

Ontario Court holds that health and safety inspector violated *Charter* guarantee against unreasonable search and seizure

The Ontario Superior Court of Justice has once again considered the difficult issue of where the line should be drawn between inspections by government regulators and investigations that seek to gather evidence with a view to laying charges. The former, if authorized by statute, can be carried out without a formal search warrant but the latter cannot without violating section 8 of the *Canadian Charter of Rights and Freedoms*, the provision that guarantees the right to be free from unreasonable search and seizure.

The case, *R. v. Canada Brick Ltd.* (June 30, 2005), involved a charge against the employer under paragraph 25(2)(h) of the *Occupational Health and Safety Act (OHS Act)* for failing to take reasonable precautions for the protection of a worker in the workplace. The employer was acquitted at trial but the Crown appealed and won a conviction. The employer argued on appeal that the trial judge had erred in holding that there had been no breach of the employer's right under section 8 to be secure from unreasonable search and seizure. The Superior Court agreed to consider this aspect of the lower court's decision.

The charge stemmed from serious injuries sustained by a worker on March 8, 2000 on one of the employer's machines. A Ministry of Labour inspector was summoned to the scene. Within two hours of arriving, the inspector issued a stop work order pending the implementation of adequate interim precautions. The inspector lifted the order later in the day after the required precautions had been taken. The employer had previously been ordered by another inspector in the summer and fall of 1999 to take a number of security measures involving the machine on which the worker was injured.

The inspector returned to the workplace on several occasions between March 8 and March 30 to conduct more interviews and seek document production. He did not have a warrant for those activities. The employer argued that, in doing so, he had breached section 8 of the *Charter* because he had already reached the conclusion that there were reasonable and probable grounds to lay charges against the employer. The trial judge had disagreed, holding that the inspector had reached this conclusion only after his investigation had ended and that his inquiries were necessary to determine whether there were reasonable and probable grounds to lay charges.

SUPERIOR COURT: REASONABLE GROUNDS EXISTED ON MARCH 8

After reviewing the legal principles concerning the application of section 8 in a regulatory context, the Court held that the employer's *Charter* rights had been breached. When the inspector attended at the workplace after being advised of the accident, he had "properly exercised the panoply of warrantless powers conferred by s. 54(1) of the *O.H.S.A.* [the powers given to inspectors], in an effort to learn how the accident occurred, whether it was the product of a preventable hazard, and what remedial action, if any was required". However, by the afternoon of March 8, 2000, the inspector had been made aware of the

orders made against the employer in connection with the machine some months earlier. At that point, the Court held, the inspector had reasonable grounds to believe that the employer had violated paragraph 25(2)(h) of the *OHSA* and should have obtained a warrant for his investigation:

"The legitimate use of warrantless, administrative authority expired on or about March 8, 2000. The predominant objective of [the inspector] thereafter was the investigative gathering of evidence respecting liability for the regulatory infraction whether or not he would ultimately see himself as having grounds to charge the company. This became a warrantless search no longer authorized by law. Deliberate deferral of consideration as to whether he had reasonable grounds or whether such grounds objectively existed does not alter the transparently clear dominant intent of the inspector in the three weeks following March 8. No longer exercising statutory powers toward remediation of a workplace hazard, the inspector's investigation improperly secured evidence without valid consent or any warrant to search."

However, despite this ruling, the Court declined to issue a stay of proceedings, noting that there was no evidence that the inspector had known that he should have secured a search warrant. The Court expressed the view that the integrity of the administration of justice had not been threatened by the government's conduct and that there was no established pattern of abuse or threat of future non-compliance with *Charter* standards.

In the result, the Court set aside the acquittal entered by the trial judge and substituted a conviction.

In Our View

The point at which a warrantless inspection becomes an investigation requiring a search warrant is when an adversarial relationship crystallizes between the subject of the investigation and the investigator. That point is reached when "the predominant purpose" of the inspector's inquiry is the determination of liability when there is a liberty interest at stake for the subject of the investigation.

The Court was clear that the mere making of a stop work order under section 57 of the *OHSA* does not serve to crystallize that adversarial relationship. This is so despite the fact that a stop work order is premised on the inspector finding that a provision of the Act or regulations has been contravened. The Court held that, the finding of a contravention alone does not mean that the inspector knows who is responsible for the contravention or how the unsafe work conditions came about.

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