

Disclosing Accident Reports

Are employers legally obligated? The OLRB weighs in.

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Can the Ministry of Labour compel employers to produce internal investigation reports after an accident? This question has been controversial in legal circles for many years.

Seven years have passed since the Ontario Court of Appeal issued its landmark decision in *R. v. Inco* ([2001] 54 O.R. (3d) 495 (C.A.)). This decision established that, where a government inspector

- has a reasonable belief that a regulatory statute (e.g., the *Occupational Health and Safety Act*) has been contravened, and
- is in reality gathering evidence to bolster prosecution,

then the inspector should no longer utilize the full range of statutory inspection powers available to him or her for routine inspections.

A new case may change all that.

Use of routine inspection powers after accidents

The situation of employers and individuals post-accident is probably best described as being stuck "between a rock and a hard place". Cooperation is legally necessary, and prudent to prevent a workplace shutdown or problematic future relations with regulatory inspectors. Yet if cooperating and handing over investigation reports, statements, training records, policies (or admissions that these are lacking) yields prosecution, this cooperation comes at a huge cost.

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Inspectors enforcing the act perform two separate roles. The inspectors perform routine inspections where the purpose is to ensure that the employer is in general compliance with the statute. Any materials gathered during such a routine process are not used to prosecute, and at most end up in inspector's file. But these same inspectors also investigate contraventions where their specific focus is on gathering evidence for use in a prosecution against an employer or individual.

It has been our experience that inspectors routinely issue orders to employers after accidents to compel production of all documents associated with the employer's investigation. Employers have the right to appeal and seek interim suspension of inspectors' to the Ontario Labour Relations Board. A recent case raises the question of whether the inspectors have legal right to rely on routine inspection powers to require disclosure of materials obtained as a result of the employer's internal accident investigation.

OPG interim suspension case

(i) The Facts: In *Ontario Power Generation Inc. v. Power Workers' Union*, 2008 CanLII 20624 (ON L.R.B.) ("OPG"), Vice Chair Peter Chauvin of the Ontario Labour Relations Board (ORLB suspended an order by a Ministry of Labour Inspector that required OPG to disclose internal documents after a workplace accident. The Vice-Chair's decision is an interim one, which means that the documents need not be disclosed until a final decision is made after a hearing. However, the case is significant as the legal threshold for obtaining a suspension is very high and they are rarely granted.

In OPG, the ORLB considered whether an order by a Ministry of Labour Inspector for the production of "all notes, photographs, statements and reports" gathered after an accident, should be suspended. The order was made in connection with an accident where two OPG maintenance workers were preparing to replace a faulty drive in a piece of equipment. As one worker shone a light into the equipment to determine if the drive was malfunctioning, a blue arc flash of electricity occurred. The worker holding the flashlight suffered burns to his right hand fingers, forearm and upper chest. He was sent to hospital but reported to work the next day.

An internal investigation was conducted on the day of the accident, and the accident was reported to the ministry the next day (it appears that OPG was not legally required to report the accident to the ministry as a "critical injury").

After attending to the scene on February 26, the ministry inspector issued seven orders directing OPG to disclose various documents including training records, codes and protection documentation etc. by March 3, 2008. Each order was made pursuant to section 54(1)(c), which gives ministry Inspectors broad powers during an inspection, including the power to "require the production of any drawings, specifications, license, document, record or report, and inspect, examine and copy the same." OPG complied with all orders excluding Order No. 1, which was a request for documents produced by the company in connection with the accident.

At the OLRB, OPG argued that it need only turn over its internal investigation documents

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while an Inspector is conducting an inspection. Once an investigation commences, however, an inspector cannot use section 54 to compel production. According to OPG, if section 54 is used during investigations or evidence gathering in aid of prosecutions, section 54 violates the *Charter*. OPG asserted that before commencing his visit on February 26, the inspector had made it clear that his plans were to conduct an investigation, not an inspection, and that therefore, the inspector must be precluded from exercising section 54 powers to compel disclosure. The Power Workers' Union and the Society of Energy Professionals also intervened in support of OPG's position. The Ministry of Labour strenuously asserted that the OLRB ought to reject OPG's arguments and had no legal basis to make a decision about whether the Inspector properly relied on section 54 of the OHSA.

(ii) Findings of the OLRB: Applying the standard test for the suspension of orders arising out of *Regional Municipality of Hamilton-Wentworth*, [1998] OLRB Rep. Aug. 709, Vice Chair Chauvin held that Order No. 1 should be suspended on the basis that:

- a) there would be no endangerment to worker safety in the event of suspension
- b) OPG would bear the full burden of the prejudice if it was required to provide the documents before it had an opportunity to argue its case, and
- c) there was a strong *prima facie* case for a successful appeal of the order.

Uncertainty in the law was also a factor supporting the Vice-Chair's decision to grant the suspension order. He acknowledged that "*the law in this area is quite unclear and inconsistent*" and that "*OPG has not fully set out its Charter arguments.*" He agreed with OPG and the interveners that OPG should have an opportunity to make full submissions on the merits so that the law in this area can be clarified. There is no doubt that the fact that this was a novel case contributed to the OLRB decision to suspend the order.

Practical Implications

It is important to remember that the OLRB has not made a final decision in this case, and the law remains unclear about the legal rights of employers to resist production of internal accident reports after workplace accidents. This case does not assess the principles of contemplated litigation or solicitor-client privilege in any detail. In appropriate circumstances, employers may be able to take the position that internal accident investigations are legally privileged and need not be disclosed even if a search warrant is obtained.

The most important factor to remember is that the law in this area is continuing to evolve. Employers should not attempt to navigate the legal minefield of disclosure of documents after an accident without guidance from experienced counsel. Employers who fail to provide documents to the Ministry after an accident without a valid legal basis face the risk of obstruction charges and unnecessary litigation.

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Further, employers must remember that the most important issue after any accident is to ensure that all reasonable precautions are taken to ensure that it does not happen again. Do not let the legal issues associated with OHS charges take away from the critically important issue of protecting worker safety and making all necessary improvements to the safety program.

Employers should not attempt to navigate the legal minefield of disclosure of documents after an accident without guidance from experienced counsel. For questions about this article, please contact Ryan Conlin at:

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