

Surviving Inspections: Beware of Accidentally Obstructing an OHS Official



SCENARIO

An OHS official shows up at your workplace after one of your workers suffers a serious injury. You're determined to cooperate with the investigation but almost immediately come to doubt the investigator's competence. Your misgivings come to a head when the investigator mishandles a piece of sensitive equipment. This is a key piece of evidence and if it breaks the entire investigation, not to mention your legal defence, may be undermined. So you remove the equipment to a safe location. While you may think that you're acting as a good Samaritan coming to the aid of an incompetent official, what you're actually doing is exposing your company to the risk of liability for obstructing an OHS investigator.

Refinery Fined \$10,000 for Obstruction

A New Brunswick oil refinery learned this lesson the hard way. The WHSCC (today known as WorkSafeNB) investigated the refinery after a worker was killed on the job. Suspecting that a leveling cylinder from a man lift was the cause of the incident, the investigator removed the cylinder and took it to an offsite machine shop for testing, storing it in a plastic tote box secured with 2 locks.

The refinery general manager and construction site manager had

concerns about the investigation, especially the testing of the cylinder. They feared that further testing would destroy the item or that somebody might steal or damage it. Their concern with the cylinder's preservation was understandable. After all, the item was a key piece of evidence in not just the OHS investigation but the expected lawsuits over the worker's death. They also knew that there were many parties involved in the litigation who had an interest in preserving the cylinder, including the refinery, the manufacturer, distributor and the company that leased the man lift containing the cylinder.

So, without telling anybody, the managers removed the cylinder from the machine shop and took it back to the refinery where they could keep an eye on it. When the WHSCC investigator found out he became enraged and demanded the cylinder back immediately. The refinery complied and the cylinder was quickly returned unharmed. But the Crown charged the refinery with obstruction and delay of an OHS investigator (under Section 33(a) of the New Brunswick *OHS Act*).

The managers didn't mean any harm, they were just trying to help, the refinery's lawyers argued. The investigator, they claimed, was inexperienced and didn't know what he was doing. Removing the cylinder was a good deed intended not to hinder but help the investigation and keep the cylinder from being destroyed.

But the court didn't buy it and ruled that removing the cylinder without permission obstructed the investigation. A company can't unilaterally assert control over an OHS investigation once it's started because it's unhappy with how it's proceeding and thinks it can 'do it better,' the court explained. So it fined the refinery \$10,000—an amount that would almost surely be much higher if the same case happened today [*R v. Irving Oil Ltd.*, 244 NBR (2d) 76].

The Right Way to Express Concerns to an OHS Investigator

OHS laws require employers to cooperate and refrain from interfering with government OHS officials when they conduct investigations and perform other duties in enforcing the laws. In addition to directly violating the OHS law, an employer's failure to cooperate may provoke officials and intensify their determination to uncover violations at your site.

By the same token, the duty to cooperate is a vague concept which may be difficult to reconcile with the competing imperative employers face in protecting their own vital rights during the investigation process. Consequently, employers may violate the duty to cooperate without meaning to. Unfortunately, as the *Irving* case demonstrates, good intentions are no defence for hindering or obstructing an investigation.

The Moral

OHS directors need to ensure that managers, staff members and other personnel that an OHS official is likely to encounter while investigating your site are aware of their duty to cooperate with the investigation. ([Click here](#) to find out about the duty to cooperate under your own jurisdiction's OHS laws.) Here's model language you can adapt for your OHS policy based on your province's OHS laws, your in-house policies and procedures for handling inspections and your lawyer's advice:

Duty to Cooperate with Government OHS Investigations

The Company and all supervisors, workers, constructors, contractors and sub-contractors are reminded that they have a duty under [list name of your province] law to cooperate with government officials investigating the workplace. In the event that you have objections, questions or concerns about the way the official is conducting the investigation, tell your supervisor or the Company's lawyer. DO NOT:

1. Raise your concerns directly with the OHS investigator;
2. Seize, move or remove objects, documents or other materials that are the subject of the investigation; or
3. Engage in any other activity that may interfere with the conduct of the investigation.

The 3 Things You CAN Do

While you do need to let OHS investigators handle the investigation, the duty to cooperate with an investigator does *not* require you to sit idly by and do nothing if you have concerns or complaints over how they're handling the investigation. There are at least 3 things you can do in this situation:

1. Tell the OHS Investigator

As even the court in the *Irving* case acknowledged, 'any citizen who feels, during the course of an investigation, under whatever legislation, that something is amiss, can very well bring that to the attention of the investigating officers to the point where in fact something which may have been overlooked is corrected.'

2. Tell the OHS Agency

You can also go over the investigator's head and speak directly to an official from the government OHS agency doing the investigation.

3. Speak to a Lawyer

Last but not least, you can and should talk to your lawyer any time you're subject to an OHS investigation. Like the Model Policy below, you should also tell staff to raise any concerns they might have about an investigation with their supervisor or the company's lawyer rather than confront a government official directly.