

## Defending Fall Protection Charges Under the *Occupational Health and Safety Act*

**Ryan J. Conlin and Nadia Pazzano**

As most employers are now aware, the Ontario Ministry of Labour has dramatically stepped up enforcement of the *Occupational Health and Safety Act* in recent years. It is the Ministry's belief that "aggressive enforcement" of the OHS Act will result in a significant reduction in the number of workplace accidents and lost time injuries.

It has become very common (particularly in the construction industry) for Ministry of Labour Inspectors to lay charges under the OHS Act against employers, supervisors and even workers where no accident has occurred. A great number of the "non-accident" charges pertain to contraventions of the Act which create a great risk of injury or death, referred to as "killer contraventions".

### **Emphasis on Enforcement of Fall Protection Provisions**

There is no question that a large percentage of the "non-accident" cases that are referred to our office pertain to contraventions of the Fall Protection provisions of the various industry specific Regulations under the OHS Act. It has been

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our experience that the majority of non-accident fall protection charges are laid under section 26.1 of the Construction Projects Regulation (O.Reg. 213/91). In such cases it is common for charges to be laid against employers, supervisors, constructors and even some workers.

In light of the reality that Inspectors generally take a "zero tolerance" approach towards fall protection contraventions, employers must appreciate that there is a great risk of fall protection charges being laid each time a contravention is identified by the Ministry. It is not uncommon for the Ministry to seek penalties up to \$30,000 against employers and constructors on a first offence involving fall protection. Therefore, employers must immediately take steps to prepare to defend potential OHS fall protection charges each time contraventions are identified by the Ministry.

## **Charges May Not Be Laid Immediately**

Given the prevalence of fall arrest prosecutions, in all cases where the Ministry identifies a fall arrest contravention, the parties involved should assume that formal charges would follow. Although it is true that in some instances the Ministry will lay charges immediately on the date of the contravention, it has up to one year from the date of the alleged contravention to lay charges under the Act. In fact, it is not uncommon for the Ministry to lay charges immediately against the worker(s) and supervisor(s), but wait until almost 1 year later to charge the employer and constructor.

## **Defending Fall Protection Charges: Can the Ministry Prove it?**

The first issue that arises in fall protection cases is whether the Ministry can prove

beyond a reasonable doubt that a worker was in contravention of the Act (i.e. was not tied off to a fall protection system or protected by guard rails). In many instances, there is no question that the worker was not protected by fall protection as required by law (i.e. the worker admits to the contravention or the Inspector witnessed the event). In such cases, the success of the company's case will turn on due diligence evidence (discussed below).

Unfortunately, the employer will not be aware of the quality of the Ministry's case until charges are laid and disclosure (i.e. the Inspector notes, witness statements, photographs etc.) are provided to the employer or their counsel. However, employers are well advised to take the following steps immediately after an Inspector references a fall protection issue:

- Measure the distance of the fall risk identified by the Inspector to confirm that it exceeds the threshold prescribed by law (10 feet/3 metres)
- Take photographs of the area identified by the Inspector
- Take witness statements from relevant individuals which make reference to building plans or diagrams
- Take detailed notes of any statements or comments made by the Inspector pertaining to the fall arrest issue
- Take steps to obtain any records, notes or statements associated with the event from other employers or the constructor (if applicable)

One real world example of where the Ministry failed to prove the case beyond a reasonable doubt was a prosecution against a supervisor and two workers for

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failing to wear fall protection on a construction project (*R v. Dos Santos et al.* [2005] O.J. No. 5999). The Inspector testified that he quickly measured the distance from the ground to the various areas the Defendants were working and determined that it exceeded the legally prescribed distance for fall protection of 10 feet (three metres). The Defendants challenged the Inspector's measurements and tendered evidence that the building plans established that the distance was less than 10 feet in the areas the workers were in.

The Court accepted the Defendant's argument and held that the Ministry had not proven that the fall risk exceeded 10 feet. The Court ruled that the Inspector's evidence amounted to an approximation of the fall distance and that the Defendants had called evidence that raised a reasonable doubt about the accuracy of the measurement.

It should also be noted that the Defendants also argued that the Ministry was not able to prove the identity of the workers beyond a reasonable doubt (meaning the Defence was arguing that the Inspector could not prove who it was who allegedly were not using fall protection). Although the Court seemed troubled by the quality of the Crown's evidence in this regard, it held that the Inspector's evidence was sufficient to establish the identity of the Defendant.

Practically speaking, identification is an issue that should always be reviewed after charges are laid, but generally speaking Inspectors ask for government issued identification from all parties involved when they are considering laying charges under the OHSA.

### **A Brief Word About How to Protect Company Investigation Materials From Disclosure**

As we discussed above, one of the most common mistakes employers make in dealing with fall protection contraventions is failing to conduct their own privileged internal investigation. Although, considerably less detailed than the investigation a company would be required to conduct in cases involving critical injuries and fatalities, the company ought to take the steps described above to preserve evidence associated with alleged fall protection investigations conducted by Ministry Inspectors.

In order to protect the legal interests of the company and its representatives, steps must be taken to protect the investigation report with litigation or solicitor client privilege. Simply stated, litigation privilege protects documents from disclosure when they were created in contemplation of potential prosecution (regardless of whether legal counsel is involved) and solicitor client privilege protects documents which were prepared for the purpose of obtaining advice from legal counsel.

In order to rely on either privilege the company must be careful to ensure that access to the Report is limited to a very close group of parties advised by counsel. The Report should be stored in a locked file cabinet and marked "Privileged and Confidential" and any appropriate precautions should be taken to protect any electronic storage of the Report.

Inspectors have vast regulatory inspection powers to compel disclosure of documents pertaining to health and safety. Employers and their management have been charged with obstruction for failing to provide

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documents sought by Inspectors. Employers should contact legal counsel immediately in the event of a dispute about disclosure of any privileged company investigation report.

## **Due Diligence and Fall Protection**

Notwithstanding our comments above, the vast majority of Defendants will be required to defend fall protection on the basis of proving that all reasonable steps were taken to prevent the offence, or in other words establishing the defence of "due diligence". The ordinary legal standards for due diligence apply in fall protection prosecutions.

The Court will expect to hear evidence about how the company has an effective and functioning safety program (i.e. a health and safety policy which is effective, communicated to workers and adequately enforced). However, the success or failure of the defence in non-accident fall protection will often turn on the company's specific due diligence evidence with respect to the two critically important issues discussed below.

### *(i) Training*

Training is critical in the context of fall protection and is legally mandatory in the construction industry (see section 26.2 of O.Reg. 213/91). Simply stated, an employer who cannot establish that workers were trained in the use of fall protection will almost certainly not be successful in establishing a due diligence defence. Obviously, a lack of training would make it virtually impossible to establish that workers were trained in the OHS provisions pertaining to fall arrest.

However, the legal threshold generally requires more than a worker simply being trained on fall protection on one occasion. This means that unionized construction industry employers ought to consider providing training beyond what is included in the Union run training courses. Regular refresher training must be conducted and properly documented. Further, site specific fall protection training should be provided for unique hazards at a particular project or work location.

Courts further expect that fall protection will be consistently emphasized at safety meetings (i.e. toolbox talks) and that supervisors will routinely discuss fall protection issues with workers. Evidence to support effective training includes the following:

- Training records
- Course materials
- Competency testing records
- Toolbox Talk notes
- Supervisor's log of discussions with workers
- Safety Committee Minutes
- Safety Reminder Notices
- Fall Arrest Notices posted at the worksite or project

### *(ii) On-Going Monitoring and Discipline*

An employer's due diligence defence often fails in fall protection cases when it cannot show that it enforced the requirement to use fall protection. This involves essentially two elements. First, the employer must show that management took adequate steps to monitor compliance. Construction industry employers should appreciate that although evidence of employing an external consultant to monitor the site for

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compliance is helpful, it will not likely meet the standard required for due diligence.

Courts expect that immediate supervisors follow a system for monitoring compliance with fall protection requirements. Specific evidence of the actions of the supervisor on the day of the alleged contravention is often critical. Ideally, the supervisor should be in a position to testify about what actions were taken on the day of the offence to monitor if workers were employing the required fall protection.

It is important to appreciate that there may be a long period between the date of the alleged contravention and any trial. This reality means that it is critically important to record the recollections of the supervisor immediately after the events take place in order to avoid the consequences of the effect of the passage of time on the supervisor's memory.

Second, courts also expect evidence that workers have been disciplined for failing to use fall protection. This is a problem for many employers. It is a due diligence expectation that employers employ progressive discipline for failing to wear fall protection with the consequences gradually escalating for repeated non-compliance by workers.

Lack of discipline for fall protection is particularly problematic where there is evidence (i.e. from the notes of external safety consultants or in safety committee minutes) of fall protection being an issue at the project or worksite. Courts expect employers to respond with stepped up monitoring where it is clear that there is a pattern of fall protection non-compliance. Construction employers should be careful to make sure that communications with the

constructor's representatives include information about any safety non-compliance by the employer's workers.

We are frequently asked, by companies which employ highly trained and experienced workers, whether Courts are prepared to consider an argument that the expectations on the employer are lowered in cases involving sophisticated workers. One Court appeared to accept such an argument in the context of a fall protection issue involving experienced iron workers (*Ontario (Ministry of Labour) v. MacMobile Welding & Contracting Inc.* [2002] O.J. No. 3699). The Court stated:

*Obviously, working as an ironworker on steel structures high above the ground is a dangerous occupation. As such, the employer and supervisor of the ironworkers must make certain that particular precautions are undertaken. This includes providing proper protective gear or systems for the purpose of preventing falls from such heights, instructions on the use of the protective gear or systems, and constant warnings and reminders to novice workers about the danger of falling when unsecured. On the other hand, consideration must be also given to the experience and knowledge of the worker in relationship to the demands of the work involved. In this case, there are two highly experienced and knowledgeable journeyman ironworkers that work on steel structures at extreme heights. They are conversant about the dangers and injuries that could result from falling off the top of a building being erected. These seasoned ironworkers in their testimony displayed an adventurous and daring attitude, traits one can*

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*surmise is ostensibly essential to their profession. Although, the Occupational Health and Safety Act is concerned about the protection and safety of workers at a workplace, there is no expectation that an employer or supervisor be superhuman or to perform their duties to perfection. Their failure to comply with the Act has to be considered on the basis of their prudence and reasonableness for the circumstances. The Act itself allows for alternative measures and a statutory defence of taking every precaution reasonable for the circumstances. To ensure that the two journeyman ironworkers wore their fall arrest system at all times would require constant supervision alongside the workers, which may not be practical or desirable. For a novice worker, however, this constant supervision would be needed for the worker's safety.*

The Court in *MacMobile* was obviously sympathetic to the argument that the experience of workers ought to be a relevant factor in assessing due diligence in fall protection cases. However, this reasoning has not been adopted by other Courts to my knowledge. Further, employers should understand that the Ministry would likely vigorously resist any attempt to rely on the experience of a worker as justification for lowering due diligence standards for fall protection.

Employers subject to prosecution in fall protection cases ought to carefully consider the pros and cons of defending charges. Where strong technical defences are available or where there is clear evidence that due diligence standards have been met, pursuing a defence may be worthwhile. One benefit of successfully

defending OHS charges is that the employer can avoid having a record, or at the very least, avoid adding further infractions to an existing record. Employers should note that the Ministry will rely on prior charges against the Defendant to support a higher fine at the sentencing stage. Moreover, many contractors find that a charge under the OHS acts as a black mark, which hinders the ability to compete for work. The reality is that, in some instances, a good defence may not be available. Where this is the case, a guilty plea may be the most practical and cost effective option.

Legal representation at the early stages of a fall arrest investigation can be invaluable. Counsel can advise on appropriate responses in a witness statement so as to limit self-incriminating statements, and identify whether or not the Ministry is required to obtain a search warrant in order to continue its investigation. Employers should also note that Ministry Orders can be appealed within 30 days. Given this compressed limitation period, employers should move quickly, under the guidance of counsel, to assess whether there are any grounds to appeal an Order.

**For questions about this article, or any OH&S issue, please contact Ryan Conlin or Nadia Pazzano:**

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## There's An OH&S Inspector At The Door! How to Respond to OH&S Accident Investigations, Search Warrants and Routine Inspections

Presenters: Ryan J. Conlin & Landon P. Young

Half-Day Program  
Tuesday, April 1, 2008  
8:00 a.m. – 12 Noon  
Check-In and Breakfast 7:30 a.m.  
Courtyard by Marriott Vaughan  
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\$295 plus GST

A safety related inspection or accident investigation can result in prosecution, high fines and fine surcharges. In the age of unprecedented enforcement of OH&S laws, it has become more complicated to strike the right balance between cooperating with the inspector and protecting your rights post-accident. This session will help you (a) act decisively and appropriately when there's a knock on your door and (b) develop an Accident Response Plan.

### You Will Learn:

- How to deal with the difficult or heavy-handed MOL inspector
- What powers inspectors have during routine inspections and new search warrant powers for accident investigations
- The balance between cooperation and self-incrimination
- Strategies for responding to requests for statements from supervisors, managers, officers and directors
- The difference between confidential company accident reports and reports required by law
- How to shield third-party consultants' reports or internal accident reports from disclosure
- The importance of post-accident steps
- How to develop a proper Accident Response Plan

### The Program Will Cover:

#### Successfully Dealing With the Inspector: Routine Inspections and Investigations

- Working to avoid orders, stop work orders
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- Managing the balance between cultivating a relationship and co-operative stance, versus self-incrimination
- Appeals without repercussions
- Officially induced error: can the inspector erroneously approve an unsafe situation

## **You've Had a Serious Accident. There's An Inspector at the Door! The Balance Has Shifted**

- Anatomy of a Ministry of Labour accident investigation - what to expect
- Powers of the inspector upon investigation: are they different from routine inspections?
- What a warrant can authorize the inspector and others to do
- The Ontario experience with search warrants
- Why change the law? Past problems with Ministry of Labour investigations

## **Making the Best of A Bad Situation: Initial Handling of the Accident Investigation**

- Statutory obligation to preserve scene, cooperate
- Notification requirements and accident reports-statutory obligations
- Obstruction charges
- Establishing positive and informed point of contact for Ministry of Labour investigator
- Importance of point of contact maintaining privileged and confidential files and materials

## **Your Accident Report and Third Party Reports**

- Ministry of Labour orders for expert advice
- Initiating your own investigation - key steps
- What if the Ministry of Labour asks for your internal report?
- Protecting confidentiality and privilege respecting your internal accident report and expert reports
- Getting expert advice about causation and corrective steps
- Successful strategies for putting the best of your report and expert advice to Ministry of Labour
- Reports to the joint health and safety committee
- Solicitor client privilege and protection of confidential reports

## **Statements From Supervisors and Senior Management**

- Is there a right to remain silent given the obligation to cooperate?
- Practical strategies for providing information but not signed statement
- Importance of cooperative stance for supervisors and senior management
- Can a search warrant be used to require a supervisor or senior manager to put equipment in motion and provide incriminating information?

## **Searches With Warrant and Without Warrant**

- What to do if the Ministry of Labour arrives with a warrant

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- Seizure of company policies, procedures, training records
- Handling attempts to seize privileged and confidential reports and files, internal investigation, expert reports
- Searches without warrant: can you refuse to co-operate or refuse entry?
- Strategies to protect rights while providing information and documents
- Preserving right to make arguments respecting search and seizure violations at trial

## Developing a Proper Accident Response Strategy

- Incorporating key post accident steps into your accident response strategy
- Distributing a written Accident Response Plan to supervisors and managers
- Key contacts within Accident Response Plan
- Precedent Accident Response Plan

Register Here: [There's An OH&S Inspector At The Door!](#)



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