

Don'cha Know, We're Talking About a Revolution: The Alberta Court of Appeal Makes OHS Law Fair



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Since its issuance, *R. v Precision Diversified Oilfield Services Corp*, [2018 ABCA 273](#), has caused the Crown to re-evaluate all charges including the language of “reasonably practicable” (for employers or prime contractors). In *Precision*, the Alberta Court of Appeal held that the Crown must not only prove that a workplace accident occurred (that is, the wrongful or negligent act—the *actus reus*), but also prove that it was reasonably practical for the employer to address the unsafe condition giving rise to the accident but failed to do so. As such, *Precision* is a historic decision, striking a balance of fairness for employers. And despite being so revolutionary, it is based on a plain and arguably obvious reading of the OHS statute.

Background

The worker was hired by Precision to assist in the removal of drillstrings from drilling wells. While disconnecting the drill pipe, he was unexpectedly struck by the drillstring, leading to a fatal head trauma. As a result of this incident, Precision was charged with two offences contrary to the *Occupational Health and Safety Act* (“OHSA”):

1. failure to satisfy its “general duty” to ensure health and safety of an employee, contrary to s.2(1) of OHSA as it then was; and
2. failure to adopt engineering or administrative controls in order to mitigate workplace hazards, contrary to s.9(1) of the *Occupational Health and Safety Code* (the “OHS Code”).

At trial, as it has in many cases, the Crown argued the accident—in and of itself—was proof of a breach of OHSA. In doing so, the Crown was required to show that Precision controlled the activities on site and, during such activities, the worker was exposed to a harmful situation. With respect to the alleged breach of the OHS Code, the Crown argued it did not have to prove that engineering control was practicable for Precision to implement; rather, the Crown argued, Precision had to prove that engineering control was impracticable to justify its due diligence defence.

The trial judge held that the Crown was not required “to prove a predetermined set of facts conclusively proving causation” between the alleged breach and the injury; he accepted that in some cases, proof of the accident may be sufficient to prove the

actus reus of the offence. Here, he found, the Crown had met its burden by establishing the deceased was an employee under Precision's control and was killed on the job, although the Crown did go further and satisfied him that the worker "was killed by torque released improperly by the driller". The trial judge also held that Precision failed to mitigate workplace hazards and was required to implement an interlock system for the machinery used as part of its due diligence. Lastly, he concluded Precision's administrative controls were ill advised and had contributed to the fatality.

During the first level of appeal, the Court of Queen's Bench justice held that in certain cases simple proof of a workplace accident is insufficient. This, she noted, was not a strict rule of law and in some situations, more than mere proof of the accident was required. While she agreed that the Crown had proved that Precision was the employer and that the drilling rig had the capacity to endanger the safety of workers, the Crown had failed to show a clear cause of the injury, that Precision had committed a "wrongful act". However, as there was some evidence which could have (otherwise) supported a conviction, a new trial was ordered. The Crown appealed this summary conviction decision to the Court of Appeal.

Alberta Court of Appeal

The Court of Appeal considered two main questions:

1. Does the wording from s.2(1) of OHSA as it then was —the employer shall ensure "as far as it is reasonably practicable for the employer to do so" the health and safety of workers—require the Crown to prove this reasonable practicality as part of the *actus reus*?
2. What is the test for the due diligence defence?

In a revolutionary yet plain reading view of the statute, the Court of Appeal held that the reference in s.2(1) of OHSA to "reasonably practicable" is not framed as a component of the defence, nor that the burden of proof shifts from the Crown to the accused. Further, the proviso of reasonably practicable "qualifies the otherwise broad and general duty under s.2(1), but it does not say liability will fall on the employ *except* or *unless* the accused *shows* or *establishes* it was not reasonably practicable to avoid the unsafe condition...an employer's duty is merely to do what was reasonably practicable." [emphasis in original]

Rejecting the notion that the provision is merely a statute-based codification of the defence of due diligence, the Court set out three requisite elements to prove an OHS offence:

1. the worker must have been engaged in the work of the employer;
2. the worker's health or safety must have been threatened or compromised;
and
3. it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake.

Note, however, that this third element does not require the Crown to prove employer negligence; indeed, this approach is wholly consistent with the fundamental principle that the accused should always be reasonably informed of the allegations, in order to raise a full defence. Rather, the Crown is required to provide and prove particulars of what they allege the employer failed to do. The Court of Appeal noted the Crown could consider various elements, including evidence regarding the circumstances of the allegedly unsafe condition and incident, any permissible inferences from that evidence, common sense, OHS legislation (*Act, Regulation* and *Code*) or whatever

may be revealed through a formal OHS investigation.

To establish a due diligence defence, the accused will put forward all evidence on how foreseeable the danger was, what reasonable steps were taken to address the unsafe condition, and whether it was operating under any mistake of fact. The standard imposed on the accused to prove due diligence is balance of probabilities (compared to the Crown's standard of beyond a reasonable doubt). Accordingly, while the accused and the Crown make similar arguments in establishing due diligence or a reasonably practical action respectively, the Crown has a higher standard of proof. In effect, this different standard of proof means that certain factors, such as mistake and employee error, may affect the due diligence defence in ways that it will not affect the *actus reus* assessment.

Thus the now proper test for due diligence is an inquiry into whether the accused took all reasonably practicable steps to ensure the employee's safety. While this inquiry is specific to each case, the Court identified factors that may establish whether reasonable care was taken, including: worker error or misconduct in reference to foreseeability of the alleged breach and compliance with industry standards. The accused's ultimate goal is to demonstrate they took all reasonably practicable steps to ensure the safety and health of the employee or operated under a reasonable mistake of fact.

Since the Crown did not, in this case, provide particulars in the two charges (in keeping with its usual practice), the Court of Appeal was unable to provide guidance for this "new" requirement. The matter was sent back to trial to apply the new framework.

Conclusion

The Court of Appeal has created a new framework for OHS charges. Going forward, the Crown must go beyond simply proving that a workplace accident occurred. It must now both particularize what standard the employer was to have met to address unsafe conditions and prove that, while it was reasonably practicable for the employer to have met that standard, they failed to do so. Undoubtedly, this case will change the approach to OHS investigations, charges and trials – ultimately providing the accused with increased specificity of the case against their organization.

This case emphasizes that the importance of employer's health and safety policies and procedures cannot be understated. The lawyers in Field Law's Labour and Employment Group have extensive experience developing and reviewing health and safety policies and in defending employers involved in OHS charges. We are available to answer your questions about how this decision and other considerations may impact you and/or your organization.

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