

Ontario Court Dismisses Remaining OHS Charges Against Fire Department



When charged with violating the OHS laws, many companies believe they can escape liability only if they prove that they exercised due diligence. But a company can also avoid liability for safety violations if the prosecution fails to prove beyond a reasonable doubt the elements of the violations with which the company is charged. In fact, the prosecution must first fulfill this burden before the issue of due diligence even arises. A fire department in Ontario recently prevailed in an OHS prosecution when the court ruled that the prosecution hadn't met this burden. Here's a look at the decision in that case.

THE CASE

What Happened: A person called 911 to report a fire at a restaurant, indicating that there might be someone inside. When volunteer firefighters responded, a woman at the scene said she thought her boyfriend was still inside the building. So two firefighters went inside. While searching, one of them "lost air." They were unable to get out and had to be rescued. Both suffered minor injuries. The Ministry of Labour charged the department with three OHS violations under the so-called "general duty" clause. The trial court initially agreed that there was no evidence to support two of the charges and dismissed them. But it refused to dismiss the charge of failing to activate an accountability system to track

firefighters entering a burning building. So the case went to trial on that remaining charge.

What the Court Decided: The Ontario Court of Justice dismissed the last charge, ruling that the prosecution failed to prove it beyond a reasonable doubt.

How the Court Justified the Decision: An accountability system is designed to, among other things, account for the location and function of all firefighters at a scene and provide a means for extracting them from a structure when conditions become life-threatening. The court noted that the OHS law in Ontario doesn't have any specific regulations on firefighting (aside from a regulation on PPE for firefighters) and thus doesn't require fire departments to set up accountability systems. But there are safety guidelines that cover such systems from the Ontario Fire Service Health and Safety Advisory Committee, which was established under Sec. 21 of the *OHS Act*.

Because of the language of the charge, the court had to decide whether the prosecution had proven beyond a reasonable doubt that the accountability system hadn't been *activated*. Based on the evidence, the court concluded that the fire department *did* set up an accountability system at the scene of the restaurant fire. For example, several firefighters acted at accountability officer and an accountability board was created. But the firefighters didn't follow department procedures on accountability systems. For example, several firefighters didn't give their name tags to the accountability officer. However, the safety guidelines note that accountability systems must be adapted to different situations, which makes sense given the inherent unpredictability of fire scenes, noted the court. Thus, although the system's execution may not have been perfect, it was activated and so the court dismissed the charge [*R. v. The Meaford and District Fire Department*, County of Grey 1060-999-10-396, Aug. 7, 2012].

ANALYSIS

The *Meaford* case is interesting for a few reasons. First, although the court dismissed the charge before the question of whether the fire department exercised due diligence needed to be answered, it did discuss due diligence anyway as well as other possible defences. For example, the firefighters entered the building because they thought someone was still inside, which turned out not to be true. So the court said the department may have been able to rely on the reasonable mistake of fact defense. The court also observed that "because of the inherent unpredictable and dangerous nature of firefighting, defences such as mistake of fact and necessity may well be more easily relied upon by fire departments than they might by other defendants" in OHS prosecutions.

In addition, a big issue in the case was the fact that the fire department was charged with a general duty clause violation because, except as noted above, there are no OHS regulations that specifically apply to firefighting in Ontario (there are such regulations in other jurisdictions). Instead, the prosecution based the charge on safety guidelines that include a disclaimer that they're *not* statements of law and there's no legal duty to comply with them. So the defense argued that the prosecution improperly treated the guidelines as law. The court declined to make a ruling on this issue because it was moot in light of the dismissal of the charge. So the question of whether a company can be prosecuted for failing to comply with what's essentially a voluntary standard was left

unresolved.

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