

# OHS & WORKERS' COMPENSATION ADVISOR



## OHS & Workers' Compensation Commentary for Management

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### Weathering the Storm: Managing Risks from Coroner's Inquests and Fatality Inquiries

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Any employer experiencing a fatality at the workplace faces a multitude of legal issues. One aspect of managing in the aftermath of a tragic fatality that receives little attention is the inquest or fatality inquiry that may arise following any OHS charges or penalty.

An inquest or inquiry could plunge the company into a proceeding in which its actions could be publicly criticized and scrutinized by its workers, family members of the deceased, any union and the media.

An inquest or inquiry can be the last proceeding in a series of emotionally draining, costly, time-consuming and difficult processes following a workplace fatality. They may involve broad issues and draw in new parties who could have agendas that may be detrimental to the company's interests. There is a significant likelihood that proverbial "dirty laundry" will be aired, thereby threatening to damage the employer's reputation and employee/labour relations at the same time. Ultimately, an inquest or inquiry can be an emotional and dynamic proceeding, unlike any other in which the company has been involved.

Notwithstanding that one cannot "win" at an inquest or inquiry, understanding how they happen, what they are about, and strategies by which employers can persevere through them should assist in minimizing the impact of an inquest or inquiry on an employer's reputation. In this article, we examine the inquest/inquiry process and provide some best practices for employers based upon our many years

of advising and representing businesses and their management in relation to such proceedings.

#### How Does an Inquest or Inquiry Happen?

Though the systems differ, each jurisdiction in Canada provides for some form of inquisitorial proceeding to investigate certain deaths: an inquest or a fatality inquiry. However, an inquiry or inquest will not be held into all deaths that occur in a workplace. Some jurisdictions have established that an inquest or inquiry will be mandatory for deaths occurring in certain workplaces but no jurisdiction requires one for all workplace deaths. For example, Ontario requires an inquest for all deaths occurring on a construction project or in a mine, while New Brunswick requires an inquest at those workplaces and also where a fatality has occurred at a sawmill or lumber, food or fish processing plant. If an inquest or inquiry is not mandatory then the decision to hold one generally rests with the province or territory's Coroner or Medical Examiner/Fatality Review Board.

There has been some controversy around mandatory inquests recently. A recent decision of the Ontario Human Rights Tribunal found that the provision of Ontario's *Coroner's Act* requiring mandatory inquests only for fatalities occurring in the construction or mining sectors was not discriminatory.<sup>1</sup> A

<sup>1</sup> *Peart v. Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 (CanLII).

complainant alleged that seasonal agricultural workers were denied the benefits of a mandatory inquest and that this was discriminatory on the grounds of race, ancestry, place of origin, colour, ethnic origin and citizenship. The Ontario Human Rights Tribunal dismissed the application after finding that the exclusion of seasonal agricultural workers from the mandatory inquest provision did not result in substantive inequality. The Tribunal reasoned, in part, that the purpose of mandatory inquests in the construction and mining sectors was attributable to the greater risk of traumatic workplace fatalities faced by workers in those sectors.

### **What Happens at an Inquest or Inquiry?**

There is no mechanism for settlement in this proceeding because the purpose of an inquest or inquiry is to examine the circumstances of a death. It is not to adjudicate between competing interests of the parties. As such, each inquest or inquiry will proceed to a full public hearing. The principal function of the hearing is to answer five questions:

- Who was the deceased?
- How did the deceased die?
- When did the deceased die?
- Where did the deceased die?
- By what means did the deceased die?

In answering those questions, there can be no determination of legal responsibility or any conclusions of law (e.g. determining that health and safety legislation has been breached).

Beyond answering those questions the inquest or inquiry may consider recommendations to prevent similar deaths. Recommendations may be directed to any party regardless of whether that party participated in the inquest or inquiry. Recommendations from an inquest or inquiry are not legally binding on those to whom they are directed but, as discussed below, they do become part of the public record and can have both reputational and future legal risks.

### **Who Participates in an Inquest or Inquiry?**

An inquest or inquiry is presided over by a Coroner or a Judge respectively. Counsel is appointed to assist each (counsel is usually a Crown attorney) and counsel may be responsible for calling most, if not all, of the evidence. In addition to counsel to the Coroner or inquiry, there may be other parties who are granted “standing” (standing permits a party to be represented by counsel, cross-examine witnesses, call and question witnesses, make arguments and submissions, and participate in any recommendations). The ease in which “standing” is obtained will depend on the jurisdiction. For example, in British Columbia, the employer involved in a workplace fatality and the trade union representing the deceased worker are automatically given “standing”. In jurisdictions where “standing” is not automatic, any interested party may obtain “standing” by demonstrating a direct and substantial interest in the proceeding. Frequently, in addition to the employer and union, the family of the deceased and the health and safety regulator seek “standing”. Depending on the issues to be explored during the hearing, hospitals, doctors, emergency medical services, and government ministries or agencies may be among those to seek “standing”. There may also be parties who seek “standing” on the basis of having a unique perspective or specialized or expert knowledge regarding the subject of the inquest.

### **Why Might Employers Participate in an Inquest/Fatality Inquiry?**

Some employers choose not to actively participate in an inquest or inquiry. Although the employer’s workers or management may be called to testify, the employer need not participate directly by seeking “standing”. There are several key reasons why an employer may choose to participate in an inquest or inquiry. The first is managing any reputational risk that may be associated with the inquest. If the incident that caused the fatality had media profile at the time it happened, it is probable that the inquest will also receive media attention. Media attention may also arise from the issues to be explored during

the inquest or inquiry. As such, there can be risk to the employer's reputation that may be best managed by participating in the inquest or inquiry process.

A second main reason to participate is to be able to address the need for and scope of recommendations that may be issued. As noted earlier, the inquest or inquiry may result in recommendations to the employer. Although such recommendations are not legally binding, a failure to carry them out could, in a future proceeding arising from similar circumstances, be detrimental to a due diligence defence – as an indication that all reasonable care was not exercised – or could be an indication of negligence that advances a future civil claim against the employer. Participation in the inquest or inquiry would permit the employer to have input into any potential recommendations. It would allow the employer the best opportunity to ensure that any recommendations that are made are reasonable and not disproportionately onerous.

### **What are Best Practices for Employers Relating to Inquests or Inquiries?**

#### **a) Provide Positive Information to Coroner/ Medical Examiner**

Following a workplace fatality, the employer's investigation may have identified a series of post-incident steps to be taken to prevent a similar incident from occurring. The investigation will also likely have confirmed the extent of pre-incident measures relating to the incident. This information should not just be used for any OHS regulatory proceeding. Rather, it should also be used for an inquest or inquiry to assist the parties in the proceeding in understanding all steps already taken to prevent similar occurrences. Offering to provide the Coroner or Medical Examiner/Fatality Review Board with a detailed brief of both pre-incident and post-incident measures and procedures can accomplish two objectives. First, if an inquest or inquiry is not mandatory, the provision of such information can assure the Coroner or Medical Examiner / Fatality Review Board that sufficient post-incident steps have been taken such that an inquest or inquiry would not serve a meaningful purpose.

The second reason to provide positive information is to ensure that the record of post-incident steps becomes part of the brief of materials that is distributed to all parties for purposes of the proceeding. This increases the likelihood that the inquest or inquiry will highlight the positive remedial steps that have been taken and that any recommendations will recognize, or even reaffirm or adopt, the post-incident steps taken by the employer.

#### **b) Attend the Pre-Inquest or Pre-Inquiry Meeting**

In most jurisdictions, a meeting will be held prior to the inquest or inquiry. This meeting is, typically, conducted by counsel for the Coroner or Judge heading the inquest or inquiry and all those who may wish to seek standing are invited to attend. The meeting discusses the inquest (anticipated witnesses, parties who may seek standing, order of questioning, etc.), its issues and processes and the confidential brief is made available to those who attend. The brief will contain all witness statements, relevant documents, photographs and medical reports. Receiving this will allow the employer to understand the evidence that is anticipated to be called by counsel to the Coroner or inquiry.

In addition, there may be a discussion regarding theories of the inquest. This discussion should reveal, at least, the initial approach of counsel to the Coroner/inquiry and any other parties who are likely to seek standing. Having such information is crucial to identifying whether any party has a particular agenda and if that agenda is likely to seek recommendations relating to company or industry processes or procedures that would have a significant impact. Employers need to guard against agendas seeking recommendations that make no logical sense and are impracticable, or the possibility of significant legislative change that will be challenging to comply with if adopted. Sometimes industry associations or organizations will seek to participate (or be asked to participate) in inquest proceedings, to explain what kinds of changes might be beneficial and workable for the industry and what would not be practical or workable.

### **c) Assess Risks Associated with Inquest**

This is mainly the outcome of the prior two factors. In deciding whether to participate, an employer should be assessing the risks associated with the inquest or inquiry and may wish to seek the input of experienced counsel. In some circumstances, such as those in which an inquest or inquiry is mandatory, the approach to the proceeding may be solely to address the core questions about the identity of the deceased and the circumstances of the death. There may be no further theory or plan to seek or suggest recommendations. In such circumstances, the employer may determine that the risks associated with the inquest or inquiry are low and may opt not to participate.

Other circumstances may suggest more significant risk. For instance, there may be an agenda to criticize the employer (without suggesting legal liability or fault) and such criticism may attract or become a subject of media attention and commentary. Further, as noted above, there may be an agenda to promote recommendations that would result in costly changes to workplace or industry practices, or which would make no sense or contribution to increased safety. In these circumstances, the employer may determine that these risks are best managed by participation in the inquest or inquiry.

Most employers and businesses may never be involved with an inquest or inquiry. However, if they arise, these proceedings can and do present risks to employers which should not be underestimated. Yet the risks can be managed. Understanding the process and strategies that may be employed should best position the company to manage the challenge of an inquest or inquiry.

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