CIRCULATE TO:

THE EMPLOYER'S HEALTH AND SAFETY TIMES

Cheryl A. Edwards, LL.B. Ryan J. Conlin, LL.B
Charles E. Humphrey, B.A., LL.B.
Stringer, Brisbin, Humphrey, Management Lawyers

October - 2014, 2014-Release 5

Ministry of Labour Inspections Not Necessarily Shielded from Judicial Review for Negligence

A recent motion in a civil case once again underlines the trend of plaintiffs towards targeting civil claims against the Ministry of Labour in its role as safety inspector.

The motion in *Marupov v. Metron Construction Inc.*[1] was in the context of a civil action brought in relation to the infamous Metron swing stage collapse of December 24, 2009, which resulted in the deaths of four workers. A fifth worker was seriously injured, and brought an action against a number of parties, including the company responsible for maintaining the flawed swing stage, as well as the Ministry of Labour.

It appears that the defendants have adopted a confrontational strategy amongst themselves, and are attempting to establish the fault of the other defendants.

At discovery, the representatives of one of the corporate defendants put a number of questions to the Ministry of Labour concerning the training and instructions given to the inspector responsible for the particular swing stage.

The Ministry of Labour refused to provide answers to those questions, claiming that they would be indicative of policy decisions which are beyond the jurisdiction of the Court. Subjective policy decisions are traditionally immunized from scrutiny by the

[1] 2014 ONSC 3535, 2014 CarswellOnt 8024 (Ont. S.C.J.).

Carswell, One Corporate Plaza, 2075 Kennedy Road, Toronto, Ontario M1T 3V4
Telephone (416) 609-3800; elsewhere in Canada/U.S. 1-800-387-5164; Fax (416) 298-5082

Courts. This rule is traditionally justified as allowing the legislature proper latitude within which to work.

That being said, should a government body undertake action, and that action is in turn negligent and causes damages, the government body may nonetheless be held liable.

The defendant brought a motion to compel the Ministry to answer its questions which were primarily concerned with the background and execution of its inspection practices in the period immediately before and after the accident.

The Court denied the Ministry's policy objection, and left open the possibility that the decision by an inspector as to whether or not to inspect and the frequency of inspections could be analyzed for negligence, leaving open the potential for such lawsuits in the future. Such a question had to be evaluated on the evidence at trial, and was inappropriate to dispose of at a summary stage in the proceedings.

The Court allowed a broad range of questions, and compelled the Ministry to provide answers to them. In particular, the Court allowed questions in respect of:

- the training and qualifications of a Ministry of Labour inspector;
- the case load that the Ministry of Labour was handling at the relevant times;
- "annual sector plans" which highlighted hazards or risks that the inspector should be on alert for;
- policy manuals or other guidelines or documents relevant to the inspections performed by the Minister;
- policy changes that have been put in place since the incident;
- specific information relating to another "critical" swing stage accident;
- reports provided to a panel convened after the accident relevant to the litigation; and
- the identification of documents reviewed by the inspector.

While the proceeding is still at an early stage, the phenomenon of bringing an action against the Ministry of Labour for negligence in relation to significant industrial accidents has reared its head recently, most notably in the context of a class action related to the Kirkland Lake, Ontario mall collapse disaster.

The Ministry of Labour is, to use a litigation colloquialism, a "deep pocket", which would be in a position to be able to satisfy any judgment for which it is joint and severally liable. It is still too early to tell what possible effects this trend may have on inspections or Ministry policy, either directly or indirectly. Nonetheless, it appears that the Ministry may now be operating in an environment of a significant risk of civil liability if inspections are conducted negligently.