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Nova Scotia conviction raises questions on extent of OHS managers' legal duties ^{Featured}

Written by [Linda Johnson](#) 24 January 2012

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If a recent OHS-related case in Nova Scotia is any indication, health and safety officers may now be required in the eyes of the law to go beyond their traditional duties and responsibilities to help mitigate risks. One health and safety coordinator had to learn this the hard way: through a conviction.

Last September, James Della Valle, health and safety coordinator at the Cape Breton Island Housing Authority (CBIHA), was found guilty of failing to “take every reasonable precaution” to protect the safety of employees and tenants after tests showed that vermiculite insulation used in housing unit attics contained asbestos.

The charge, laid in July 2010 under the province’s Occupational Health and Safety Act, related to the months between October 2005, when Della Valle received the test results, and April 2006, when the results became known to the CBIHA director and the first steps were taken to remove the insulation.

Della Valle pleaded not guilty, saying that when he received the information, he fully informed two maintenance supervisors — Darrell McNeil, who worked at CBIHA, and Todd Routledge, who worked at another housing complex in Sydney — of the test results and of the remedial measures recommended by the testing company. He said he was never involved in making decisions nor had anything to do with implementing follow-up measures. He assumed those he had informed would do the necessary work.

Judge A. Peter Ross found Della Valle guilty on the grounds that he had a general duty to inform others where there was a risk. He said the OHS coordinator should have circulated the test results more widely and “ensured that appropriate action of some sort was in fact instigated.”

According to the decision, Della Vella had a duty to act because a “potential health hazard” had been identified. “Where someone in the position of the defendant has knowledge of a possible danger from a credible source, this alone may precipitate a duty to take positive preventive measures,” it said.

But David Law, an Ottawa-based partner at Gowlings law firm and who has practiced occupational health and safety law for 24 years, said that in requiring Della Valle to go beyond his job description and even his authority, the verdict puts an unprecedented onus on safety managers.

“His defence was ‘I went to the outer limits of my job and I did my job, and that should be enough.’ And the court seems to say, ‘no,’” he said. “I read that decision as saying that you can’t just stay within the four corners of your job. You have to go beyond it, if there’s a risk.”

Beyond work duty

In his decision, Ross argued that Della Valle should have followed up with McNeil and Routledge. Since the insulation was not being removed, he should have reported the situation to his immediate supervisor and to the joint health and safety committee.

This suggests that the judge thinks Della Valle should have told somebody that his bosses weren’t doing anything, Law said. The senior person, McNeil, who was also convicted, admitted in court that he was responsible. In the decision, he is quoted as saying, “the buck stops with me.”

“And yet,” Law said, “the court says you [Della Valle] should have done more; you should have chased McNeil and Routledge. It’s asking a junior person to chase their boss.”

“There’s an element of that which is acceptable, but I feel this decision may ask too much of individuals. It seems to say that our legal duty is greater than our work duty, and we could be at risk of failing legally if we don’t go outside our authority at work.”

Pat Murphy, regional director for the eastern region of the OHS unit of Nova Scotia’s Ministry of Labour and Advanced Education, said Della Valle was charged because he failed in his duty as an employee, not as safety coordinator. While the province’s OHS Act does not have a general duty clause for safety supervisors, it does include such a clause (Sect. 17) for employees.

“He’s not a supervisor, he’s not an employer and he’s not a constructor or contractor. He was strictly an employee,” he said. “And in this case it was deemed there was a significant failure in the general duty of the employee.”

Murphy pointed out the verdict reinforces the importance of the internal responsibility system (IRS), which obliges all employees to take every reasonable precaution to ensure their own health and safety, and that of anyone else at or near the workplace.

“No one escapes that overarching general duty responsibility. I see it just as a reinforcement of the IRS, which is the foundation of the legislation,” he said.

“And just by virtue of being the safety coordinator, you don’t escape the responsibility thrust on everybody.”

According to the judge, Murphy said, although Della Valle reported the asbestos to the maintenance supervisors, what he failed to do afterwards was so important that the charge was warranted.

Because he and the other defendants did not follow up on the asbestos report or even tell his direct supervisor, housing authority workers and contractors went on working in the attics, and tenants were not informed.

“The potential for exposure continued on and on. The investigators felt that — especially given the knowledge that a safety coordinator would have and an understanding of the tenets of occupational health and safety — he didn’t do enough,” he said.

“If you hold the responsibility of a safety coordinator, and you become aware of a hazard, the central question is where does your responsibility stop?”

Confidentiality

Law said the case is also unusual in that the OHS manager, who is generally the person who finds the problem in the first place, is rarely charged. Where negligence is thought to have created a risk of illness or injury to workers, the company itself or the operations supervisor is generally held legally accountable.

The decision also shows a disregard for the confidentiality that OHS managers need to do their jobs, Law added. By finding that Della Valle should have reported the issue to a joint OHS committee (though he had already told a committee representative), the court was saying that he should have disclosed confidential company information.

Collecting confidential information on the infractions and violations of a company, however, is an essential part of an OHS person’s job, said Law. Like a doctor, they find and know about problems and, he added, that role needs more respect.

“Governments need to be very clear that they will permit these people to function with some degree of confidentiality because, if they have that protection, they will do their jobs honestly. They will go to their bosses and say these are all of our faults and mistakes, and where do we start first?” he said.

“But if we start to convict them because their bosses don’t follow their advice — which is what happened to Mr. Della Valle — that’s unfair to the health and safety person. And it seems to me it gives Mr. Della Valle a really good incentive to know as little as possible.”

Murphy said telling the joint OHS committee that asbestos had been found in the unit attics would not have been a matter of revealing confidential information. The purpose of the committee is to address health and safety concerns with management, and it would have been reasonable for him to inform the committee.

As a provincial case, the decision is not binding on other courts in Nova Scotia or the rest of Canada. And while it can be used as a guide in future cases, Murphy said he doesn’t think it’s likely to change the role of the OHS manager. Where the law has imposed a general duty on employees to take every action to ensure their own and others’ safety, everyone must comply.

“If a person is a mechanic or a pipefitter in an organization, they’re expected to fulfill that duty. And if you happen to be the OHS manager, that doesn’t relieve you of it. In fact, some people would argue that puts more onus on you to make sure you do things sufficiently.”

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#2 **GAIL BROWNLEE** 2012-01-26 13:48

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Great article. It will be interesting to see how this plays out.

Quote

#1 **Graham Dobson** 2012-01-25 13:14

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Great article. This issue had to surface sooner or later and has finally put some legal definition around the role of safety advisors/managers. Passing the buck is not legally acceptable, nor should it be. Although there must be some period of time for all parties to respond, it must be reasonable in the circumstances. Having stated that, there must be an immediate response to a imminently hazardous situation that begs further questions such as why the work was allowed to continue or why the ministry responsible was not notified.

The role of a safety professional cannot and should not be constrained by employment contracts or restrictive job descriptions. The person filling that role, and taking on those responsibilities must be free to act as necessary to protect the health and safety of workers and public present. Management should be expected to support decisions made by health and safety professionals.

Quote

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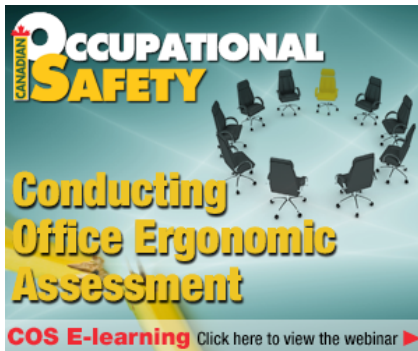
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