

OCCUPATIONAL HEALTH AND SAFETY IN SASKATCHEWAN: RESPONDING TO INCIDENTS AND UNDERSTANDING DUE DILIGENCE

March 4, 2024



FINES AND PENALTIES

Maximum penalties for incidents causing serious injury or death

Legislation	Individual	Corporation
Provincial (SEA)	<ul style="list-style-type: none">• \$500,000 (+ 40% VFS)• Two years imprisonment	<ul style="list-style-type: none">• \$1,500,000 (+40% VFS)
Federal (Criminal Code)	<ul style="list-style-type: none">• No limits on fines• 10 years imprisonment for bodily harm• Life imprisonment for death	<ul style="list-style-type: none">• No limit on fines



SCENARIO

- At a largescale industrial plant, ammonia is used as a coolant
- During a routine test of equipment, there is an accidental ammonia release
- A **fatal injury** occurs and there is a largescale release of ammonia into the atmosphere
- What are the next steps?



RESPOND TO THE INCIDENT

- Call 911
- Provide first aid and medical assistance
- Activate Crisis Response Plan
- Ensure remaining employees have limited access to incident scene
- Contact legal counsel for assistance
- Report the incident to OHS (Notify – s. 2-2 of *The Occupational Health and Safety Regulations, 2020*) - 72-hour marker for serious injuries
- Consider creating Investigation Charter

TIPS FOR DEALING WITH OHS INSPECTIONS AND INVESTIGATIONS



- **Create a response plan** for dealing with investigations
- Designate and train a spokesperson who can deal with the regulator
- Advance preparation is key; seek an agenda
- Give “due diligence” issues some consideration
- Contact site personnel and urge co-operation
- Mirror the investigation and search
- Where appropriate, allow client representative to answer questions, but direct follow-up questions to legal counsel
- Counsel employees not to obstruct or impede the search

STATUTORY INVESTIGATION OBLIGATIONS

- The employer *must investigate* accidents that cause the death or that require admission to a hospital as an in-patient for a period of **24 hours** as soon as is reasonably possible
- **72-hour** marker for *notification* of serious injuries
- See sections 3-18 (actual incidents) and 3-20 (dangerous occurrences) of *The Occupational Health and Safety Regulations, 2020*
- No alteration of the incident scene except for relieving human suffering – section 3-19 of *The Occupational Health and Safety Regulations, 2020*

STATUTORY INVESTIGATION OBLIGATIONS

- It is the “employer’s” investigation
- Obligation is to prepare a **written report** “*in consultation with*” the co-chairpersons or their designates

Basic Components

- Take photographs and measurements of the scene
- Gather any video of the occurrence that was recorded
- Record the environmental conditions at the time of the incident (weather, wind conditions, etc.)
- Conduct preliminary interviews with witnesses and take notes of the interviews
- Gather documentation
- Contemplate whether an expert is required and retain one under privilege if necessary
- Consider legal assistance prior to submitting report to OHS

OHS INQUIRIES – 3-67 OF THE SEA

- An OHS Officer may interview anyone who OHS believes possesses information respecting:
 - A fatality
 - A serious injury
 - An allegation of harassment
- Employee may nominate a person to be present while being interviewed.
 - Employer legal counsel (internal or external) can attend if requested by employee.
- The OHS Officer may permit others to be present.
- Employee must comply with direction to be interviewed.



PROSECUTIONS

- The organization will receive a summons
- Consult legal counsel
- Gather all documentation relating to charge and provide to lawyer
 - *Documentation may demonstrate defences such as mistake of fact or officially induced error*
- Be proactive in reviewing Crown Disclosure
- Consider the following:
 - *Retaining consultants/experts to do your own evaluation of alleged damage, contamination or “adverse effects”*
 - *Take immediate steps to mitigate any release*
 - *If necessary, remediate as soon as possible and document efforts and money spent*
 - *Altering operations to avoid future charges and to demonstrate efforts to mitigate if matter proceeds to sentencing*
 - *Media and public relations*
- Environmental prosecutions and trials are costly and could be damaging to public image

DUE DILIGENCE

- Once the *actus reus* (prohibited act) is proven, the burden shifts to the employer to establish due diligence (mistake of fact or reasonable care) on a balance of probabilities
- Statutory defence is enshrined in **section 3-80** of ***The Saskatchewan Employment Act*** (“**SEA**”)

In any proceedings for an offence ... respecting a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, the onus is on the accused to prove, as the case may be, that:

- (a) it was not practicable or not reasonably practicable to do more than was actually done to satisfy the duty or requirement; or*
- (b) there was no better practicable means than was actually used to satisfy the duty or requirement.*

- Common law defences continue to apply – *R. v. Sault Ste Marie*, [1978] 2 SCR 1299

REASONABLY PRACTICABLE MEASURES

Key statutory terms and concepts in due diligence

SEA s. 3-1(1)(x)

“**Practicable**” means possible given current knowledge, technology and invention.



SEA s. 3-1(1)(z)

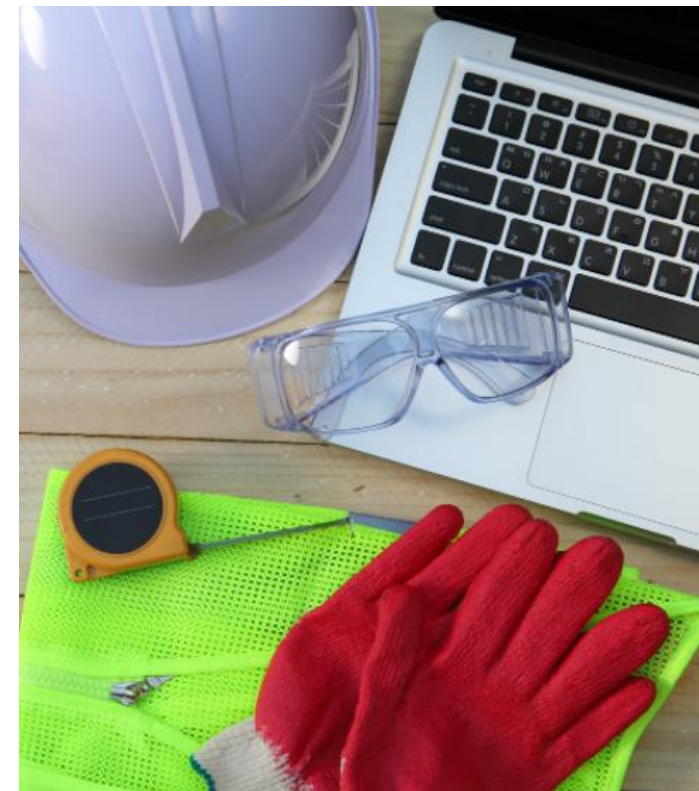
“**Reasonably practicable**” means practicable unless the person on whom a duty is placed can show that there is a gross disproportion between the benefit of the duty and the cost, in time, trouble and money, of the measures to secure the duty.

DUE DILIGENCE

R v Sault Ste. Marie, [1978] 2 SCR 1299

- Origin of due diligence defence
- Due diligence is proven where the accused took all reasonable care
- All reasonable care proven if:
 - Accused reasonably believed in a mistaken set of facts which would render the act or omission innocent; or
 - Accused took all reasonable steps to avoid the event

“The question will be...whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.”



Q & A

THANK YOU

John Agioritis

T: (306) 975-7143

C: (306) 290-9005

jagioritis@mлтаikins.com

“MLT Aikins” the MLT Aikins Designs and “Western Canada’s Law Firm” are trademarks of MLT Aikins LLP. Copyright © 2017 MLT Aikins LLP. All rights reserved.

Note: This presentation is of a general nature only and is not exhaustive of all possible legal rights or remedies. In addition, laws may change over time and should be interpreted only in the context of particular circumstances such that these materials are not intended to be relied upon or taken as legal advice or opinion. Readers/viewers should consult a legal professional for specific advice in any particular situation.