Knowledge of hazard not necessary to be liable under OHSA

Date : January 1, 2002

An employer need not know that a hazard exists in its workplace to be found liable under Ontario's *Occupational Health and Safety Act* (*OHSA*). This is the result of a decision issued on April 19, 2001 by the Ontario Court of Appeal, a decision that appears to have settled some confusion in the case law.

R. v. Timminco Ltd. concerned an alleged offence under subsection 25(1) of the Act and subsection 185(1) of Regulation 854, which provide:

> Section 25(1): "An employer shall ensure that, ...
> (c) the measures and procedures prescribed are carried out in the workplace; ..."
>
> Regulation 185 (1): "A prime mover, machine, transmission equipment or thing that has an exposed moving part that may endanger the safety of any person, shall be fenced or guarded unless its position, construction or attachment provides equivalent protection."

The charge arose from the death of a crown press operator from injuries sustained in a workplace accident. The operator died when he was caught between the index beam carriage and the stationary frame of the press. The accident occurred in the area behind the press, an area where operators were not required to go, although the evidence showed that some operators did go there for maintenance-related purposes. There was no guard or fence to block access to the area.

In its case against Timminco, the Crown contended that the press operated by the victim had an exposed moving part that endangered him, contrary to the regulation. Timminco countered that it had taken steps to operate a safe work place, and had no knowledge of the exposed area behind the press alleged by the Crown to be a danger.

PROVINCIAL COURT: AN "UNEXPLAINED TRAGIC ACCIDENT"

Timminco won in provincial court, persuading the judge to enter a directed verdict of acquittal. The basis of this ruling was that, to prove the offence, the Crown was required to lead evidence that Timminco knew that the exposed moving beam presented a hazard to the worker. As no such evidence had been led, the judge acquitted Timminco of liability for what he termed a "wholly unexplained tragic accident".

SUPERIOR COURT: TIMMINCO HAD SUFFICIENT KNOWLEDGE OF HAZARD

On appeal, a judge of the Superior Court of Justice held that, on the facts as found by the lower court, Timminco had sufficient knowledge of the exposed moving part to establish the basic components of the offence. He therefore concluded that the lower court had erred in allowing the motion for a directed verdict of acquittal, and ordered a new trial. Timminco appealed.

COURT OF APPEAL: A PUBLIC WELFARE STATUTE, A STRICT LIABILITY OFFENCE

Before the Court of Appeal, the issue was whether Timminco's knowledge of the hazard presented by the moving part was a necessary component of the offence. The Court held that it was not, and sent the matter back for a new trial.

As a starting point for its analysis, the Court discussed the nature of the *OHSA* and how the statute should be interpreted:

> "[The *OHSA*] is a public welfare statute. The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with its broad purpose."

Moreover, the offences described in the Act were strict liability offences. This meant that the prosecution did not have to prove Timminco's knowledge of the danger. While Timminco could not defend itself by saying it did not know of the danger, it could lead a defence that it had taken all due care to avoid the accident. This defence included a reasonable belief in a mistaken set of facts which, if true, would render its omission innocent.

Requiring the Crown to prove some knowledge of the danger would "impede the adequate enforcement of public welfare legislation", the Court stated. Moreover, the addition of a mental element to the offence was not warranted by the language of the statute:

> "In my opinion, clear language is required to create [an offence with a mental element] in a public welfare statute. Yet words like "willfully", "with intent", "knowingly" and "intentionally" are conspicuously absent from s. 25(1)(c) of the *Occupational Health and Safety Act*. Section 25(1)(c) simply requires that an employer "shall ensure that "the measures and procedures prescribed are carried out in the workplace". In fact, use of the word "ensure" suggests that the Legislature intended to impose a strict duty on the employer to make certain that the prescribed safety standards were complied with at all material times."

Further, the Court stated, given the language of subsection 185(1) of the regulation, all the Crown had to show was that the exposed moving part "may endanger" a person - not that any particular person actually was endangered.

In Our View

The Court, in sending the case back to a new trial, has indicated that, to prove the offence, the Crown would have to show some evidence that:

- Timminco was the victim's employer;
- Timminco had a "machine" (the press) with an exposed moving part that may endanger the safety of any person; and
- the exposed moving part was not "fenced or guarded", or constructed in such a way that would provide equivalent protection.

This decision suggests that employers should review their workplaces to ensure compliance with the *OHSA* and establish that they have taken reasonable care to eliminate workplace hazards that are described in the Act and regulations. A good faith lack of knowledge of the existence of the hazard is no defence.

For further information, please contact Jacques Emond at (613) 940-2730.