Alberta Court of Appeal Clarifies Crown's Obligation in Proving Occupational Health and Safety Charges

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Recently, the Alberta Court of Appeal released its decision in R v Precision Diversified Oilfield Services Corp, 2018 ABCA 273. The Court of Appeal considered a legal issue that it had not previously addressed, namely whether the expression "as far as it is reasonably practicable for the employer to do so" in Alberta's occupational health and safety legislation was a codification of the due diligence defense.

Background Precision Drilling ("Precision") was involved in drilling a well for Novus Energy approximately 30 kilometers from Grande Prairie, Alberta. On December 12, 2010, the drilling rig's crew was "tripping out" or removing pipe from a well-bore. One of the floor-hands (the "Worker") was severely injured during the tripping out procedure and died the following day.

As a result of the accident, Precision was charged with two criminal offences: (i) failing to ensure the health and safety of the Worker "insofar as it was reasonably practicable to do so" as required by s. 2(1) of the Occupational Health and Safety Act (the "OHS Act"); and (ii) failing to take measures to eliminate workplace hazards as required by s. 9 of the Occupational Health and Safety Code 2009.

Provincial Court Decision
At the provincial court criminal trial, there was no evidence that confirmed how the Worker was injured as there were no witnesses to the accident. While it was clear that some part of the drilling equipment struck him, causing the fatal injuries, it was unclear exactly which part of the drilling equipment struck him.

Despite the lack of evidence about how the Worker was injured, the trial judge convicted Precision on both offences, and imposed a total fine of $400,000.[1] The trial judge determined that Precision had failed to take all reasonable steps to avoid the accident as it had not installed an interlock device, which was an engineered solution that had been put in place by one of Precision's competitors. Precision appealed to the Court of Queen's Bench of Alberta.

Court of Queen's Bench Decision

On appeal to the Court of Queen's Bench, Madam Justice Veit overturned the convictions and ordered a new trial.[2]
With respect to the first offence, Madam Justice Veit noted that section 2(1) of the OHS Act is a strict liability offence, such that the Crown is required to prove the actus reus or the doing of the prohibited act, and once that is shown, the burden of proof shifts to the accused to show a defense of due diligence. Madam Justice Veit stated that in dealing with workplace accidents, sometimes proof of the consequence adequately establishes that a wrongful act was committed: for example, if a worker fell through a hole in the floor or fell off a platform because there was no guardrail. In those types of cases, a Court may be able to conclude that the Crown proved the necessary actus reus - that the employer committed a wrongful act, simply by the accident itself.

Madam Justice Veit found that in order to establish the actus reus of the offence charged, the Crown was required to prove that Precision committed a wrongful act. As there was no clear cause for the Worker's fatal injuries (except of course his contact with the drilling equipment), the Crown was unable to prove that Precision committed the wrongful act. The Court noted that in this case, the Crown could not prove the actus reus simply by relying on the accident itself.

Our previous summary of the Court of Queen's Bench decision is found here.

Court of Appeal Decision

The Crown sought and obtained leave to appeal to the Court of Appeal on two questions, one of which was whether the Court of Queen's Bench erred in law by requiring the Crown, as part of the actus reus of the offence, to prove negligence or the wrongful act.

The Court of Appeal noted that to answer this question, the Court of Appeal was required to consider a legal issue that had not been previously addressed by the Court of Appeal before: whether the expression "as far as it is reasonably practicable for the employer to do so" is part of the actus reus of s. 2(1) of the OHS Act, or was a codification of the due diligence defense.

The Crown argued it was entitled to rely on the "accident as prima facie proof of breach" and that Precision was then required to prove its due diligence defense. Essentially, the Crown argued that the expression "far as it is reasonably practicable" was a codification of the due diligence defense. Precision, on the other hand, argued that the expression "far as it is reasonably practicable for the employer to do so" formed an essential element of the actus reus and those words meant something more than simply proving the basic facts of the incident.

The majority of the Court of Appeal held that the ordinary meaning of the provision suggests that the expression is not a codification of the due diligence defense. As a result, to prove an offence under section 2(1) of the OHS Act, the Crown must establish beyond a reasonable doubt the following:

- the worker must have been engaged in the work of the employer;
- the worker's health or safety must have been threatened or compromised (i.e. an unsafe condition); and

- it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake.

The majority found that these elements were consistent with the language of section 2 of the OHS Act (now section 3), the purpose and intent of the OHS Act, the Supreme Court of Canada's seminal decision[3] and the interpretations given to similar provisions in other provinces.

While there may be overlap between the Crown's obligation and the due diligence defense, in the Court of Appeal's view these were distinct inquiries subject to different standards of proof.

Implications

This decision finally clarifies the obligation on the Crown in proving charges under the OHS Act. While charges under the OHS Act are strict liability offences, the Crown must still rely on a factual foundation to establish the wrongful act. For charges under section 3(1) of the OHS Act (formerly section 2(1)), the Crown cannot always rely on the accident to prove the offence. The wording of the provision requires that the Crown prove that it was reasonably practicable for the employer to address the unsafe condition and the employer failed to do so. If the Crown does so, the accused will then be able to put forward a due diligence defense.

As discussed in our previous summary, from an employer's perspective, compliance with industry standards in a closely regulated industry may make it difficult for the Crown to prove that it was reasonably practicable for the employer to address the unsafe condition. Compliance with industry standards, maintaining good safety records and providing proper training to workers can significantly enhance a company's ability to meet the due diligence defense to overcome charges under the occupational health and safety legislation.

BLG regularly assists employers in providing training on occupational health and safety requirements and in occupational health and safety investigations and prosecutions.

1 The trial judge's full reasons for conviction can be found in *R v Precision Drilling Canada Limited*, 2015 ABPC 115.

2 *R v Precision Drilling Ltd*, 2016 ABQB 518

3 R v Sault Ste. Marie (City), 1978 CanLII 11 (SCC)

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