

“SAFETY MANAGERS: NEW TARGETS FOR CANADIAN OH&S ENFORCEMENT?”

SEPTEMBER/OCTOBER 2007 – ISSUE OF COS MAGAZINE

By: Cheryl A. Edwards, Partner, Heenan Blaikie LLP

“Guilty as charged” is probably the last phrase Canadian safety managers expect associated with their name after a tragic workplace accident. But a Court recently made just this finding against a Nova Scotia safety manager. Given this development, should corporations and their OH&S management personnel be paying more attention to the risk of personal conviction for personnel in this role? And should measures be taken to minimize this risk?

The Recent Nova Scotia Safety Manager Conviction

On May 8, 2007, Mr. Bernard Richard (Dick) Dearing stood before His Honour Justice Campbell, in the Provincial Court in Sydney, Nova Scotia. His case was scheduled for trial. Instead, on that day, he made history. For the first time in Canada to this author’s knowledge, a plea of guilty in the capacity of safety manager was entered on an OH&S charge. He was fined \$1,000.00 plus applicable surcharge for a single charge under Nova Scotia’s OH&S Act.

The circumstances out of which Mr. Dearing’s charges arose were described by the Court (as they are in so many cases) as “horribly poignant”. An offshore company from India, Zoom Developers Private Ltd., hired Mr. Dearing as safety manager in February 2004. Zoom had purchased the assets of a Nova Scotia steel firm, Cisco, and was dismantling and removing from Canada all steelmaking equipment. Workers commenced hoisting and removing equipment in March 2004. A comprehensive safety program described in Court as a “template program that was in use at the Cisco operation at some point in time during the operation of the plant”...modified by Mr. Dearing, “unilaterally for use at the Zoom operation” was put into place. No consultation with the JHSC occurred. On September 23, 2004, during movement of large and heavy

steel beams out of a fabrication shop, a highly experienced and qualified ironworker, Mr. Roy Marchant, was fatally crushed by a falling beam during rigging and moving the load.

The Court heard in detail about the terrible lasting effects of the accident on Mr. Marchant's family and the accused, Mr. Dearing, a friend of Mr. Marchant. Yet the Court also heard that this was an administrative charge against the safety manager, entirely lacking in connection to the accident involving Mr. Marchant. The charge against Mr. Dearing? The safety program was put into place without consultation with the joint health and safety committee as required under Section 28(1) of Nova Scotia's OH&S statute. The safety manager Mr. Dearing, was described as a former manager for Nova Scotia's Department of Labour, an enforcer of OH&S, with 23 years of experience before his hire by Zoom. No concerns were raised respecting the quality of the safety program he put into place even though it was a template program. He had no involvement in the accident. Not a word in the proceeding explained why the safety manager of Zoom was singled out for an administrative regulatory prosecution. With all due respect to the tragic circumstances, the Court, and prosecution and defending parties, this writer's amazement at these charges, and now the result, continues. With great respect, what were they thinking?

The Charges Against the Safety Manager

Six separate charges were commenced against the safety manager Mr. Dearing. Each commenced with the phrase "while an employee and acting in the capacity of a safety manager on behalf of the employer Assume Developers (P) Ltd. In this capacity, which fascinatingly is not mentioned under any OH&S legislation in Canada, Mr. Dearing was charged with failing:

1. To take every reasonable precaution in the circumstances to protect the employee's health and safety;
2. To establish and maintain a written occupational health and safety program in consultation with the committee or representative adapted to the circumstances of the organization (this second charge was the subject of the "guilty" finding);

3. To ensure that the OH&S program included provisions for training and supervision of employees in matters necessary to their health and safety;
4. To ensure that the OH&S program included provisions for hazard identification and reporting;
5. To ensure that the OH&S program included provisions for workplace OH&S monitoring and follow up and control of identified hazardous; and
6. To ensure that the OH&S program included provisions for monitoring implementation and effectiveness of the program.

Could This Happen to Your Corporate OH&S Manager (or to You)?

A question no doubt on the minds of many readers, including Canadian OH&S personnel, is whether safety managers have become the latest target for Canadian OH&S enforcement. Surely the content of the above charges forms part of the responsibilities of most safety managers. Or do they? Responsibility for written corporate OH&S programs, training, hazard identification, reminders and enforcement, are traditionally seen as the corporate employer's responsibility. One would think that the safety manager, rather like the joint health and safety committee member, would be last in the firing line for potential OH&S prosecution. (*Endnote—Of course, the term safety manager is intended here to include the safety coordinator, director, and other titles by which this position is known*).

Typically, the safety manager would have an important advisory role, would be involved in developing and encouraging corporate OH&S programs, but would certainly not be the workplace party seen as fundamentally responsible under OH&S legislation for programs.

Usually the safety manager has no managerial authority over workers. Any authority exercised is typically to encourage and support managers and workers in their efforts to comply with safe practices and obligations in Canadian OH&S legislation. Further, while many Canadian OH&S statutes have detailed responsibilities for supervisors in charge of the workplace, Nova Scotia's OH&S statute does not define "supervisor". Some suggestion has been made that this is the reason that enforcers in

this case charged Mr. Dearing as employee acting in the capacity of safety manager. The facts do not show any presence on the site by Mr. Dearing as supervisor.

It is the employer's duty in Section 28 of the Nova Scotia OHSA to establish an OH&S program in consultation with the committee — this does not in any way appear to impose obligations on employees or supervisors. In this writer's view it certainly stretches the provisions of the OH&S Act to attempt to apply these provisions to a safety manager.

Anecdotally, it appears that OH&S enforcers sometimes recommend prosecution of corporate safety personnel as "supervisors", yet those recommendations have only rarely translated into OH&S charges, and never, to date, in conviction. If safety managers have become a prosecution target, this raises serious questions about the necessary role and authority of safety management personnel in developing and encouraging compliant and stringent health and safety improvements and programs. Should they now be directing safety matters and given all necessary authority to do so?

Can Corporations and Safety Personnel Minimize the Risk?

The corporate safety manager finds him or herself in a unique and sometimes awkward role. Often with little managerial authority, they frequently find themselves in situations where their role is to transition a company into compliance, sometimes from a disastrous state of non-compliance. In this advisory role should they be held responsible while the corporation is brought into compliance? Should they be held responsible if, after their recommendations, the corporation decides to take steps short of full compliance?

Some small steps to consider to minimize the risk of prosecution against safety management personnel would be the following:

- Ensuring that indemnification policies, setting out circumstances in which corporate support, representation, and payment of penalties to representatives, cover safety managers. Safety managers should have an assurance that they will be supported if assisting the corporation properly

and diligently with compliance they are caught in the web of an OH&S prosecution;

- Ensuring that job descriptions clearly and accurately set out the particular safety manager's authority. If the role is only an advisory one, and could not be considered truly managerial, this should be stated and could support the position that the safety manager has no capacity as "supervisor", as defined in many OH&S statutes. Alternatively, if the safety manager has such authority, this can be clarified so that they have full support to give directives and insist on compliance and improvements where safety concerns or violations exist.

Whether or not we accept that prosecuting and penalizing a safety manager in the circumstances of any case furthers the intent of OH&S legislation, or could possibly further and better prevent tragic workplace accidents, corporations and their safety personnel must face the reality that government enforcers may from point to further safety managers as potential targets for OH&S prosecution.

Cheryl A. Edwards is a former Ontario Ministry of Labour OH&S Prosecutor and Leader in Heenan Blaikie's national OHS and WSIB Practice Group. Cheryl has more than 20 years of experience providing strategic, focused, practical advice and in-house training for public and private sector organizations. She also has extensive experience representing clients at trials, complaints, inquests and appeals. For more information, you can contact Cheryl at:

Email: cedwards@heenan.ca

Direct Line: 416 360.2897

Cell: 416 452.4958