

"MACHINE GUARDING REQUIRES STRICT COMPLIANCE: A REMINDER FROM THE COURTS IN R. V. DOFASCO"

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Can an employer properly use a procedural instruction in lieu of a physical guard on machinery or equipment? Can the deliberate decision by workers to fail to use this procedural instruction afford, or be considered as part of, a due diligence defence to a guarding charge? In a decision issued by Ontario's highest court on November 1 2007, these questions received the resounding answer "No!" and all employers received a stern reminder that guarding-related requirements in OH&S legislation must be strictly complied with. This article examines this important recent decision and its implications for guarding-related regulatory requirements across Canada.

The Dofasco Decision

The Court of Appeal for Ontario's recent decision in *R. v Dofasco Inc.* (**2007 ONCA 769 (CanLII)**) allowed an appeal by the Ontario Ministry of Labour from two judgments below, each of which had upheld the acquittal of Dofasco Inc. ("Dofasco") on a charge under s. 25 of the Industrial Regulations of the Ontario OHS Act. The charge arose when an employee suffered a serious hand injury while working on a cold-rolling steel mill. Dofasco was charged with failing to guard a pinch point in the cold-rolling steel mill in violation of s. 25, which, like many similar provisions in corresponding OH&S Regulations across Canada, requires that employers *prevent access to* moving parts or in-running nip hazards. Much of the litigation focused on what employers may or must do to "prevent access" to moving parts.

At trial and subsequent appeal below, the Courts had concluded that Dofasco's workplace procedures and equipment allowed for safe loading of steel into the mill and this negated the need for a guard. Steel was loaded into the mill by an operator in a pulpit, and local workers standing near the machinery were expected to use a push bar and hand-grippers if necessary to assist in feeding steel into the mill, which kept them at arm's length from any pinch points. Thus Dofasco was acquitted of the guarding charges below. In coming to this decision, the trial Court found that responsibility for the accident and injury fell completely on the injured employee and not Dofasco, because the employee had consciously disregarded the operating procedures which Dofasco had put in place. Apparently the worker and a co-worker conceded deciding "to he__with it, lets do it the way we used to", and the worker's hand caught in the machinery while feeding the steel manually.

On appeal there was no dispute that the mill had no physical guard to prevent access to the pinch point. The central issues were:

- whether Dofasco provided alternative safety measures (procedures) that amounted to compliance with s. 25 of the Regulation requiring that the employer prevent access;
- whether the injured employee's deliberate actions, in disobeying a known procedure designed to prevent access, relieved Dofasco of liability for failure to guard;
- whether Dofasco was entitled to argue compliance with s. 25 of the Regulation or its due diligence by relying on the deliberate disobedience of the worker as the basis of, or part of the basis of, its defence.

Court Rejects Alternative Measures Defence-Physical Guard Expected

Dofasco put forward two procedural or operational measures that it argued prevented access to pinch point or hazard, despite the fact that a physical guard was not present. It argued that a co-worker, who operated the opening and closing of the pinch roll of the mill from the pulpit, was in essence an operating control that obviated the need for a guard. Secondly, Dofasco submitted that workers such as the injured worker were able to push steel into the mill using a 10 to 12 foot bar, which kept them at a safe distance from the pinch point.

The Court of Appeal rejected Dofasco's submissions. The Court ruled that a physical control to prevent access was required. Procedures or operational measures in the absence of a physical guard do not meet this requirement. The Court reminded employers that the purpose of guarding is to prevent advertent and inadvertent conduct on the part of an employee from resulting in injury and, "in particular, to take individual discretion, judgment and degree of concentration and capability out of the equation." The Court determined that the push bar, which the worker failed to use in this instance, left "all of these parameters in play rather than ruling them out as a physical guard is intended to do, and therefore, fall[s] outside the contemplation of s. 25 of the Regulation."

Court Rules Out "Finger-Pointing" On Guarding Charge

The Court of Appeal also found that despite the acknowledged fact that the injured worker deliberately disobeyed safe work procedures (the push bar procedure), that was not in itself a defence. In support of this conclusion, the Court provided a number of reasons:

- firstly, on a plain reading of the guarding provisions of the Regulations, employee misconduct is not relevant to the issue of whether the offence of failing to guard has been committed. As the Court stated: "Rather, at least in relation to employees carrying out their work, an employer is strictly liable if it fails to comply with its obligations and there is no suggestion that employee misconduct constitutes any form of defence";
- second, the Court reminded employers that guarding requirements are designed to protect workers from injuries due to both inadvertent and advertent acts while performing their work. Safety Regulations, the Court reminded, are not just to protect the prudent worker, but are also there to protect the careless or even reckless worker. The worker in this matter did indeed suffer an injury as a result

of his own deliberate act, but that act was “in furtherance of productivity in the work” being done, the Court admonished;

- finally, the Court noted that the work procedure established by Dofasco had not worked on the day of the accident, which contributed materially to the employee’s decision to not follow that procedure and thus, to the accident itself. The Court decided that it would be unfair to blame the employee solely for the accident when there was no physical guard to prevent access, the established procedure was defective, and the employee had only failed to follow the procedure so that production was not slowed down.

Court Rejects Use of “Finger-Pointing” As Any Part of Due Diligence Defence

The Court of Appeal rejected Dofasco’s submissions that it had taken all reasonable steps to ensure that employees would not be endangered by the mill’s rollers and that it reasonably believed that the rollers did not present a hazard. Despite evidence of training, operating procedures, and providing the push bar, the Court summarily rejected consideration of a defence of due diligence. The Court stated that in the absence of evidence that Dofasco had taken steps to place a guard or other device at the pinch point as required, no due diligence existed.

Further, the Court found that employee error or the deliberate flouting of established safety procedures was not considered as a possible factor weighing in favour of a due diligence defence. It is noteworthy that the court did pause to comment that “there seems to be some confusion as to what meaning ought to be attributed to deliberate acts...(this) does mean ...that on occasion an employee may make a conscious decision to disobey an instruction or work practice in order to get his work done”.

Conclusion

Although this Court decision continues to recognize that employers can be relieved of liability for proven breaches of the OHS Act when the evidence shows that the employer has taken all reasonable care or due diligence, the notion of what is acceptable as due diligence, especially pertaining to guarding offences, appears to have been considerably restricted by *R. v. Dofasco Inc.* Courts in all jurisdictions have grappled with this question, with some courts in the past accepting the existence of procedural steps (and worker failure to follow procedural steps) as a defence. Having in place a safe work procedure (i.e. the use of push bars) is not duly diligent this Court has ruled, because that system could fail (or be deliberately disregarded in the absence of a physical barrier as here). As Dofasco had not actually taken steps to physically guard the mill, it was convicted here.

The Court did not unfortunately reconcile its comments about “employee error” or “deliberate flouting of safety procedures” in one important respect. Historically, Canadian courts have accepted that momentary worker inadvertence or inattention, or failure to follow procedures or practices, will not result in liability by an employer, where the employer otherwise has in place an established, ongoing, functioning system of policies and procedures and effective training and reminders and enforcement of procedures. Indeed the very concept of due diligence as developed by Canadian Courts suggests that where a system is functioning, due diligence will be found despite a momentary failure by a single worker to follow the system. In this regard, the Ministry

of Labour itself accepted in this case (in its factum to the Court) that an employer who has otherwise been duly diligent “will not be held responsible for unforeseeable rogue acts of an employee solely within the control of that employee”. We would submit, therefore, that an employer that has in place effective physical guards that meet all applicable standards, procedures requiring physical guards in place during all operations, training and ongoing reminders of physical guarding requirements, and enforcement of procedures, should still be able to rely upon its due diligence in this regard despite “worker error” or “flouting of requirements” in this context.

Of course the best approach for employers in light of the *Dofasco* decision is to redouble their efforts to ensure strict compliance with OHSA guarding-related provisions. Careful regard to OHSA guarding requirements requiring physical guards, and ensuring policies and procedures are in place to address guarding hazards (and consistently applied and followed), are fundamental. Careful regard must be had to all applicable standards for guarding such as evolving and stringent CSA Standards. Many Canadian organizations are out of compliance with current Standards. Organizations that have not conducted a guarding assessment through the use of an external expert to assess their state of compliance with OHSA and applicable standards would be well advised to consider taking such a step in light of *Dofasco*. An audit can even potentially be conducted using the protection of solicitor-client privilege, if it is carefully established from the outset that it is conducted for the purpose of obtaining legal advice on compliance matters and steps going forward.

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