped or rotated. Unfortunately, the smoke box, which weighed approximately 628 pounds, fell forward onto the supervisor, Robert Neidig, causing injury to his right arm and leg.**
- **Employees of Chrima were able to quickly move the smoke box off of Mr. Neidig. An ambulance was called, and Mr. Neidig was taken to the hospital, and subsequently perished.**

18

- **Neidig was certified as a forklift driver, Bahia had never received any ongoing training as to forklift.**
- **"A bad judgment call by a supervisor (someone fully cognizant of the responsibilities set out in the safety procedures) must unfortunately rest on the back of his employer who is directly responsible for compliance."**
- **Defence counsel has attempted to establish that the Accused did have in place a system or procedures to reasonably ensure a safe workplace.**
- **There were no written procedures in place for material handling, and in particular the flipping of the smoke box.**

19

- **"In this day and age there should be written procedures as to health and safety issues as opposed to a "practice having developed". Really, the submissions of the defence are that this business has been in operation for a considerable number of years without having had an industrial accident, and accordingly, the *ad hoc* practices that have developed must be safe. The fact of this industrial accident occurring as it did aptly demonstrates that it was more good fortune than good management that there had not been prior accidents."**
- **Company was fined $125,000.00**

20

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