OCCUPATIONAL HEALTH & SAFETY LEGISLATION FRAMEWORK AND THE DEMAND FOR DUE DILIGENCE

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In the context of criminal law, we have all heard the phrase "innocent until proven guilty". To the contrary, lay people exposed to occupational health and safety law often opine that once charges are laid, the parties are "guilty until proven innocent". Such is the case because occupational health and safety legislation is regulatory in nature and engages the concept of strict liability. Upon proof of the impugned act, a strict liability offence will lead to a conviction unless the defendant can prove that he exercised due diligence. More specifically, the court will determine whether the accused took all reasonable steps to avoid the offence or whether the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent. In short, due diligence is often the only method of avoiding a conviction in a strict liability offence and it is therefore a vital component to answering a charge under occupational health and safety law.

OCCUPATIONAL HEALTH AND SAFETY – LEGAL FRAMEWORK

Provincial Regulatory Offences

Occupational health and safety legislation in Alberta consists of three parts:

- the *Occupational Health and Safety Act (the "Act")*[1]
- Regulations passed under the Act *(the "Regulations")* [2]
- The *Occupational Health and Safety Code (the "Code")* [3]

The aforementioned legislation places obligations on employers, workers, suppliers, contractors, prime contractors and owners – all of whom are defined in the Act. In essence, the obligations create a complex web of accountability to ensure the safety of the worker.

Generally, the legislation applies to all work sites, workers and employers in Alberta. The major exceptions are:

- Farmers and ranchers
- Domestic workers
- Workers in federally regulated industries.[4]

[1] *Occupational Health and Safety Act,* R.S.A. 2000, c.O-2

[2] *Occupational Health & Safety Regulations*, Alberta Regulation 62/2003

[3] *Occupational Health & Safety Code,* Alberta Regulation 87/2009

[4] *Occupational Health and Safety Act,* Section 1(s)

As noted, there are three provincial legislative pieces to the Occupational Health and Safety framework in Alberta. Each piece of legislation plays a distinct role. The *Act* sets out the primary obligations of the employers, workers and other parties, as defined thereunder. The *Regulations* generally address the requirements related to government policy and to administrative matters . Finally, the *Code* specifies the mandatory technical standards that employers and workers have to comply with.

In the decision of *R.* v. *City of Sault Ste. Marie*, the Supreme Court of Canada indicated that in the absence of a clear legislative intent to the contrary, all regulatory offences would be presumed to bear strict liability.[5]

Provincial occupational health and safety legislation is regulatory in nature and offences thereunder are considered strict liability offences.

Federal Criminal Code of Canada Offences

In addition to the regulatory offences found under the provincial legislative framework, there have been relatively recent changes to the *Criminal Code of Canada* which allow for prosecutions thereunder. Bill C-45 received Royal Assent on November 7, 2003. In essence, Bill C-45 is legislation that amended the *Criminal Code of Canada*. It established a new legal duty which relates directly to occupational health and safety matters. More specifically it added Section 217.1 to the *Criminal Code of Canada*. Such section reads:

> **217.1** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Moreover, Bill C-45 imposes criminal liability on organizations and members of the organization under Sections 22.1 and 22.2. The relevant sections read as follows:

> **Offences of negligence — organizations**
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> 22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if,
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> (a) acting within the scope of their authority
>
> > (i) one of its representatives is a party to the offence, or
> >
> > (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct

[5] *R.* v *City of Sault Ste. Marie* [1978] 2 S.C.R. 1299

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> of only one representative, that representative would have been a party to the offence; and

> (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

> 2003, c. 21, s. 2.

> **Other offences — organizations**

> 22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

> (a) acting within the scope of their authority, is a party to the offence;

> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

> (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

> 2003, c. 21, s. 2.

Bill C-45 arose as a direct result of the Westray Mine disaster wherein 26 Nova Scotia miners died in an explosion in 1992. As a result of the failure in the justice system that became evident through a public inquiry, Bill C-45 was recommended and ultimately put into law.

Justice K.P. Richard was appointed to oversee the public inquiry. Justice K.P. Richard made 74 recommendations. #73 was such that:

> #73: The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the parliament of Canada such amendments to

> legislation as are necessary to ensure that corporate executives and directors or held properly accountable for workplace safety.6

Perhaps the most glaring failure of the justice system, as it related to the Westray Mine were the predictions of disaster that were publically proclaimed in advance of the incident.

In any event, as a result of the Westray Mine disaster, Bill C-45 was instituted and implemented.

Practically speaking, parties can now be charged under both provincial regulatory laws or the federal laws found within the *Criminal Code of Canada*.

REGULATORY VERSUS CRIMINAL OFFENCES – Actus Reus & Mens Rea

As noted above, offences under the occupational health and safety legislation in Alberta are considered regulatory offences. Such are different from criminal offences in many different ways. For example, criminal offences are often referred to as "true crime" offences. In the case of true crimes, the Supreme Court of Canada has held that there is a presumption that a person should not be held liable for the wrongfulness of his act if the act is without *mens rea*.[7]

In order to obtain a conviction for a Criminal Code violation, the Crown must prove both of the following:

- *actus reus* – the accused has committed the impugned act. For example, the accused fired the gun that shot and killed the person.
- *mens rea* – the accused had a guilty mind which is often reflected by the presence of intent. For example, the accused intended to fire the gun and kill the person.

If both the *actus reus* and the *mens rea* are present, a conviction for a true crime under the *Criminal Code of Canada* should be entered.

Contrary to criminal code offences, regulatory offences are normally created by provincial legislature. Examples of regulatory schemes are found within occupational health & safety law and environmental law. Unlike true crime offences, as noted above, regulatory offences are considered strict liability offences.

The seminal case related to regulatory offences and the various forms of liability (true crime, strict liability and absolute liability) is found in the Supreme Court of Canada decision of *R* v. *Sault Ste. Marie* (referred to above). In such case, the City of Sault Ste. Marie had built a waste disposal site a short distance from a waterway. When the waste entered the neighbouring stream, the City was charged with discharging refuse into the stream, causing pollution contrary to the *Ontario Water Resources Act*.

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[6] *Westray Mine Public Inquiry Report*, November 1997, *The Westray Story: A Predictable Path to Disaster, Mr. Justice K.P. Richard* (http://www.gov.ns.ca/lwd/pubs/westray/)

[7] *R. v. Prince,* (1875), L.R. 2 C.C.R. 154

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In essence, the court found that in order to obtain a conviction under a regulatory offence, the Crown need only prove the *actus reus* of the offence. *Mens rea* is not relevant to the analysis of guilt. With that said, the court found that the defence of due diligence "will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."[8]

Because of the general duty offences found under provincial legislation one may argue that the Crown's obligation to prove the *actus reus* is quite easy. Simply, an accident at a worksite is often considered *prima facie* evidence of the breach of the employer's general duty clause. In such case, the importance of a due diligence defence becomes paramount.

BURDEN OF PROOF

For a conviction under Criminal Code offences, the Crown must prove the elements of the *actus reus* and *mens rea* "beyond a reasonable doubt." In *R*. v. *Lifchus*[9], the Supreme Court of Canada held that "beyond a reasonable doubt" has a specific legal meaning. Summarized, jurors may convict an accused if they are "certain" or "sure" that the accused is guilty.

Unlike true crimes, in strict liability cases, a two stage burden of proof analysis has evolved. In the ***first stage***, the Crown must prove that the party committed the *actus reus* beyond a reasonable doubt.

As noted above, in occupational health and safety matters the mere fact that a worker was injured on a worksite goes a long way in proving the *actus reus*. Such is the case because of the "general duty" imposed in Section 2 of the *Occupational Health and Safety Act* of Alberta. Section 2 reads as follows:

> **Obligations of employers, workers, etc.**
> **2(1)** Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,
> (a) the health and safety of
> (i) workers engaged in the work of that employer, and
> (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and
> (b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act, the regulations and the adopted code.
> **(2)** Every worker shall, while engaged in an occupation,
> (a) take reasonable care to protect the health and safety of the worker and of other workers present while the worker is

[8] *R. v. Sault Ste. Marie, supra*

[9] *R. v. Lifchus,* [1997] 3 S.C.R. 320

working, and
(b) co-operate with the worker's employer for the purposes of protecting the health and safety of

(i) the worker,

(ii) other workers engaged in the work of the employer, and

(iii) other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.

(3) Every supplier shall ensure, as far as it is reasonably practicable for the supplier to do so, that any tool, appliance or equipment that the supplier supplies is in safe operating condition.
(4) Every supplier shall ensure that any tool, appliance, equipment, designated substance or hazardous material that the supplier supplies complies with this Act, the regulations and the adopted code.
(5) Every contractor who directs the activities of an employer involved in work at a work site shall ensure, as far as it is reasonably practicable to do so, that the employer complies with this Act, the regulations and the adopted code in respect of that work site.

R.S.A. 2000 cO-2 s2;2002 c31 s3

From a review of the wording of Section 2, it is clear that the "general duty" imposed upon employers and workers is very broad. As such, some consider the Crown's burden to be easily met.

Once the Crown has proven the *actus reus*, as noted above, there is no need to prove the *mens rea*. Thereafter, the ***second stage*** is initiated and the burden of proof shifts to the defence to prove due diligence on a "balance of probabilities." A balance of probabilities is normally defined as "more probable than not."

Arguably, the shifting burden may be seen as a compromise which balances the general nature of the charging provisions found in the provincial legislation with the Defendant's right to provide full answer and defence.

DUE DILIGENCE

Due diligence is the standard of performance by which a business can measure itself and prevent accidents. More specifically, in addition to mistaken fact, the legal standard is whether the defendant

took all reasonable care which a reasonable person might have been expected to take in the circumstances to avoid the accident.

A reasonable person is someone who is familiar with the operation of the work place and is aware of the legislation as it relates to that work place. While the courts have held that the standard is not one of perfection, it is noted that the more hazardous an activity, the greater the care that must be taken.

In order to establish a due diligence defence, there must be proof of a detailed system to prevent the commission of the offence.

In order to prevent prosecutions, a culture of safety must normally be implemented at every level of the organization. To this end, documentary evidence will go a long ways in establishing the due diligence defence. Some compare the records which establish due diligence (for example a Task Hazard Analysis) to DNA establishing innocence in a criminal matter. While dramatic, documents are the DNA needed to avoid convictions in OHS matters. As a natural consequence, the absence of documents and records will be prejudicial to the defence of OHS charges.

While the elements of due diligence are voluminous and too lengthy for the purposes of this paper, there are specific categories that arise in the defence of most occupational health and safety matters. They include an assessment of the following:

- Worker competency
- Identification and minimization of hazards
- Industry standards
- Monitoring the worker

Worker Competency

In determining whether the employer has met the burden of due diligence, the Court may assess worker competency. To this end, Sections 13 and 14 of the *Occupational Health and Safety Regulations* are relevant. They are reproduced as follows:

> General protection of workers
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> **13(1)** If work is to be done that may endanger a worker, the employer must ensure that the work is done
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> (a) by a worker who is competent to do the work, or
>
> (b) by a worker who is working under the direct supervision of a worker who is competent to do the work.
>
> **(2)** An employer who develops or implements a procedure or other measure respecting the work at a work site must ensure that all workers

who are affected by the procedure or measure are familiar with it before the work is begun.

(3) An employer must ensure that workers who may be required to use safety equipment or protective equipment are competent in the application, care, use, maintenance and limitations of that equipment.

(4) If a regulation or an adopted code imposes a duty on a worker, the worker's employer must ensure that the worker performs that duty.

Duties of workers

14(1) A worker who is not competent to perform work that may endanger the worker or others must not perform the work except under the direct supervision of a worker who is competent to perform the work.

(2) A worker must immediately report to the employer equipment that

(a) is in a condition that will compromise the health or safety of workers using or transporting it,

(b) will not perform the function for which it is intended or was designed,

(c) is not strong enough for its purpose, or

(d) has an obvious defect.

(3) If a regulation or an adopted code imposes a duty on a worker,

(a) the duty must be treated as applying to circumstances and things that are within the worker's area of occupational responsibility, and

(b) the worker must perform that duty.

In essence workers are either competent or not competent. If they are not competent, then they are not authorized to work without direct supervision.

It is generally accepted that there are the three components which assist in assessing competence. To this end, one must ask the following questions:

1. Was the worker adequately qualified?

2. Was the worker suitably trained?

3. Did the worker have sufficient experience?

If the aforementioned questions are answered positively, then the worker should be considered "competent."

Identification of Hazards

In determining whether an employer was duly diligent, the courts will look at the knowledge, assessment and communication of work place hazards. In essence, employers are expected to be familiar with, and communicate, both existing and potential work place hazards.[10] To this end, foreseeability is an important element in assessing hazards.

In *R. v. Rio Algom Limited*, one of the issues surrounded the foreseeability of the event. Ultimately, the Ontario Court of Appeal held that the test of foreseeability:

> "was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way that it did happen, but rather whether a reasonable man in the circumstances would have foreseen that an overswing "of the gate" could be dangerous in the circumstances…"[11]

In essence, the court found that the incident was foreseeable. In effect, both existing and potential workplace hazards must be identified and steps taken to minimize the hazard must be put in effect.

Industry Standards

In assessing due diligence, the court may look at industry standards, as distinct from industry practice. They key case in relation to industry standards is *R*. v. *General Scrap Iron and Metals Ltd*.[12]

General Scrap was ultimately decided by the Alberta Court of Appeal. This case stems from a conviction and sentence for General Scrap's failure to ensure the health and safety of one of its workers. The worker was killed by a bale of scrap wire that crushed him. General Scrap was fined $100,000.00 and a 15% victim surcharge. General Scrap claimed that the judge erred because he ignored evidence of the industry standard and erroneously applied his own standard of care. General Scrap had argued that they had been following the industry standard and such fact assists in proving due diligence.

On dismissing the appeal, Justice Russell held that "even if industry standard was to stack bales four-high (or any number of other practices), this does not address the legal standard of care."[13] It is the

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[10] *R. v. Rio Algom Limited,* (1988) 1 C.O.H.S.C. 1 (Ont. C.A.)

[11] *R. v. Rio Algom Limited, supra*

[12] *R. v. General Scrap Iron & Metals Ltd.,* 2003 A.B.C.A. 107

legal standard of care (the industry standard) which is pertinent to an analysis of guilt in a due diligence defence. Justice Russell found that General Scrap fell short of the industry standard and the conviction was upheld.

Monitoring

A final element of due diligence observed by the courts will include the presence or lack of monitoring of the worker by the employer. It is settled that the employer must not only monitor their workers but must provide enforcement and discipline to ensure that safe work practices and procedures are followed.

CONCLUSION

In the end, some believe that the Crown's ability to "prove their case" is simply based upon the presence of an injury to a worker engaged in the work of an employer. Assuming the validity of the foregoing statement, the defence of due diligence becomes paramount. This is particularly true when one notes that the penalties and costs upon conviction can be significant.

In Alberta, a maximum penalty for a first offence is $500,000 or imprisonment not exceeding six (6) months. Such amount increases to $1,000,000 or imprisonment not exceeding twelve (12) months for a second offence.

Perhaps, more important than the fine are the additional costs which an employer may need to bear upon conviction. Such costs include but are not limited to:

- first aid
- property damage
- production loss
- production delay
- hiring and retraining
- equipment rental
- cancel contracts
- goodwill or reputation
- preventative action costs
- insurance
- increased wages
- fines

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[13] *R. v. General Scrap Iron & Metals Ltd., supra*

- legal costs
- share value
- WCB premiums

In short, protecting the worker is a worthwhile endeavor based on both noble and financial reasons. A strong due diligence program will not only protect the worker but will also protect the employer. Clearly, due diligence provides a win/win solution to a significant problem facing all workers and employers in Alberta – occupational heath and safety.