Are you OHSA Compliant? Could You Mount a Due Diligence Defence?

Mark E. Geiger
416.593.3926
mgeiger@blaney.com

Melanie I. Francis
416.597.4895
mifrancis@blaney.com
Due Diligence...What does it Mean?

- In the context of Occupational health and safety, due diligence means:
  - Taking every reasonable precaution in the circumstances to avoid risk to public health or safety
  - Giving consideration to what a reasonable person would have done in the circumstances

- If your organization is charged with an offence under the OHSA, you want to be able to mount a due diligence defence
Strict Liability Offences

- Crown must prove beyond a reasonable doubt the actus reus of the offence (the action or lack of action by the defendant)
- If Crown meets its burden, onus shifts to defendant
- Defendant must establish due diligence defence on a balance of probabilities
- Meaning, it is more probable than not that the defendant took every reasonable precaution in the circumstances
- At a minimum - comply with Regs
How Do We Establish the Defence?

- *Cooper Construction, Kenaiden* - 2 key cases
  - Diligent and Proactive Directing Mind of the Corporation
  - Comprehensive Health and Safety Policy
  - Competent, well-trained Supervisor
  - Use of outside safety consultant
  - Establishment of Committees and health and safety representatives as set out in the Act
    - How selected?
    - Certified?
  - Proper, documented site inspections
Example #1
Example #2
Industrial Context

- Employer primary responsibility
- Competent supervision
- Training on all equipment
- Monthly inspections
- Health and Safety Representatives and Committee
  - Selection
  - Certification
- Know the Regulations!!!!! [Reg. 851]
Compliance with the Act

- A Key Element to Establishing Due Diligence
- Important Aspects
  - JHSC
  - Training
  - Health and Safety Policy
  - Workplace Violence and Harassment Policy
- Regulations
  - More detailed requirements
  - Having the proper committees, training, processes in place will help keep you in compliance with regs
WHIMIS

- Federal legislation focuses on suppliers
- Provincial legislation focused on identifying key information and passing it on to employees
- Part IV OHSA and Regulation 860
- An employer in charge of a worksite where controlled products are used has 3 duties:
  - to ensure that controlled products are labelled or identified,
  - to obtain material safety data sheets for controlled products, and
  - to educate workers
Joint Health and Safety Committees

- Under Ontario’s *Occupational Health and Safety Act (OHSA)*, the following workplaces are required to establish Joint Health and Safety Committees (JHSC):

  1. Any workplace that regularly employs ≥ 20 workers;
  2. Construction projects on which ≥ 20 workers are regularly employed and are expected to last 3 months or more;
  3. Any workplace (other than construction projects) to which a regulation concerning a designated substance applies (even if fewer than 20 workers are regularly employed there);
  4. Any workplace where an order has been issued under section 33 of the *OHSA* (even if fewer than 20 workers regularly employed); and
  5. Any workplace where the Minister of Labour orders a committee to be established
Under 20 workers?

- A project or workplace that doesn’t require a committee must select at least one health and safety representative from among the workers.
- **Note** - workplaces with 5 or fewer workers are exempt.
- Workers (or union if applicable) to select.
- Health and Safety Representative must have sufficient training to effectively perform the role.
JHSC Composition

- Workplaces with 50 or more workers are required to have a committee consisting of 4 members (minimum)
- (Workplaces with less than 50 workers to have committee of at least 2)
- Less than 20 workers - require a Health & Safety Rep
- At least half of the committee members must be worker members
  - non-management employees who are selected by their co-workers; or
  - selected by their union if applicable
- The remaining members are management selected and carry out managerial functions
JHSC Composition cont.

- Suggested term is at least one year
- Membership terms to be staggered
- One worker member and one management member to be certified
- MOL recommends that if possible, committees represent the health and safety concerns of the entire workplace. For example, if a workplace has a plant, office, laboratory and warehouse, each of these areas should be represented on the committee
Certification of JHSC Members

- This responsibility for certification and training have shifted from the WSIB to the Chief Prevention Officer (CPO)
- The CPO certifies members once they complete the Parts 1 and 2 of mandatory training: Basic Certification and Workplace-Specific Hazard Training
- MOL has approved list of Basic Certification Providers: [http://www.labour.gov.on.ca/english/hs/cert_providers.php](http://www.labour.gov.on.ca/english/hs/cert_providers.php)
- Hazard Training can be through Health and Safety Ontario, the Workers Health and Safety Centre, other health and safety professionals, or through in-house training
Certification Cont.

- **Basic Certification** - provides an overall knowledge of health and safety that applies to all workplaces

- **Workplace-Specific Hazard Training** - focuses on significant hazards in your workplace, how to assess those hazards and ways to control and/or eliminate them

- Complete a Workplace-Specific Hazard Training Confirmation to MOL form (3189A)
JHSC Meetings

- Committee members are required to meet at the workplace at least every 3 months.
- Both worker members and management members elect a co-chair to run meetings.
- Minutes of each meeting must be recorded and available for review by a Ministry of Labour inspector.
- In addition to these meetings, one designated worker member (preferably a “certified” member) must conduct an inspection of the physical condition of the workplace once monthly.
Function of the JHSC

- Committees have 4 principal functions:
  1. Identify potential hazards;
  2. Evaluate these potential hazards;
  3. Recommend corrective actions; and
  4. Follow up on implemented recommendations

- Where the JHSC is unable to reach a consensus with respect to its recommendations, either co-chair is empowered to make written recommendations

- OHSA requires employers to provide a written response to their JHSC within 21 days of receiving recommendations
Workplace Violence and Harassment Policy

- Written policy with respect to both workplace violence and harassment required
- Important elements that should be included:
  1. Clear definitions of key terms;
  2. Identify the responsibilities of the employer, its management/supervisors and employees;
  3. Articulate the process for making complaints and for dealing with reprisals after a complaint is made; and
  4. Articulate the process for the investigation of a complaint
Workplace Violence Risk Assessment

- Employer required to conduct an assessment (and ongoing reassessments) of the risks of violence in a workplace
- Reassessments must take place at least annually
- We also suggest a reassessment:
  1. After an incident of violence at the workplace;
  2. After an incident of violence at a company with a similar workplace environment;
  3. Upon hearing about an incident of violence occurring at a company carrying on similar business; or
  4. After changes to the workplace environment
- Results must be provided to the JHSC
Implementing Workplace Violence and Harassment Policies

- A program must be developed in order to implement the policies relating to both workplace violence and harassment.
- These programs should establish:
  1. Measures and procedures to control perceived risks;
  2. Measures and procedures for the reporting of incidents and investigations;
  3. Protocol to obtain emergency assistance when required; and
  4. Special procedures for taking all reasonable precautions for the protection of a worker where domestic violence is an issue.
- Must ensure that all employees have the required information and instruction regarding both the policies and their respective programs.
- Remember: Familiarity breeds contempt, or at least complacency.
- Look with fresh eyes!!