

## Member's Quarterly

Spring 2022 Edition

## Feature

## Counsel or No Counsel? Right to Counsel and OHS Investigations

*OHS and criminal investigations not handled in the same manner*

**W**e sometimes assume that parties to regulatory proceedings are entitled to have legal counsel throughout the regulatory process, including the investigation. A recent decision from Alberta examined whether occupational health and safety officers can request interviews with individuals without legal counsel and whether parties can be penalized for refusing to comply with such requests in the context of occupational health and safety investigations.

Administrative monetary penalties ("AMPs") were issued against Volker Stevin Contracting Ltd. ("VSC") and two of its employees for violating section 54 of the Alberta *Occupational Health and Safety Act* (the "Act"), which prohibits interference with an occupational health and safety officer who is exercising powers or performing duties or functions under the Act, following a workplace fatality.

Two employees of VSC were conducting inspections on storm drain catch basins in a residential area. The employees pulled their vehicle up to the storm drain and one of the employees got out to begin the inspections. As the work was underway, the employee in the vehicle saw another vehicle approaching and moved the truck, running over the other employee fatally injuring him.

Following the incident, an occupational health and safety officer contacted VSC and interviews were arranged with VSC employees at the VSC offices. When the officer attended the interviews, the employees were accompanied by counsel for VSC. The officer advised that counsel was not permitted to attend the interviews, relying on *Ebsworth v Alberta (Human Resources and Employment)*, 2005 ABQB 976 ("Ebsworth"), in which the court found that occupational health and safety officers have jurisdiction to conduct interviews and investigations into incidents, determine the manner in which information regarding incidents is received and govern its own procedure, including the ability to exclude legal counsel from interviews. Counsel refused to allow the employees to be interviewed alone and the interviews did not proceed.

VSC was then served with letters requiring some of its employees to attend interviews at the offices of Alberta Occupational Health and Safety ("OHS"). The letters specified that the interviews would only be conducted with the individual employees in attendance. Counsel for VSC responded to the letters stating he was counsel for the VSC employees, alleging that OHS did not have the authority to require the VSC employees to attend the scheduled interviews and stating the VSC employees would not attend interviews without counsel present. The employees did not attend the interviews.

Following the interview attempts, OHS issued orders pursuant to section 59 of the Act requiring VSC employees to attend a videoconference interview and to allow for collection of information relating to the fatality pursuant to section 53(2) of the Act. Counsel for VSC advised OHS that it had been provided with all information that it was entitled to request, the VSC employees did not have any information that could be lawfully requested and OHS did not have lawful authority to interview the VSC employees.

OHS then contacted VSC senior management requesting contact information for the VSC employees without response. As a result, OHS began an investigation into whether VSC contravened section 54 of the



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Act by interfering with OHS' attempts to conduct interviews and whether an administrative penalty was a warranted result. OHS advised VSC employees of its authority to conduct interviews and collect information and explained the statutory immunity that would attach to any information they provided.

In response, counsel for VSC and the employees argued that the authority to conduct interviews, collect information and issue AMPs was unconstitutional. Following additional back and forth between OHS and counsel for VSC and the employees, and the continued refusal to be interviewed or provide additional information, OHS issued an AMP in the amount of \$5,000 against VSC for contravening section 54 of the Act, prohibiting interference with an occupational health and safety officer exercising powers or performing duties under the Act. OHS also issued AMPs of \$1,000 against each of the VSC employees for contravening section 53(2) of the Act, which requires any person present when an incident occurred or who has information relating to the incident to provide such information requested by an officer and failing to comply with an order issued under section 59 of the Act. The AMPs set out the basis for the penalties, the submissions received from counsel for VSC and the employees, the factors supporting the penalties and the rationale for the amount of each penalty.

VSC and the VSC employees appealed the issuance of the AMPs on a number of grounds:

- statutory provisions assessing AMPs are unconstitutional and violate the right to a fair trial before conviction or imposition of any penalty;
- there was no interference with the OHS officer by VSC and the employees did not have any information relating to the incident in question;
- OHS officers do not have the power to compel an interview;
- *Ebsworth* was overruled and does not apply in the circumstances;
- the AMP failed to identify a witness and is therefore void;
- VSC employees were not properly served with a demand to attend an interview and did not refuse to attend or provide information; and
- the penalty is inappropriate.

The Alberta Labour Relations Board reviewed the applicable statutory provisions and standard of review, finding that the applicable standard of review for all grounds of appeal with the exception of those raising constitutional issues was reasonableness. The Board dismissed the grounds of appeal regarding constitutional issues for failure to provide the requisite notice to the Attorney General of Canada and Minister of Justice and Solicitor General of Alberta.

In reviewing the grounds of appeal relating to the officer's powers and *Ebsworth*, the Board examined the *Ebsworth* decision, specifically portions of the decision regarding the *Charter* issue wherein Justice Verville found that OHS investigation interviews were not akin to interviews in a criminal investigation as the individual is not detained, there is no adversarial or coercive relationship between the state and the individual and therefore, sections 7 and 10 of the Charter were not engaged. Justice Verville found that an OHS investigation is similar to routine information gathering where the individual's liberty is not in jeopardy. The Board rejected the appellants' argument that *Ebsworth* was overruled on the basis that although the *Ebsworth* decision was appealed, the appeal was abandoned and it was reasonable for the OHS to rely on *Ebsworth*, which remained good law.

The Board also dismissed the grounds of appeal challenging the officer's authority to compel interviews, confirming that OHS officers do have a right to compel interviews without legal counsel in accordance with the principles in *Ebsworth*. With respect to whether VSC interfered with the investigation; whether VSC

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employees had information to provide; whether a proper demand for information was made; and whether VSC refused to provide information, the Board found that the OHS officer made reasonable findings of fact that VSC interfered with the investigation; VSC employees had information and proper demand was made for the information; and VSC employees refused to provide any information. The Board also rejected the argument that witnesses were not identified in the AMP, noting that this was not a requirement. Lastly, the Board considered whether the penalties were inappropriate. The Board found that the OHS officer properly considered the actions of VSC employees and VSC in determining the penalty and confirmed that the penalties imposed were appropriate and dismissed the appeal.

This decision serves as a reminder to employers and workers alike that OHS investigations can and do differ from criminal investigations and the rights afforded to parties are not always the same.

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