

YOU'VE HAD AN ACCIDENT! **MANAGING THE CONSEQUENCES IN THE POST C-45 WORLD**

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The proclamation of Bill C-45 Criminal Code amendments heralds a new world of "criminalization" of health and safety in Canada. Effective March 31, 2004, the effective date of these amendments, the prospect of parallel OH&S and "criminal" investigations and proceedings arising from a serious workplace accident is real and immediate.

We all know or can imagine the impact of a serious workplace accident. Its effects ripple for years—from the immediate emotional turmoil to the attendance of police and OH&S authorities, possible shut down of all or part of the workplace, necessary remedial action and the possible receipt of a summons and costly OH&S prosecution. Now add to this list possible Criminal Code "criminal negligence" charges against the organization, its managers or senior management, should it be determined that "wanton or reckless disregard" for worker or public safety has been shown.

The worst possible time to prepare for the impact of a workplace accident is upon arrival of the police and OH&S authorities. A crisis-management approach (or even a "break glass, take out prepared written Accident Response Plan and apply" approach) can result in far more significant legal liability and negative publicity than necessary. Best practices for managing a serious workplace accident will not eliminate its effects, but key management cornerstones such as an Accident Response Plan and training of key frontline personnel can:

- ❖ ensure that opportunities to protect legally privileged documents are used;
- ❖ ensure that all appropriate legal requirements and investigators' demands are met, without incriminating more than necessary;
- ❖ ensure preservation of details and evidence which could assist with a defence; and
- ❖ ensure that the rights of organizations and individuals, which reach heightened status during a criminal investigation, are known and protected.

A WRITTEN ACCIDENT RESPONSE PLAN

A written Accident Response Plan is more than a process for conducting an accident investigation to discover the cause and determine preventative action. It is more than steps to comply with reporting requirements. An Accident Response Plan amalgamates all key accident-related procedures. From the most basic immediate obligation to notify specific named management representatives and comply with statutory reporting requirements, through to confidential instructions for key frontline personnel to properly protect the interests of the corporation, its supervisors, and its officers and directors during the course of a serious accident investigation, this Plan outlines steps to manage investigations by the police, OH&S authorities, and other regulatory agencies.

The Plan must be available to key frontline personnel at a workplace who could become involved in a serious accident investigation. Key frontline personnel and Accident Coordinators (a name I often use for a frontline coordinator) must be trained in these procedures. Imagine the police, OH&S and other regulatory authorities descending on an evening or weekend. Imagine them requesting information, statements, documents and materials from multiple persons. Imagine a patchwork of inconsistent, possibly incorrect, or incriminating information being provided, with no single corporate point of contact. Imagine an untrained representative refusing to cooperate, or disturbing the scene and restarting equipment. Then imagine after a summons is received long after an investigation being asked by legal counsel what the police and regulatory authorities asked for and received. Now you can start to imagine the importance of a written Accident Response Plan and a trained Accident Coordinator.

KNOW THE LEGAL PROVISIONS APPLICABLE TO WORKPLACE ACCIDENTS AND THEIR LIMITS

A Plan for managing the consequences of a workplace accident must ensure that all statutory OH&S notification and accident reporting requirements and obligations to preserve the scene, are written into the Plan and known to key personnel. There are no C-45 reporting requirements; virtually all workplace accidents attract a police visit.

The importance of ensuring that compulsory OH&S accident reports are limited to minimum required details cannot be overemphasized. Most jurisdictions require basic details such as name of the employer, name of the worker, name of witnesses, name of attending physician. But such compelled reports do not mandate a detailed written report that goes beyond minimum reporting requirements. Any report containing witness statements, admissions of fault, prior unanswered concerns raised by workers or joint health and safety committees, or other

incriminating details, may be utilized by OH&S authorities in a prosecution, and now by the police in assessing potential “criminal negligence” of the organization or individuals. No organization should ever hand the police or OH&S officials the potential case for prosecution against them.

Another legal provision applicable to workplace accidents that must be known and managed is the statutory obligation to cooperate. Canadian OH&S legislation contains obligations not to obstruct or hinder or interfere with an OH&S inspector. This obligation to cooperate is increasingly strongly asserted by OH&S investigators. But the statutory obligation to cooperate in OH&S matters does not extend to a “criminal” investigation of the organization or any individual representative. Arguably, based on recent Supreme Court of Canada cases and the developing law on the line between “inspections” and “investigations”, an OH&S investigator who has started to gather evidence may also not be entitled to the same degree of compelled cooperation. And a statutory obligation to cooperate has never meant, for example, that an official can demand the creation of incriminating reports and materials, insist upon statements without the opportunity to confer with legal counsel or demand material which is properly covered by solicitor client privilege.

All frontline representatives must strike a cooperative stance but when any concern arises about whether investigators are stretching the limits of their legal authority, the Plan should require that legal counsel be consulted immediately.

PRESERVING DETAILS OF THE POLICE AND OH&S INVESTIGATION

The organization that emerges from a police or OH&S investigation without knowing what details, allegations, measurements, photographs, information on their due diligence, or alleged lack of diligence or “criminal negligence” has been assembled, is completely unequipped to correct any negative information provided to authorities, or provide positive information which may assist them.

Imagine a situation in which improper information from emotionally distraught workers is given, resulting in an OH&S or criminal prosecution. It is quite common, for example, for trained workers to deny ever having been trained or having seen a particular policy or document. An Accident Coordinator should request permission to be present during all OH&S and police interviews. If permission is denied then the Accident Coordinator should conduct a second interview of witnesses after each OH&S or police interview.

All measurements, photographs, documents or physical evidence taken or seized should be tracked and recorded. If access by the organization to potentially crucial evidence at the accident scene is being denied, the Plan should direct that counsel to be contacted immediately to facilitate appropriate requests for access to the scene and evidence. The Plan should contain detailed instructions for dealing with seizure of evidence, with or without search warrants. The Accident Coordinator should keep detailed privileged and confidential notes with lists of items taken or seized. Any misinformation should be corrected as early as possible, and any and all positive information respecting physical evidence or policies and practices in place to prevent the accident, should be provided upon completion of the police/OH&S investigation.

CONDUCTING YOUR OWN ACCIDENT INVESTIGATION

To the extent not seized by the police or OH&S authorities, organizations must preserve physical evidence of the scene (damaged equipment or materials, photographs of the scene, video recordings) in a safe place pending any potential criminal or OH&S prosecution. Whether or not police and OH&S officials have interviewed key witnesses, it is crucial to appreciate that investigators will never conduct the thorough “due diligence” review that you should conduct in the circumstances. The Accident Coordinator should interview all witnesses and take detailed notes regarding relevant “due diligence” steps such as knowledge of hazards, knowledge of rules, training, steps by supervisors to monitor, warnings by supervisors.

Preserving these details as part of your Plan is time very well spent. In the event of a criminal or OH&S prosecution these details can be of immeasurable assistance. Internal company investigation reports should be marked “privileged and confidential”. They are privileged even before legal counsel is retained, as a result of “contemplated litigation privilege”. Once provided to legal counsel they are protected by “solicitor client privilege”.

PROTECTING YOUR DOCUMENTS, REPORTS, AND EXPERT REPORTS WITH SOLICITOR CLIENT PRIVILEGE

Imagine a situation where the organization’s “privileged” accident report is requested, or its expert report outlining accident causation is requested or ordered by authorities. Your Plan should prepare your organization to manage this issue.

A common technique of OH&S authorities investigating an accident involving complex equipment, or unexplained failure or collapse, is to order the organization to obtain an expert report respecting causation, or safety of the workplace. Assuming that the order or directive is validly issued under an OH&S provision, it must be appreciated that such reports provide investigators with incriminating information, which in turn is simply used against the organization or individuals. An organization experiencing a serious workplace accident may also determine to retain an expert on its own in order to obtain advice on liability or other matters.

In each case, it is quite appropriate for the organization's legal counsel to retain the third party expert, in order to obtain a "privileged and confidential" report to counsel from the expert. Solicitor client privilege attaches as this report is provided for the purpose of obtaining legal advice from counsel. This allows the organization to manage whether, when, and what to disclose from the expert.

A thorough and analytical report which advises counsel frankly on causation, non-compliance, and other important issues for the purposes of providing legal advice need not be disclosed to police or OH&S officials, and can be maintained as a privileged report as long as it is not circulated beyond a very close group of parties advised by counsel. A "solicitor client privileged" report can be maintained as privileged throughout an investigation and any necessary trial.

But what about the expert report ordered by OH&S authorities? Where a third party expert report has been ordered by OH&S officials pursuant to regulatory powers, one common management strategy is for the expert to prepare a brief non-privileged report responsive only to the issues in the order. Privilege is maintained over the more detailed "solicitor client privileged" report. In some instances where a privileged report's positive aspects will assist or exonerate the organization, waiver of privilege can occur but this should occur only after very careful consideration, and consultation with legal counsel.

STATEMENTS: THE CONUNDRUM

After an accident, police and OH&S officials will wish to take statements from all direct witnesses, and will sometimes request statements from supervisors or senior management. No organization may properly in any circumstances prevent the taking of statements from direct witnesses. But imagine a supervisor, senior manager, or even an officer or director being asked to attend at the police station to provide a statement respecting their knowledge of workplace circumstances and conditions, practices being followed, and their own personal steps to prevent the accident, potentially in the presence of OH&S authorities who wish to record that statement as well. Or imagine an OH&S investigator attending at a workplace to interview a supervisor or senior manager, advising them that they must cooperate and give individual statements, or be charged with obstruction. Your Plan can assist in managing the statement issue.

The question of whether to provide a statement, particularly for supervisors, senior managers, officers or directors is virtually always a matter on which specific legal advice should be sought. Such requests send up red flags that personal charges against senior representatives could be contemplated, and in the post C-45 world should signal possible individual or corporate "criminal" charges. In each case the decision on whether to give a statement balances the risk of prosecution for declining, the positive qualities of information which could be given, and possible negative admissions which could be made. A frequent strategy is for counsel or the senior manager to agree to cooperate with investigators and provide all information requested, but to decline to provide information in the form of a signed statement.

If and when supervisors and senior management decide to participate in a statement-taking process it is prudent to have legal counsel present. At that time, inquiries of investigators can be made to attempt to determine if they have grounds to believe the individual or the organization have committed an offence, so they may have this information in deciding whether to give a statement.

A multitude of issues can and should be managed within an Accident Response Plan. With the anticipated increased involvement of police and prosecutors combing cases for potential "wanton or reckless disregard" amounting to criminal negligence, and parallel OH&S penalties and limitless corporate fines being brought to bear, the need for workplace accident response strategies in Canada has never been greater.

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