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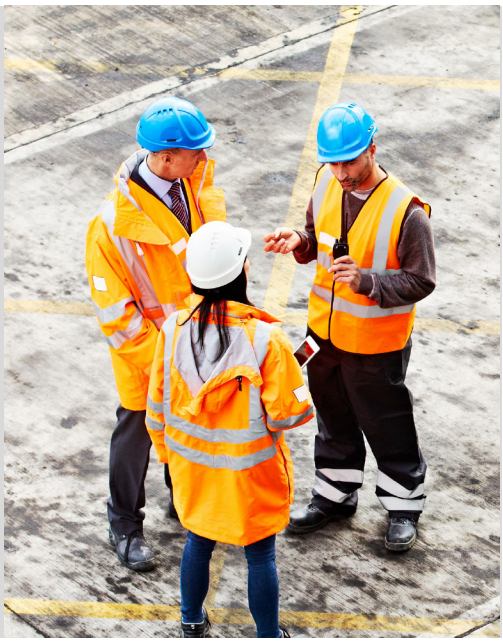
OHS Inspections vs Investigations: Understanding Employer Rights



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OHS regulators are powerful people. OHS legislation, across Canada, provides them very broad powers to exercise when inspecting a workplace. They are authorized to enter a workplace, possibly at any time, without warrant and, while there, gather all manner of information. This can include demanding the production of documents and materials, taking photographs, gathering samples, seizing items, questioning people (which may include excluding the employer or other workplace parties from the questioning), taking tests, and bringing in experts to assist them. But how far do these powers go? What limits are there on when and how a regulator can gather information from the workplace? One key limit is where the regulator has moved from inspecting the workplace to investigating an OHS offence. As discussed in this article, the broad inspection powers do not apply when the regulator is gathering information to prosecute the party in control of the workplace – whether that is an employer, constructor, or prime contractor (the term "employer(s)" will be used for the rest of this piece). The challenge, though, is recognizing when the purpose of the regulator's activities has shifted and that will be examined by looking at where the employer's rights come from, what the law says about the shift in purpose, and the signs that an inspection may have become an investigation.

An Employer's Rights and Where They Come From

Section 8 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") provides that "[e]veryone has the right to be secure from unreasonable search and seizure." The term "everyone" is not limited to people and includes corporations meaning employers have a constitutional right to be free from unreasonable search and seizure.

However, it is important to note that the right only extends to those interests for which there is an expectation to privacy. If there is no expectation of privacy, section 8 *Charter* interests are not engaged. The courts have recognized that employers have an expectation of privacy in the workplaces they control. An example of where an employer would not have an expectation of privacy would in the home of an employee. Therefore, there may not have been any breach of an employer's right against unreasonable search and seizure if information is gathered from an employee's home or another location that the employer does not control.

The question that naturally arises is: if an employer has an expectation of privacy in the workplace, why does an employer have to allow a regulator to access the workplace? The answer is that employers do not have the same expectation of privacy as a regular person. Employers in regulated fields have a diminished expectation of privacy. This allows government agents, such as OHS regulators, to inspect the workplace to ensure compliance. Candidly, without this diminished expectation of privacy, regulatory systems would be frustrated as regulators would not be permitted to inspect. It is unlikely that a warrant could be obtained because the regulator may lack sufficient information to establish reasonable and probable

grounds that an offence had been committed – which is necessary in order to obtain a warrant.

That said, an employer's expectation of privacy is *not* diminished in criminal matters or when the regulator's predominant purpose is to gather information to prosecute the employer with an OHS offence. In these circumstances full *Charter* protections, relating to search and seizure, apply. The challenge, as discussed below, will be determining when an inspection has shifted to an investigation.

When Does an "Inspection" Becomes an "Investigation"

This is an inherently complex and challenging question. There are a number of factors that create the complexity. First, as noted, Canadian OHS regulators have broad powers permitting entry and information collection on an employer's private property. Second, these powers can be exercised in both proactive circumstances, as part of a routine inspection, or in reactive circumstances following an incident or complaint. Regulators are permitted to gather information proactively and following serious workplace incidents to determine compliance. Yet the same information gathered to determine compliance can also be information that is used to prosecute the employer. A third factor adding to this complexity is that the inspector/officer responsible for determining compliance may also be the same person who will be the lead investigator in a prosecution. Further, in some jurisdictions the regulator's internal language can create further uncertainty. In Ontario, for example, the Ministry of Labour uses the term "investigation" for any reactive activity (such as a complaint, work refusal, accident) and that term will appear on documents from the outset of the Ministry's involvement. Finally, regulators will not tell employers when they are moving from inspecting to investigating. Asking them often results in vague answers. With this comingling of functions, lack of clarity from regulators, and, at times, confusing use of language, it is often very difficult to determine if and when the purpose has shifted.

More than 15 years ago, the Supreme Court of Canada ("SCC") considered the point at which search and seizure rights were engaged in regulatory matters (which are different than criminal matters). In *R. v. Jarvis*, 2002 3 S.C.R. 757, the court established the predominant purpose test to provide guidance in determining whether an inspection has become an investigation and therefore whether an employer's section 8 rights have been engaged. Simply stated, where the predominant purpose of the regulator's activity is gather information to ensure compliance with OHS legislation, the diminished expectation of privacy applies and this *inspection* may be done without a warrant. However, where the predominant purpose of the regulator's activity is to gather information to advance a prosecution or determine penal liability, then an *investigation* is being conducted, the regulator's broad powers no longer apply, and the employer has full search and seizure protections.

The SCC did not set out a complete list of factors that would be considered when determining the regulator's predominant purpose. It did, however, identify that reasonable and probable grounds to believe an offence has occurred is one of the factors that would be assessed. The SCC went on to say that that "in most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered."

What other factors might be relevant in determining whether an investigation is underway? While there are very few cases that have applied the predominant purpose test to OHS matters, there are some factors that do seem to indicate an investigation is underway. It is logical that the more a regulator acts like an investigator, the more likely that an investigation is taking place. In that sense, it may be useful to look at how the regulator is acting and collecting information. For example, are discussions occurring informally in groups "on the floor" of the workplace or is the regulator separating individuals to ask them questions in a more formal manner? Are audio recordings being made of the interviews or are written records of the questions asked and answers given being kept? Is the regulator asking due diligence questions or obtaining information relevant to due diligence (which are only relevant in a prosecution because an order or direction cannot be avoided by demonstrating due diligence)? Example of due diligence information would be details about prior similar incidents or contravention or how long/frequently a task had been performed in a certain way prior to an incident.

There are a couple of clear indicators that the regulator is gathering evidence for a prosecution. First, the execution of a search warrant by the regulator is an obvious sign of their intentions. If a search warrant is executed, the employer should refrain from voluntarily providing information beyond that authorized by warrant and should be contacting experienced counsel. The second clear indicator is where the regulator "cautions" a witness, particularly a supervisor or member of management, during an interview. A caution is a process in which the officer/inspector explicitly tells the person that the officer has reasonable and probable grounds to believe that the person has committed an offence. Amongst other things, the officer should also tell the person that they are no longer required to answer questions and have a right to counsel. In

such circumstances, the person should inform the employer they have been cautioned and, in the authors' view, refrain from speaking further with the regulator. They should also consider obtaining the assistance of legal counsel from that point forward.

Steps for Employers to Enforce Section 8 Rights

Enforcing section 8 rights must be done carefully and should only be done with close support and advice from experienced counsel. This is because a misplaced attempt to enforce the right – for example by refusing to provide information or answer questions – is likely to result in the individual and/or organization being prosecuted for obstruction. There can, therefore, be very significant consequences if one errs in the assessment of when the predominant purpose has become the collection of evidence for prosecution. Often, the most practical approach (from a risk management perspective) is to comply with the demands of the regulator and, if necessary, seek to enforce the *Charter* right in response to a prosecution.

While a cautious approach of comply now complain later may be prudent, that doesn't mean that an employer is to be entirely passive to activities of the regulator. Rather, an employer should consider trying to create a factual record of the investigation steps and the approach of the regulator. An employer may consider creating and maintaining a detailed factual record of all of the regulator's investigatory steps. This record will help to identify and demonstrate the progress and course of the investigation and may capture helpful details such as the content of questions, aggressive and adversarial questioning, or other behaviours that are consistent with an investigation. Further steps that may be taken can include periodically asking the regulator about its actions and why it is taking them, requesting that an employer representative be present when witnesses are interviewed by the regulator, having witnesses taken notes or otherwise document their interview, requesting to have a representative present when any professional reviews or tests are conducted on equipment or materials, and asking for a copy of any expert report that may be prepared by or for the regulator. Taking these steps creates many more data points that can be considered when evaluating the actions of the regulator which may prove very useful in enforcing *Charter* protections.

What Happens if Section 8 was Breached?

If the regulator attempts to use information that it collected without a warrant after the dominant purpose shifted to an investigation for prosecutorial purposes, the employer can bring a motion to enforce its section 8 rights. This is why, as much as possible, it is important that the employer have its own factual record because it must prove that its rights were violated.

If a court finds that the employer's section 8 rights have been violated, the information/evidence gathered (and possibly and further information derived from the unconstitutionally obtained information) may be excluded by a court – meaning it cannot be relied upon by the prosecution. However, the exclusion of evidence is not automatic. A court can find that *Charter* rights were violated but not exclude the information obtained from the violation. Whether such evidence will be excluded will be assessed based on a three-part test that considers: (1) the seriousness of the violation which will consider whether the violation was brief, committed more than once, or committed in bad faith or with willful blindness to *Charter* rights; (2) the impact of the breach on *Charter*-protected interests which means considering how much the breach undermined the protected interest and may include considering where the breach occurred; and (3) society's interest in adjudication on the merits which considers the impact of excluding or permitting the evidence on the administration of justice.

As penalties for OHS violations continue to escalate, understanding and enforcing the legal rights employers have become more important. In that regard, understanding how to distinguish regulatory inspections from investigations, where the dominant purpose is to gather evidence to use against the employer in a prosecution, allows employers the opportunity to prepare for and, if necessary, assert these important rights. It must be stressed that this area is complex and consultation with experienced legal counsel would be prudent, if not advisable. However, effective preparation and vigorous enforcement of this right, during the course of an OHS prosecution, can produce very effective and tangible results.

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