

MANAGEMENT COUNSEL

Employment and Labour Law Update



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Internal Accident Investigation Report Not for Crown's Eyes

Determining which documents are accessible to the Ministry of Labour ("MOL") during the investigation and prosecution of a workplace accident can be critical to successfully defending charges under the *Occupational Health and Safety Act* ("OHSA"). A recent decision of the Ontario Court of Appeal affirms the steps an employer should take to ensure that an internal accident investigation report is protected from disclosure to a Crown prosecutor acting for the MOL.

In *Bruce Power Inc.*¹ the Crown obtained an internal accident investigation report that had been prepared by Bruce Power in contemplation of litigation and on the advice of counsel. The Court of Appeal found that the Crown's possession of, and reliance on, this document was improper and compromised the right of Bruce Power and two of its supervisors to receive a fair trial. As such, the charges under the OHSA were stayed.

Facts

In January 2002, an employee of a sub-contractor performing work at Bruce Power was seriously injured in a fall. Bruce Power and two of its supervisors were charged under the OHSA. Following the accident, an inspector with the MOL attended Bruce Power to commence an investigation. On the same day, Bruce Power contacted outside legal counsel who advised Bruce Power to carry out a number of important steps to investigate the accident and protect its interests. The steps undertaken by Bruce Power included:

- Conducting its own investigation with a view to producing a report that could be used to provide legal advice and to defend against the charges anticipated under the OHSA.
- Creating an internal investigation team comprised of both management and union members.
- Drafting terms of reference expressly providing that the investigation was being carried out in contemplation of litigation and that documents created, including the final report, were to remain confidential and in the care of Bruce Power's legal department.
- Informing every individual interviewed during the investigation that the substance of his/her interview would remain confidential.
- Marking the draft internal accident investigation report *confidential*.

¹ 2009 ONCA 573.

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- Explaining the confidential and privileged nature of the report to everyone to whom it was circulated, and directing those in receipt of the report to return or destroy all copies in their possession.

Unfortunately, not every member of the investigation team followed the clear directive to keep the report confidential. One individual informed the MOL inspector of the existence of the report and eventually provided a copy. This disclosure of the accident report was potentially very damaging to Bruce Power and the other accused. A well prepared internal accident investigation report can contain information that might not otherwise be uncovered by a MOL inspector, including facts related to prior, related incidents, facts regarding the accident itself, names of witnesses, witness statements, admissions, photographs, expert reports, *etc.*

Also troubling was the fact that the MOL inspector accepted a copy of the report even though he had been made aware of Bruce Power's position that the report was privileged.

Bruce Power's Motion to Stay the Prosecution

Upon learning of the disclosure of the internal investigation report, counsel for Bruce Power and its employees brought a motion to stay the proceedings. They argued that the Crown's possession and review of the privileged document was a violation of their right to a fair hearing, and that the only appropriate remedy was to stay the charges. The Court found that, although the report was 'primarily informational' in its content, it clearly set out items that were intended to be privileged and could be used to the disadvantage of the defendants. The Court also observed that because some of the Crown's witnesses had already seen the report, it was possible that their testimony would be tainted as a result. As such, because the chance of prejudice to Bruce Power and the supervisors was so great, the Court concluded that the only appropriate way to preserve their right to a fair trial was to stay the charges in their entirety.

An internal accident investigation report can serve a vital role in [the] defence [of an OHSA charge] but its usefulness can be significantly undermined if it falls into the hands of a Crown prosecutor.

The Crown prosecutor was successful on an appeal, and thereafter Bruce Power and its employees brought the case before the Ontario Court of Appeal. The Court of Appeal affirmed the original trial court decision and restored the stay. However, the Court of Appeal cautioned that it is only in the most serious of cases where a breach of privilege will warrant the granting of a stay. In other cases, a court will attempt to find a less drastic remedy to avoid a breach of a defendant's rights, including for example, requiring the Crown to return the internal accident investigation report and forbidding the Crown from relying on it at trial.

Lessons Learned

Following a workplace accident, an employer must act promptly to defend against potential charges under the OHSA or other legislation (including the *Criminal Code*). An internal accident investigation report can serve a vital role in this defence but its usefulness can be significantly undermined if it falls into the hands of a Crown prosecutor. *Bruce Power* provides a good example of the substantive and procedural steps an employer can take to place itself in the best position to argue that an internal accident investigation report is privileged and therefore beyond the reach of the Crown.

A summary of the key steps an employer should take to protect the privileged status of an internal accident investigation report include the following:

- Consult with experienced legal counsel as early as possible to obtain specific advice in relation to the circumstances at hand and to best protect the organization's interests.
- On the *written* advice of legal counsel, begin to collect the information necessary to prepare an internal accident investigation report that can be used to receive legal advice and defend against charges anticipated under the OHSA.
- Prepare the privileged, internal report separate and independent of any other report required by law (*i.e.*, by a Joint Health and Safety Committee under subsection 9(31) of the OHSA).
- Inform every member of the internal investigation team that the investigation is being carried out, and that all materials are being produced, for the purposes of receiving legal advice and in contemplation of litigation.
- Arrange for legal counsel to explain to the investigation team the rationale for and importance of privilege, and how privilege applies to the investigation report.
- Inform anyone interviewed during the investigation that their interview is being carried out in contemplation of litigation and that the employer intends the interview to remain confidential.
- Ensure very limited circulation of the report under the direction of counsel, and that those in receipt of the report are directed to return and/or destroy their copy.
- Keep all investigation files separate and secure from other workplace files.
- Consult with and receive advice from legal counsel before *any* disclosure to *any* party including a MOL inspector. Disclosure should be limited and only as necessary.
- Clearly mark as *privileged and confidential* and prepared *in contemplation of litigation*, any report or document that has been prepared in the course of the investigation.

For further advice or assistance please contact a member of the Sherrard Kuzz team.

Score One For Goliath

On June 23, 2009, Wal-Mart's five-year legal and political wrangle paid off when the Saskatchewan Court of Queen's Bench voided the UFCW's certification of one of Wal-Mart's department stores in Saskatchewan.

The battle began in April 2004, when the UFCW filed an application for certification to represent a group of employees at Wal-Mart's Weyburn, Saskatchewan store. At the time, the Saskatchewan *Trade Union Act* ("TUA") provided for a union friendly certification procedure wherein a union could be certified without a vote if it was able to demonstrate through signed membership cards, that it had the support of more than fifty percent of employees in a prospective bargaining unit (known as "card-based certification").

By the fall of 2007, final determination of the application had not yet been rendered and a fortuitously timed provincial election promised to level the playing field.

Keeping abreast of the current and future state of employment and labour legislation is an important way to ensure your organization gains the benefit of evolving laws.

On November 7, 2007, the Saskatchewan Party won enough seats to form a majority government, replacing the New Democratic Party of Saskatchewan in the process. One of Premier-elect Brad Wall's first mandates was to amend the certification procedure under the TUA. The amendment, becoming law on May 7, 2008, eliminated card-based certification and instead required a *vote* canvassing employees' wishes with respect to union representation ("vote-based certification").

The new government also passed an Order-in-Council which terminated the appointments of three members of the Saskatchewan Labour Relations Board (the "Board"), including the Chair of the Board, James Seibel. Prior to the termination of his appointment, Chair Seibel had been seized of the UFCW's application at the Weyburn store and on this basis he continued to preside over the matter.

On December 4, 2008, former Chair Seibel granted the UFCW's application without a vote, contrary to the then prevailing legislation. This decision triggered a wave of litigation both before the Board and the Saskatchewan Courts during which Wal-Mart

argued that (1) former Chair Seibel was not legally able to preside over the application following the termination of his appointment and (2) the Board erred in law in failing to apply a vote-based certification procedure.

On March 26, 2009, the Board issued an order declining to reconsider its December 4, 2008 decision. Wal-Mart immediately filed an application for judicial review which was heard by Foley J. of the Saskatchewan Court of Queen's Bench. The judgment, released in June of this year, found that while former Chair Seibel was authorized by section 4(1.2) of the TUA to complete any matters he had begun before the termination or expiry of his term at the Board, he erred in law when he relied on signed membership cards rather than ordering a vote as the then current legislation required.

The Court ruled that because the amendment to the TUA was procedural rather than substantive it should have been applied retroactively. In short, the Court stated that "*the only sanctioned procedure for determining employee support at the relevant time was through a voting process*". Accordingly, using any other method was an error in law and contrary to the legislation. The Court therefore voided the UFCW's certification and remitted the matter back to the Board for determination in accordance with the amended TUA.

More than five years have now passed since the original application for certification was filed. Many of the employees who had been at the Weyburn store in 2004 and supported the UFCW are no longer with Wal-Mart. According to local reports, when news of the Court's recent decision to void the UFCW's certification reached Wal-Mart's current employees at the Weyburn store they cheered. In the circumstances, should this application for certification eventually make its way to a vote, Wal-Mart may very well emerge victorious. That said, on July 22, 2009 the UFCW filed an appeal of the decision of the Saskatchewan Court of Queen's Bench, meaning that this may be just one more decision in the ongoing legal marathon.

Lessons Learned

Keeping abreast of the current and future state of employment and labour legislation is an important way to ensure your organization gains the benefit of evolving laws.

At Sherrard Kuzz, we actively follow legislative reform in all provinces and at all levels of government. We advise our clients, on a pro-active basis, when a change in the law is on the horizon. More than that, we help our clients understand the practical implications new legislation will have on their organizations and work with them to ensure the best result possible.

DID YOU KNOW?

Sherrard Kuzz LLP has once again been invited to speak at the **Human Resources Professionals Association Annual Conference and Tradeshow** in January 2010 (www.hrpa.ca/conf2010). This year's speakers are:

Erin R. Kuzz & Katherine E. Ford - *Mental Health in the Workplace: A New Challenge, A Different Approach*

-and-

Madeleine L. S. Loewenberg - *Going Into Overtime*

And while you're at the Conference, drop by our booth to say hello and find out what's new.

DID YOU ALSO KNOW?

A vehicle used in the course of employment is considered a “workplace” for the purposes of the *Smoke Free Ontario Act*; the maximum individual fine is \$4000; and there is no maximum fine for a corporation.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Frequently Asked Employment & Labour Law Questions - And Then Some!

1. Our business is down. Can we just lay off some of our employees?
2. We have an employee who has been off sick for two months and won't say when he is coming back to work. Can we treat him as having quit or abandoned his employment?
3. We want to change a few things in our pension plan / group health plan / long & short disability plan. Can we do this? How?
4. There have been a number of incidents of theft / property damage on our workplace. We'd like to install surveillance cameras. Can we?
5. What are our obligations toward an employee returning from maternity leave?
 - a) What if the replacement employee is a better worker and I would prefer to keep him/her?
 - b) What if the returning employee's position does not exist any longer?
 - c) What if there has been a reorganization of the workplace the returning employee's position is now performed by three people in different departments?

Have an additional question? Email it to info@sherrardkuzz.com and we'll try to answer it at the Seminar.

DATE: Thursday January 21, 2010; 7:30 – 9:30 a.m. (Program at 8:00 a.m. - breakfast provided.)

VENUE: Hilton Garden Inn, 3201 Highway 7, Vaughan 905.532.2235

COST: Please be our guest

RSVP: By Monday January 11, 2010 to info@sherrardkuzz.com or 416.603.0700

HRPAO CHRP designated members should inquire at www.hrpa.org for certification eligibility guidelines regarding this *HReview Seminar*.



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