

Winners & Losers: Are OHS Officials Doing an “Inspection” or an “Investigation”?



OHS laws give the government safety officials who visit workplaces broad powers, such as interviewing workers, requesting copies of internal documents, taking photographs and confiscating equipment and materials. The catch: The officials can use these powers only to carry out *inspection* duties, i.e., to make a determination of what happened, whether the OHS laws are being complied with and, if not, what measures are necessary to protect the workers at the site.

What they’re not allowed to do is use those powers to gather evidence for a prosecution. At that point, the official becomes an “investigator” and needs a warrant to avoid violating your Charter rights. Result: Understanding whether the OHS officials who come to your worksite are acting as inspectors or investigators is crucial to protecting the legal rights of your company and its officials. Unfortunately, that’s easier said than done. But looking at the following 2 cases should go a long way in helping you recognize the difference between an inspection and an investigation.

OHS OFFICIAL ACTING AS INSPECTOR

SITUATION

In February, a worker doing repair work on a steel bridge falls from scaffolding and suffers serious injury. OHS officials show up at the scene immediately to determine what happened and return 3 more times in March and May to collect documents and pieces of equipment for testing by an outside engineering firm. On the basis of the test results, the employer is charged with 7 OHS Act and scaffolding regulations violations. The employer claims that the officials were conducting an investigation and illegally seized the evidence without a warrant.

DECISION

The Nova Scotia Provincial Court rules that the officials legally exercised their OHS inspection powers and refuses to toss the evidence.

EXPLANATION

An inspection becomes an investigation when officials have “reasonable and probable cause to believe” that safety violations have occurred, the court explained. This may take hours or even minutes to come to that conclusion; in other cases, it takes much more time and extensive review of the evidence to determine not only what caused the incident but who was responsible for causing it. That was the situation in this case, the court reasoned. The officials didn’t determine that violations occurred until after reviewing the results of the engineering report. So, the court ruled that seizing the equipment on which the testing was performed was a lawful exercise of their inspection powers.

[Nova Scotia \(Environment and Labour\) v. Nova Scotia \(Transportation and Public Works\)](#), 2006 NSPC 39 (CanLII), August 10, 2006

OHS OFFICIAL ACTING AS INVESTIGATOR

SITUATION

A plant notifies the Ontario MOL that a brickworker has been crushed in a de hacker machine. Immediately upon arriving at the scene, the MOL official issues a stop work order for the de hacker but lifts it later that afternoon once a temporary guard to the walkway approach to the machine is in place. The official returns to the plant several times over the next 3 weeks to interview workers and seize documents. Based on that evidence, the plant is charged as an employer with an OHS machine guarding violation. It contends that the MOL official illegally seized the evidence without a warrant.

DECISION

The Ontario Superior Court of Justice agrees that the official illegally seized the evidence as part of an inspection.

EXPLANATION

When he first responded to the scene, the official was acting as an inspector whose responsibility was to figure out what happened, whether any laws were broken and what orders to issue to protect workers at the site. Issuing the stop order for the de hacker until a temporary guard was in place was a valid exercise of those powers based on the determination that the unguarded walkway posed an unreasonable danger.

But after leaving the site, the official learned an important fact, namely, that the MOL had issued an order to the plant 7 months earlier requiring a permanent guard for the walkway. At that point, he had reasonable and probable grounds to believe that an OHS violation had occurred. Result: The evidence he gathered when returning to the plant after reaching that conclusion was seized as part of an investigation and required a warrant. Unfortunately for the employer, the court ultimately concluded that while the seizure was illegal, it

wasn't serious enough to violate the plant's Charter rights.

[R. v. Canada Brick Ltd.](#), 2005 CanLII 24925 (ON SC), June 30, 2005